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ARTICLE

Qualified and Absolute Immunity at Common Law

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Abstract. Qualified immunity has become one of the Supreme Court's most controversial doctrines. But while there has been plenty of commentary criticizing the Court's existing clearly-established-law test, there has been no thorough historical analysis examining the complicated subject of state-officer immunities under nineteenth-century common law. Yet the legitimacy of state-officer immunities, under the Court's precedents, depends on the common law as it existed when Congress passed the Civil Rights Act of 1871. In the Supreme Court's own words, it cannot "make a freewheeling policy choice" and must apply immunities that Congress implicitly adopted from the "common-law tradition."

This Article therefore provides the first comprehensive review of the common law on state-officer immunities around 1871. In particular, it canvasses the four nineteenth-century treatises that the Supreme Court consults in assessing officer immunities under the common law of 1871: Cooley's 1879 *Law of Torts*; Bishop's 1889 *Commentaries on Non-contract Law*; Mechem's 1890 *Law of Public Offices and Officers*; and Throop's 1892 *Law Relating to Public Officers*. Not only do these treatises collect many overlooked state common law precedents, but they rely heavily on the Supreme Court's own, often ignored, nineteenth-century decisions.

These historical sources refute the prevailing view among modern commentators about one critical aspect of qualified immunity. This Article confirms that the common law around 1871 did recognize a freestanding qualified immunity protecting all government officers' discretionary duties—like qualified immunity today.

But many other important features of the Supreme Court's current officer-immunity doctrines diverge significantly from the common law around 1871: (1) High-ranking executive officers had absolute immunity at common law, while today they have only qualified immunity; (2) qualified immunity at common law could be overridden by showing an officer's subjective improper purpose, while today a plaintiff must satisfy

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the stringent clearly-established-law test; and (3) the plaintiff had the burden to prove improper purpose with clear evidence, while today there is confusion over this burden.

Restoring the common law around 1871 on state-officer immunities could address many modern problems with qualified immunity, and these three features from the common law provide a roadmap for reforming the doctrine. If high-ranking executive officials have absolute immunity, that would sufficiently protect the separation of powers without resort to the clearly-established-law test—which frequently denies plaintiffs money damages when their constitutional rights are violated by lower-ranking executive officials. At the same time, if plaintiffs in qualified immunity cases have the burden to prove lower-ranking officers' subjective bad faith with clear and convincing evidence, then officer defendants and courts will have significant procedural mechanisms to dismiss insubstantial claims before trial.

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Introduction

Police use of force against racial minorities—most notably the killing of George Floyd—prompted massive protests across the nation in 2020, and "qualified immunity has emerged as a flash point" in the continuing national conversation over police reform.[1] As one federal judge recently explained, "[i]n legal circles and beyond, one of the most debated civil rights litigation issues of our time is the appropriate scope and application of the qualified immunity doctrine, particularly in cases of deaths resulting from police shootings."[2]

Qualified immunity today frequently shields government officials from having to pay money damages when they violate citizens' constitutional rights. Several Justices of the Supreme Court have recognized significant problems with the existing qualified immunity doctrine.[3] Citing a commendable recent article by William Baude, Justice Thomas has urged the Court to "reconsider [its] qualified immunity jurisprudence" and reestablish "the focus of [its] inquiry [on] whether immunity existed at common law."[4] Many circuit judges have acknowledged substantial criticism of the current law.[5] And "perhaps the most ideologically diverse amici ever assembled" have implored the Supreme Court to reexamine qualified immunity.[6]

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1. Hailey Fuchs, *Qualified Immunity Protection for Police Emerges as Flash Point Amid Protests*, N.Y. TIMES (updated Mar. 8, 2021), https://perma.cc/ZE8P-CRZG.

2. Ventura v. Rutledge, 398 F. Supp. 3d 682, 697 n.6 (E.D. Cal. 2019).

3. *See, e.g.*, Baxter v. Bracey, 140 S. Ct. 1862, 1862 (2020) (Thomas, J., dissenting from the denial of certiorari); Kisela v. Hughes, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting); Ziglar v. Abbasi, 137 S. Ct. 1843, 1872 (2017) (Thomas, J., concurring in part and concurring in the judgment); Camreta v. Greene, 563 U.S. 692, 730 (2011) (Kennedy, J., dissenting); Crawford-El v. Britton, 523 U.S. 574, 611-12 (1998) (Scalia, J., dissenting); Wyatt v. Cole, 504 U.S. 158, 170-71 (1992) (Kennedy, J., concurring).

4. *Ziglar*, 137 S. Ct. at 1871-72 (Thomas, J., concurring in part and concurring in the judgment) (citing William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45 (2018)).

5. *See, e.g.*, McCoy v. Alamu, 950 F.3d 226, 237 (5th Cir. 2020) (Costa, J., dissenting in part), *vacated mem.*, No. 20-31, 2021 WL 666347 (U.S. Feb. 22, 2021); Horvath v. City of Leander, 946 F.3d 787, 800-01 (5th Cir. 2020) (Ho, J., concurring in the judgment in part and dissenting in part); Reich v. City of Elizabethtown, 945 F.3d 968, 989 n.1 (6th Cir. 2019) (Moore, J., dissenting), *reh'g en banc denied*, No. 18-6296 (6th Cir.) *cert. denied*, 141 S. Ct. 359 (2020); Cole v. Carson, 935 F.3d 444, 470, 473 (5th Cir. 2019) (Willett, J., dissenting), *cert. denied sub nom.* Hunter. v. Cole, 141 S. Ct. 111 (2020); Morrow v. Meachum, 917 F.3d 870, 874 n.4 (5th Cir. 2019); Echols v. Lawton, 913 F.3d 1313, 1325 (11th Cir.), *cert. denied*, 139 S. Ct. 2678 (2019); Thompson v. Cope, 900 F.3d 414, 421 n.1 (7th Cir.), *reh'g and reh'g en banc denied*, Nos. 17-3060 & 18-1223 (7th Cir. 2018); Rodriguez v. Swartz, 899 F.3d 719, 732 n.40 (9th Cir. 2018), *vacated mem.*, 140 S. Ct. 1258 (2020).

6. *Cole*, 935 F.3d at 472 (Willett, J., dissenting); *see also* Brief of Cross-Ideological Groups Dedicated to Ensuring Official Accountability, Restoring the Public's Trust in Law

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Yet toward the end of its 2019 Term, the Court denied several petitions for certiorari urging this reexamination.[7] Justice Thomas dissented from the denial of certiorari in one of those cases, reiterating that he "continue[s] to have strong doubts about [the Court's] [42 U.S.C.] § 1983 qualified immunity doctrine" and advocating a "return" to a historical examination of the "common law."[8] As the petition in that case argued, "[m]erits briefing" could have "explore[d] fully the alternatives to the current qualified immunity regime."[9]

The Supreme Court may have wanted further percolation on these reform alternatives because there has been "[s]urprisingly little attention" to "how significant doctrinal reform should be achieved."[10] While plenty of commentary criticizes the status quo, there has been no analysis thoroughly addressing state-officer immunities as they existed at common law. Aaron Nielson and Christopher Walker recently acknowledged this dearth of scholarship, noting that how qualified immunity operated at common law "in 1871" is "a complicated subject" that "calls out for additional historical examination and analysis."[11]

This historical analysis is crucial because, as the Supreme Court has held, the legitimacy of state-officer immunities depends on "the common law as it existed when Congress passed § 1983 in 1871."[12] The federal Civil Rights Act of 1871 "create[d] a species of tort liability"—a cause of action for money damages

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Enforcement, and Promoting the Rule of Law as Amici Curiae in Support of Petitioner at 1-6, I.B. v. Woodard, 139 S. Ct. 2616 (2019) (mem.), 2019 WL 1596323.

7. *See* Fuchs, *supra* note 1.

8. Baxter v. Bracey, 140 S. Ct. 1862, 1864-65 (2020) (Thomas, J., dissenting from the denial of certiorari).

9. Petition for a Writ of Certiorari at 32, *Baxter*, 140 S. Ct. 1862 (No. 18-1287), 2019 WL 1569711.

10. Scott Michelman, *The Branch Best Qualified to Abolish Immunity*, 93 NOTRE DAME L. REV. 1999, 2000 (2018). For recent reform proposals that scholars have offered, see Joanna C. Schwartz, *After Qualified Immunity*, 120 COLUM. L. REV. 309, 314-15 (2020) (discussing "how constitutional litigation would function in a world without qualified immunity"); and John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 VA. L. REV. 207, 209, 262-63 (2013) (proposing an objective qualified immunity test based on "clearly unconstitutional" conduct with "a broader concept of notice derived from existing law" (emphasis omitted)).

11. Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 NOTRE DAME L. REV. 1853, 1866, 1868 (2018).

12. Filarsky v. Delia, 566 U.S. 377, 384 (2012) (citing Tower v. Glover, 467 U.S. 914, 920 (1984)); *see also* Buckley v. Fitzsimmons, 509 U.S. 259, 268-69 (1993); Wyatt v. Cole, 504 U.S. 158, 170 (1992) (Kennedy, J., concurring); *id.* at 175 (Rehnquist, C.J., dissenting); Burns v. Reed, 500 U.S. 478, 497-98 (1991) (Scalia, J., concurring in the judgment in part and dissenting in part); Malley v. Briggs, 475 U.S. 335, 340 (1986); Briscoe v. LaHue, 460 U.S. 325, 345 (1983).

against state officials acting under color of state law who violate federal rights.[13] This statute, also known as the Ku Klux Klan Act of 1871, was an integral part of the paradigm shift in American law during Reconstruction after the Civil War.[14] As Justice Thomas has explained, "[i]n the wake of the Civil War, Republicans set out to secure certain individual rights against abuse by the States."[15] Through the Civil Rights Act of 1871, "Congress sought to respond to 'the reign of terror imposed by the Klan upon black citizens and their white sympathizers in the Southern States.'"[16]

The Act's text, both originally and as codified today in 42 U.S.C. § 1983, says nothing about state-officer immunities.[17] Starting in the 1950s, the Supreme Court began interpreting the § 1983 cause of action to include those officer immunities recognized at common law around the time of the federal statute's initial passage in 1871, reasoning that Congress would have to provide clear legislative intent to abrogate preexisting common law immunities.[18] Discussing whether that statutory interpretation is correct is beyond the scope of this Article.[19] Similarly, it is beyond the scope of this Article to analyze whether the Supreme Court in *Monroe v. Pape* correctly interpreted the Act's phrase "under color of any [law] of any State" to cover state-officer actions

13. Imbler v. Pachtman, 424 U.S. 409, 417 & n.10 (1976); *see also* Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13, 13 (codified as amended at 42 U.S.C. § 1983).

14. *Baxter*, 140 S. Ct. at 1862 (Thomas, J., dissenting from the denial of certiorari).

15. *Id.*

16. *Id.* (quoting Briscoe v. LaHue, 460 U.S. 325, 337 (1983)).

17. *See Imbler*, 424 U.S. at 417 & n.10 (citing Civil Rights Act of 1871 § 1, 17 Stat. at 13; and 42 U.S.C. § 1983).

18. *See, e.g.*, Filarsky v. Delia, 566 U.S. 377, 383-84 (2012) (tracing § 1983 immunity doctrines back through *Imbler v. Pachtman*, 424 U.S. 409 (1976), and *Tenney v. Brandhove*, 341 U.S. 367 (1951)); Pulliam v. Allen, 466 U.S. 522, 529 (1984) (similarly citing *Pierson v. Ray*, 386 U.S. 547 (1967), and *Tenney*, 341 U.S. 367).

19. *Cf.* Baude, *supra* note 4, at 77 ("But it is not the case, as more extreme accounts have suggested, that Section 1983 permits absolutely no immunities at all because the text is categorical on its face. Unwritten defenses are not unknown to the law." (footnote omitted)).

    The Supreme Court's requirement of clear legislative language to override background common law principles may have been an early application of the canon requiring "unmistakably clear" statutory language for Congress to alter the "usual constitutional balance between the States and the Federal Government." Gregory v. Ashcroft, 501 U.S. 452, 460-61 (1991) (quoting Will v. Mich. Dep't of State Police, 491 U.S. 58, 65 (1989)); *see also* Aaron L. Nielson & Christopher J. Walker, *Qualified Immunity and Federalism*, 109 GEO. L.J. 229, 261 (2020) ("The federalism-infused substantive canon that statutes 'must be read consistent with principles of federalism inherent in our constitutional structure' thus may support qualified immunity." (footnote omitted) (quoting Bond v. United States, 572 U.S. 844, 856 (2014))). The Court also has since clarified that only clear congressional statements can override background "common law" and "immunity" principles. *Bond*, 572 U.S. at 857-58.

without authorization under state law.[20] This Article takes both holdings as givens, although each has recently garnered renewed debate.[21]

Accordingly, this Article starts from the premise articulated by the Supreme Court that the common law of 1871 dictates state-officer immunities. The Court "do[es] not have a license to establish immunities from § 1983 actions in the interests of what [it] judge[s] to be sound public policy."[22] Rather, the Court's "'role is to interpret the intent of Congress in enacting § 1983, not to make a freewheeling policy choice'"—and precedent dictates that doing so requires a historical examination of the "common-law tradition."[23]

This Article therefore provides the first comprehensive review of the common law of 1871 on state-officer immunities. No other article has canvassed the four nineteenth-century treatises that the Supreme Court has consulted in recent decades to assess officer immunities at common law: Thomas Cooley's 1879 *Law of Torts*;[24] Joel Prentiss Bishop's 1889 *Commentaries on the Non-contract Law*;[25] Floyd Mechem's 1890 *Law of Public Offices and Officers*;[26] and Montgomery Throop's 1892 *Law Relating to Public Officers*.[27] Of

20. Monroe v. Pape, 365 U.S. 167, 183-84, 187 (1961); *see also* Baude, *supra* note 4, at 63-69 (arguing that *Monroe* correctly decided this issue but that even under Justice Frankfurter's dissenting opinion, "Section 1983 fills in a remedial gap"). The common law's distinction between acts in mere excess and acts in a clear absence of authority might bear on this issue. *See* Brown v. Reding, 50 N.H. 336, 349 (1870) (discussing "the mere excess of authority by persons acting under color of law").

21. *See, e.g.*, Baude, *supra* note 4, at 58-59, 63-69.

22. Buckley v. Fitzsimmons, 509 U.S. 259, 268 (1993) (quoting Tower v. Glover, 467 U.S. 914, 922-23 (1984)).

23. *Id.* at 268-69 (quoting Malley v. Briggs, 475 U.S. 335, 342 (1986)).

24. THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS, OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT (Chicago, Callaghan & Co. 1879).

25. JOEL PRENTISS BISHOP, COMMENTARIES ON THE NON-CONTRACT LAW AND ESPECIALLY AS TO COMMON AFFAIRS NOT OF CONTRACT, OR THE EVERY-DAY RIGHTS AND TORTS (Chicago, T. H. Flood & Co. 1889).

26. FLOYD R. MECHEM, A TREATISE ON THE LAW OF PUBLIC OFFICES AND OFFICERS (Chicago, Callaghan & Co. 1890).

27. MONTGOMERY H. THROOP, A TREATISE ON THE LAW RELATING TO PUBLIC OFFICERS AND SURETIES IN OFFICIAL BONDS (New York, J.Y. Johnston Co. 1892).

See, e.g., Filarsky v. Delia, 566 U.S. 377, 387 (2012) (citing Cooley and Bishop); City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 727 (1999) (Scalia, J., concurring in part and concurring in the judgment) (citing Cooley); Bogan v. Scott-Harris, 523 U.S. 44, 51 (1998) (citing Cooley, Bishop, Mechem, and Throop); Antoine v. Byers & Anderson, Inc., 508 U.S. 429, 433 n.8 (1993) (citing Cooley); Wyatt v. Cole, 504 U.S. 158, 164 (1992) (citing Cooley and Bishop); *id.* at 172 (Kennedy, J., concurring) (citing Bishop); *id.* at 176 n.1, 178 & n.2 (Rehnquist, C.J., dissenting) (citing Cooley and Bishop); Burns v. Reed, 500 U.S. 478, 500 (1991) (Scalia, J., concurring in the judgment in part and dissenting in part) (citing Cooley and Bishop); Imbler v. Pachtman, 424 U.S. 409, 426 n.23 (1976) (citing Cooley).

these treatises, the Supreme Court has relied on former Michigan Supreme Court Justice Cooley's treatise the most,[28] describing it as particularly "influential."[29] The Supreme Court's immunities cases cited Bishop the second most among these treatises, and one journal in 1885 described Bishop as "the foremost law writer of the age."[30]

These treatises collect scores of common law precedents from state supreme courts. And state courts throughout our nation's history have been "general common-law courts" that "possess a general power to develop and apply their own rules of decision"—through customary, unwritten law set by judicial precedents.[31] These treatises also rely on the Supreme Court's own nineteenth-century immunity decisions. Unlike today, when federal courts must leave common law developments to the state courts,[32] the Supreme Court in the nineteenth century could expound on the common law along with state courts.[33]

These historical sources refute the prevailing view among modern commentators that nineteenth-century cases did not recognize "a freestanding common-law defense" for government officers' discretionary duties.[34] This Article confirms that the common law around 1871 did recognize a freestanding qualified immunity protecting all government officers' discretionary duties—like qualified immunity today. Key nineteenth-century Supreme Court precedents—namely, *Otis v. Watkins* (1815)[35] and *Wilkes v.*

28. The Court has thus recognized that sources after 1871 might be relevant in identifying the principles of the common law in 1871. *See* Rehberg v. Paulk, 566 U.S. 356, 365-66 (2012).

29. *Bogan*, 523 U.S. at 51.

30. Stephen A. Siegel, *Joel Bishop's Orthodoxy*, 13 LAW & HIST. REV. 215, 215 (1995) (quoting *Mr. Bishop as a Law Writer*, 21 CENT. L.J. 81, 81 (1885)); *see also supra* note 30 (collecting cases and treatise citations).

31. City of Milwaukee v. Illinois, 451 U.S. 304, 312 (1981).

32. *Id.*

33. *See* Ann Woolhandler, *Patterns of Official Immunity and Accountability*, 37 CASE W. RSRV. L. REV. 396, 449-50 (1987). In 1842, the Court in *Swift v. Tyson* held that federal courts could develop common law in diversity-jurisdiction cases if state statutes did not specifically address the situation. 41 U.S. (16 Pet.) 1, 18-19 (1842). In 1938, the Court overruled *Swift* in *Erie Railroad Co. v. Tompkins*. *See* 304 U.S. 64, 79-80 (1938).

34. Baude, *supra* note 4, at 58-59; *see also, e.g.*, Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1801-02 (2018); Fred O. Smith, Jr., *Formalism, Ferguson, and the Future of Qualified Immunity*, 93 NOTRE DAME L. REV. 2093, 2100 (2018); Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 72 & n.209 (2017); Albert W. Alschuler, Herring v. United States*: A Minnow or a Shark?*, 7 OHIO ST. J. CRIM. L. 463, 465 (2009); James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. REV. 1862, 1924 (2010); Woolhandler, *supra* note 33, at 415-17.

35. 13 U.S. (9 Cranch) 339, 356 (1815).

Dinsman (1849)[36]—recognized a freestanding qualified immunity. A reporter's annotation subsequently added to the Supreme Court's 1845 *Kendall v. Stokes* opinion described a freestanding qualified immunity defense, citing *Otis* and *Wilkes* along with many other state supreme court decisions.[37] Cooley's treatise similarly reinforced a freestanding qualified immunity defense by collecting many of the same sources cited in the forgotten reporter's annotation to *Kendall*.[38] And the authors of the other three treatises agreed.[39] These treatises recognized that qualified immunity applied to all sorts of officials, including police officers, as the treatises enumerated the various officials and cases in which courts applied qualified immunity.[40]

But while the common law recognized the existence of a freestanding qualified immunity, the common law's test for overcoming this immunity looked quite different from the Supreme Court's modern clearly-established-law doctrine. At common law, this immunity was "qualified" because it did not apply if a plaintiff proved an officer's subjective improper motive—typically referred to as malice or bad faith.[41] Modern analysis also misses that at common law the plaintiff bore the burden to show this bad faith by clear evidence because courts started from the presumption that government officials acted with honest motives.[42]

This Article proceeds in four parts. Part I identifies two sets of government-officer actions that categorically lacked immunity at common law[43]: ministerial duties neglected by an official or actions taken by ministerial

36. 48 U.S. (7 How.) 89, 129-31 (1849).

37. 44 U.S. (3 How.) 87, 87 annot. 2 (1845) (Stewart Rapalje ed., New York, Banks L. Pub'g 2d ed. reprt. 1903) (1884).

38. *See* COOLEY, *supra* note 24, at 411-12, 411 n.6.

39. *See infra* notes 211-24 and accompanying text.

40. *See infra* notes 211-24 and accompanying text.

41. COOLEY, *supra* note 24, at 411-13; BISHOP, *supra* note 25, §§ 785-789, at 365-67; MECHEM, *supra* note 26, §§ 636-640, at 420-27; THROOP, *supra* note 27, § 715, at 677-78; *cf.* MECHEM, *supra* note 26, § 640, at 427 (arguing for a broader definition of what counts as "judicial action," which would have rendered "motive" irrelevant in those cases).

42. *See infra* notes 225-41 and accompanying text.

43. This Article refers to these various doctrines as "immunity" doctrines, which is how they are known today. These common law doctrines exempted officials from liability for tort damages, and the nineteenth-century treatises used interchangeable labels when referring to them. *See* COOLEY, *supra* note 24, at 376 ("exemption from liability"); BISHOP, *supra* note 25, § 777, at 360 ("[n]ot answerable to Courts,"); *id.* § 781, at 362 ("[no] [c]ivil [l]iability"); MECHEM, *supra* note 26, § 624, at 407 ("immunity from civil action"); *id.* § 638, at 421 ("exempt from civil [l]iability"); THROOP, *supra* note 27, § 709, at 670 ("[n]o liability"); *id.* § 713, at 674 ("immunity").

officials in excess of their delegated authority (discussed in Subpart A),[44] and discretionary duties performed by an official with a clear absence of jurisdiction (discussed in Subpart B).[45] Part II then discusses the creation of absolute immunity at common law, which provided certain government officers—such as legislators[46] and judges[47]—immunity for their discretionary duties without asking whether they acted in bad faith. Part III evaluates which executive duties were accorded either absolute or qualified immunity under the common law around 1871. High-ranking executive officials had absolute immunity for their discretionary duties.[48] Qualified immunity was accorded to all other government officials' discretionary "quasi-judicial" duties that were arguably within their jurisdiction—what we consider today essentially as discretionary policy decisions or judgments requiring the application of facts to law. Part IV concludes by showing how the Supreme Court's current officer-immunity doctrines depart from the common law around 1871 in three main ways: (1) High-ranking executive officers had absolute immunity at common law, while today they have only qualified immunity (and vice versa for government prosecutors and legislative aides); (2) qualified immunity at common law could be overridden by showing an officer's subjective improper motive, while today the clearly-established-law test applies; and (3) qualified immunity at common law required the plaintiff to prove bad faith with clear evidence, while there is confusion today over whether the plaintiff or defendant bears the burden of proof in qualified immunity cases.

The common law approach identified in this Article accounts for many of the concerns the Supreme Court articulated in *Harlow v. Fitzgerald* when it replaced the traditional bad-faith test for overcoming qualified immunity with the clearly-established-law test.[49] Because high-ranking executive officials had absolute immunity, that immunity sufficiently protected the separation of powers without resort to the clearly-established-law test—which today frequently denies plaintiffs money damages when their constitutional rights

44. *See* COOLEY, *supra* note 24, at 376-79; BISHOP, *supra* note 25, §§ 793, 796, at 368; MECHEM, *supra* note 26, §§ 643, 647, 657, at 429-30, 432, 441-42; THROOP, *supra* note 27, §§ 724, 729, at 688, 693.

45. *See* COOLEY, *supra* note 24, at 417, 419; BISHOP, *supra* note 25, §§ 783, 790, at 363-65, 367; MECHEM, *supra* note 26, §§ 624-634, 641, at 407-19, 427-28; THROOP, *supra* note 27, §§ 717-721, at 679-83.

46. *See* COOLEY, *supra* note 24, at 376; BISHOP, *supra* note 25, § 777, at 360-61; MECHEM, *supra* note 26, §§ 644-645, at 431-32; THROOP, *supra* note 27, § 709, at 670-71.

47. *See* COOLEY, *supra* note 24, at 377-78, 408-11; BISHOP, *supra* note 25, §§ 781, 784, at 362, 365; MECHEM, *supra* note 26, § 619, at 400-02; THROOP, *supra* note 27, § 713, at 673-76.

48. *See* COOLEY, *supra* note 24, at 377; MECHEM, *supra* note 26, §§ 606-609, at 394-96; THROOP, *supra* note 27, § 712, at 672.

49. 457 U.S. 800, 817-19 (1982).

are violated by lower-ranking executive officials. At the same time, because plaintiffs in qualified immunity cases had the burden to prove officers' subjective bad faith with clear evidence, officer defendants and courts had significant procedural mechanisms—including summary-judgment motions—to dismiss insubstantial claims before trial. This heightened evidentiary burden on plaintiffs is precisely what the senior White House officials in *Harlow* asked for as a fallback to absolute immunity—although they failed to tie their argument for this alternative to the common law.[50] Post-*Harlow* developments in summary-judgment law have also made it easier to dismiss insubstantial claims before trial, including in the qualified immunity context, as Justice Kennedy, joined by Justice Scalia, explained in *Wyatt v. Cole*.[51]

Consequently, the historical sources canvassed in this Article show that the common law around 1871 contains a roadmap for reforming modern qualified immunity law. The common law approach would simultaneously protect the separation of powers while offering plaintiffs meaningful damages remedies when many types of state officers grossly breach their public duties.

I. Government-Officer Actions That Categorically Lacked Immunity at Common Law

As a threshold matter, the common law around 1871 defined two sets of government-officer actions that categorically lacked immunity: (1) mandatory ministerial duties neglected by an official or actions by ministerial officials taken in excess of delegated authority, and (2) discretionary duties clearly outside the official's jurisdiction or delegated authority.[52]

50. *See infra* notes 388-92 and accompanying text.

51. *See* 504 U.S. 158, 171 (1992) (Kennedy, J., concurring) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986)).

52. Pfander and Hunt collected nineteenth-century cases where plaintiffs recovered monetary payments against government officials. Pfander & Hunt, *supra* note 34, at 1875 n.52 (collecting cases); *see also* Tanzin v. Tanvir, 141 S. Ct. 486, 491 (2020) (citing Pfander & Hunt, *supra* note 34). These cases can be explained largely by the ministerial-duty and clear-absence-of-jurisdiction exceptions to immunity. *See* Wise v. Withers, 7 U.S. (3 Cranch) 331, 337 (1806) (clear absence of jurisdiction); Bd. of Liquidation v. McComb, 92 U.S. 531, 541 (1876) (ministerial duty of a tax collector exercising "a plain official duty, requiring no exercise of discretion"); Elliott v. Swartwout, 35 U.S. (10 Pet.) 137, 159 (1836) (ministerial duty of tax collector); Imlay v. Sands, 1 Cai. 566, 573 (N.Y. Sup. Ct. 1804) (ministerial duty of customs-house collector); Miller v. Horton, 26 N.E. 100, 103 (Mass. 1891) (finding a clear absence of jurisdiction where commissioners killed the plaintiff's horse despite it not actually having a disease); *see also* Osborn v. Bank of the U.S., 22 U.S. (9 Wheat.) 738, 840, 867-68 (1824) (granting an injunction against "ministerial officer[s]" who could not rely on an unconstitutional statute). Other cases involved the Takings Clause's unique just-compensation remedy, a government official who acted within his authority, or a finding of malice. *See* Meigs v. M'Clung's Lessee, 13 U.S. (9 Cranch) 11, 18 (1815) (implicating a just-compensation

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A. Neglected Ministerial Duties

As the Supreme Court explained the same year Congress enacted the Civil Rights Act of 1871:

> The rule is well settled, that where the law requires absolutely a ministerial act to be done by a public officer, and he neglects or refuses to do such act, he may be compelled to respond in damages to the extent of the injury arising from his conduct. There is an unbroken current of authorities to this effect. A mistake as to his duty and honest intentions will not excuse the offender.[53]

This rule about ministerial duties followed directly from the theory at common law about why and when government officers had some form of immunity. The common law recognized that certain duties performed by government officials were owed primarily "to the public," while other duties were owed primarily "to the individual."[54] The former generally entailed an exemption from tort liability, while the latter permitted "an individual action for damages."[55]

The "nature of the duty"—not the "dignity" or "the grade of the office"—determined whether there was "immunity from private suits."[56] The "policeman," for example, might be "one of the lowest grade of public officers," yet this officer still had some "immunity from private suits" when performing a "duty to the public."[57] Because this analysis turns on the nature of the duty rather than the particular office, a government officer—such as a "sheriff"—could have some "duties to individuals as well as to the public."[58]

This distinction—between government duties owed primarily to the public and those owed primarily to individuals—prompted common law courts to demarcate "discretionary" and "ministerial" duties.[59] As Cooley

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remedy under the Takings Clause, where "[t]he land [wa]s certainly the property of the Plaintiff below; and the United States [could not] have intended to deprive him of it by violence, and without compensation"); Callender v. Marsh, 18 Mass. (1 Pick.) 418, 435 (1823) ("[T]he defendant in this action is not liable to damages. In no case can a person be liable to an action for a tort, for an act which he is authorized by law to do . . . ."); Merriam v. Mitchell, 13 Me. 439, 458 (1836) (per curiam) (holding the defendant liable for malicious prosecution where "[t]he jury have expressly found malice" predicated on the lack of probable cause).

53. Amy v. Supervisors, 78 U.S. (11 Wall.) 136, 138 (1871); *see also* Wilkes v. Dinsman, 48 U.S. (7 How.) 89, 129 (1849).

54. COOLEY, *supra* note 24, at 379.

55. *Id.*

56. *Id.* at 381; *see also* MECHEM, *supra* note 26, § 657, at 441; Scheuer v. Rhodes, 416 U.S. 232, 247 (1974).

57. COOLEY, *supra* note 24, at 381.

58. *Id.* at 392-93.

59. *See id.* at 376-77. Cooley also stated that certain *non*discretionary duties still could be owed primarily to the *public*—and thus entail immunity—if "no single individual of the

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explained, "discretionary powers . . . are only conferred where the duties to be performed are public duties: concerning the public primarily and specially, and individuals only incidentally."[60] So, for example, legislators "are not chosen to perform duties to individuals, but duties to the State," and judges "do justice as between [particular individuals], to the end that peace and order may prevail in the political society, and that rights may be protected and preserved."[61] In other words, under Cooley's framework, the public delegated certain officials the power to make discretionary decisions while performing their duties as government officials. The public thus expected that such officials would have the proper latitude to exercise that delegated discretion.

Separation-of-powers concerns buttressed common law officer immunities. The people delegated to certain officials the "public trust" of duties requiring discretionary judgments "for the benefit of the political society,"[62] and that delegated discretion would be divested if overridden by another branch of government.[63] Analogously, the common law recognized that officials complied with, and "exactly discharged," their duties even when making honest mistakes.[64]

In contrast, mandatory duties in the performance of which "officials lacked discretion" were "thus ministerial."[65] For example, a police officer executing a warrant was performing a mandatory ministerial duty, as the officer's duty was simply to follow the dictates of the warrant rather than to exercise any discretion.[66] So "[t]hose officers . . . who merely execute the

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public can be in any degree legally concerned with the manner of its performance." *Id.* at 379 (discussing the example of a "sheriff . . . in the execution of a convict").

60. *Id.*

61. *Id.* at 379-80.

62. *Id.* at 375.

63. *See id.* at 376-77 ("Discretionary power is, in its nature, independent; to make those who wield it liable to be called to account by some other authority is to take away discretion and destroy independence.").

64. BISHOP, *supra* note 25, § 787, at 366 (recognizing that a government officer "may err," so "when he has done what is thus commanded, whether the result is correct or not, he has exactly discharged his duty, and the law, which compelled this of him, will protect him, whatever harm may have befallen individuals").

65. Bogan v. Scott-Harris, 523 U.S. 44, 51 (1998) (citing Morris v. People, 3 Denio 381, 395 (N.Y. 1846); and Caswell v. Allen, 7 Johns. 63, 68 (N.Y. Sup. Ct. 1810)); *see also* McCord v. High, 24 Iowa 336, 344 (1868) ("In short, [the defendant officer] has no discretion, and can exercise no judgment, in regard to the end to be attained by his discharge of duty . . . .").

66. *See* BISHOP, *supra* note 25, § 795, at 368 ("If an officer, having a writ for the arrest of one person, takes another instead, however mistakenly, he is liable to the latter."); THROOP, *supra* note 27, § 754, at 715 (recognizing as "purely ministerial" the "ordinary functions of those officers [that is, sheriffs and constables]," which generally "consist[ed] of the execution of process, or other mandates of a court or judicial officer"); *see also* Campbell v.

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commands of superiors, are properly denominated ministerial."[67] Mandatory ministerial duties, though, could arise in other ways besides commands from superior officers, as the law itself could impose mandatory ministerial duties on government officials.[68] Even officials with classic discretionary duties (such as legislators and judges) could still have other duties deemed ministerial and thus not immunized.[69]

After distinguishing ministerial from discretionary duties, the common law around 1871 then attached different consequences for officers' breaches of these duties. As to ministerial duties, officers lacked immunity for claims that they neglected these duties.[70] The common law protected officers' valid ministerial actions, but ministerial officers lacked immunity if they merely exceeded their authority—even when acting in good faith.[71] The consequences regarding officers' discretionary duties will be discussed in Subpart B, as well as in Parts II and III.

B. Clear Absence of Jurisdiction or Delegated Authority for Discretionary Actions

Besides neglected ministerial duties, the common law also categorically denied immunity to discretionary actions when officers *clearly* lacked jurisdiction or delegated authority. There is an important distinction here: Officers exercising ministerial duties lacked immunity when acting in *mere excess* of authority, but officers exercising discretionary duties lacked immunity under this exception only when there was a *clear absence*—not just when they acted in excess—of authority.

As the Supreme Court explained one year after the passage of the Civil Rights Act of 1871, "[a] distinction must be here observed between *excess* of jurisdiction and the *clear absence* of all jurisdiction over the subject-matter."[72] "Where there [was] clearly no jurisdiction," an officer lacked immunity.[73] For

Sherman, 35 Wis. 103, 108-10 (1874) (providing an example of a ministerial officer seizing property pursuant to a warrant).

67. COOLEY, *supra* note 24, at 375-76.

68. *See* BISHOP, *supra* note 25, § 796, at 368 (citing St. Joseph Fire & Marine Ins. Co. v. Leland, 2 S.W. 431, 432-33 (Mo. 1886)).

69. COOLEY, *supra* note 24, at 377-78; BISHOP, *supra* note 25, § 784, at 365 & n.3 (collecting cases); *see Ex parte* Virginia, 100 U.S. 339, 348 (1880) (describing the process of "selecting jurors," as done by a judge, as "a ministerial act").

70. *See* COOLEY, *supra* note 24, at 376; BISHOP, *supra* note 25, § 796, at 368; MECHEM, *supra* note 26, § 664, at 445; THROOP, *supra* note 27, § 724, at 688.

71. *See* BISHOP, *supra* note 25, § 793, at 368; MECHEM, *supra* note 26, § 663, at 445.

72. Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 351 (1872) (emphasis added).

73. *Id.* at 351-52.

example, "if a probate court"—with authority over only "wills" and "estates"—initiated criminal trials "for public offences," then jurisdiction would be "entirely wanting," and the judge would lack immunity.[74] But an officer retained immunity for discretionary acts merely in excess of jurisdiction. For instance, if a court with criminal jurisdiction held "a particular act to be a public offence"—although the law did not make the act an offense—the judge would still have immunity even though authorizing an arrest and trial for that nonoffense "would be in excess of his jurisdiction."[75] This doctrine therefore retained an "exemption from liability which obtains for errors."[76]

This same distinction, based on a clear absence of jurisdiction or delegated authority, applied to executive officials' immunity for discretionary acts. The Supreme Court noted in 1896 that, "[a]s in the case of a judicial officer," an executive officer loses immunity for discretionary acts "*manifestly or palpably* beyond his authority."[77]

The seminal case in this area for executive officials—the Supreme Court's 1804 decision *Little v. Barreme*[78]—is frequently identified as a "paradigmatic example" of how the early Marshall Court "did not generally permit a good-faith defense" for damages claims against officers.[79] That interpretation overreads *Little v. Barreme*. To be sure, the officer's "pure intention" did not

74. *Id.* at 352.

75. *Id.* The common law further presumed that courts of "superior or general authority" had jurisdiction. *Id.* at 347; *see also* COOLEY, *supra* note 24, at 419 & n.4 (discussing *Bradley v. Fisher* as recognizing a distinction between "inferior courts or judicial officers" versus "judges of the superior courts"); MECHEM, *supra* note 26, § 627, at 408-09; THROOP, *supra* note 27, § 720, at 682.

76. *Bradley*, 80 U.S. (13 Wall.) at 352.

77. Spalding v. Vilas, 161 U.S. 483, 498 (1896) (emphasis added); *see also* Miller v. Horton, 26 N.E. 100, 103 (Mass. 1891) (Holmes, J.) (holding that the defendant commissioners "acted outside their jurisdiction" in condemning a plaintiff's horse when it did not actually have a disease); Shanley v. Wells, 71 Ill. 78, 83 (1873) (deeming a police officer's motives irrelevant in a warrantless arrest where "the offense charged was a misdemeanor, not committed in the presence of the defendant, . . . and there was no authority in law to make the arrest without a warrant"); Wise v. Withers, 7 U.S. (3 Cranch) 331, 337 (1806) ("[A] court martial has no jurisdiction over a justice of the peace, as a militiaman," so "a decision of such a tribunal, in a case clearly without its jurisdiction, cannot protect the officer who executes it."); Gross v. Rice, 71 Me. 241, 248 (1880) (finding an absence of jurisdiction where the defendant prison warden "had no authority to detain or punish [a prisoner] after his sentence had expired").

78. 6 U.S. (2 Cranch) 170 (1804).

79. Baude, *supra* note 4, at 55 & n.46 (citing JAMES E. PFANDER, CONSTITUTIONAL TORTS AND THE WAR ON TERROR 3-14, 16-17 (2017)); *see also* David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1, 17 (1972); Woolhandler, *supra* note 33, at 415-16; *cf.* Nielson & Walker, *supra* note 11, at 1865 ("[T]hat the President told Little what to do does not mean it was a reasonable reading of the statute.").

immunize him from damages in that case.[80] But that was because he clearly lacked delegated authority for his action—not because the Court rejected wholesale a good-faith defense for discretionary actions arguably within an official's jurisdiction.

Little v. Barreme, in which the Court affirmed a damages award against a Navy captain, centered around three key facts. First, a federal statute authorized the President to direct naval commanders to seize boats *going to* French ports.[81] Second, the President instructed naval commanders to seize boats both going to *and coming from* French ports.[82] And third, the defendant, Captain Little, then relied on the President's instruction and "seized with pure intention" a boat *coming from* a French port.[83] In a commonly quoted passage,[84] Chief Justice Marshall wrote that he initially believed that "instructions of the executive" might "excuse" an officer "from damages," but he ultimately concluded that such "instructions cannot . . . legalize an act which without those instructions would have been a plain trespass."[85] The Court therefore held that Captain Little clearly had no authority to seize the ship, as it was "a *plain* trespass."[86] The President's blatant "misconstruction of the act" was no defense because the statute clearly withheld authority to seize ships *coming from* French ports.[87]

The Supreme Court's modern immunity case law correctly recognizes *Little v. Barreme* as fitting within the common law's immunity exception for clear absences of jurisdiction:

> In both *Barreme* and *Bates* [*v. Clark*, 95 U.S. 204 (1877)], the officers *did not merely mistakenly conclude* that the circumstances warranted a particular seizure, but failed to observe the limitations on their authority by making seizures *not within the category or type* of seizures they were authorized to make.[88]

Other cases granted immunity when an officer "simply made a mistake in the exercise of the discretion conferred upon him."[89] The Court described the test

80. *Little*, 6 U.S. (2 Cranch) at 179.

81. *Id.* at 177.

82. *Id.* at 178.

83. *Id.* at 178-79.

84. *See, e.g.*, Baude, *supra* note 4, at 56; Engdahl, *supra* note 79, at 14-15.

85. *Little*, 6 U.S. (2 Cranch) at 179.

86. *Id.* (emphasis added); *see also* Nielson & Walker, *supra* note 11, at 1865 ("[P]erhaps that was because Little's mistake was not a reasonable one; that the President told Little what to do does not mean it was a reasonable reading of the statute." (emphasis omitted)).

87. *Little*, 6 U.S. (2 Cranch) at 178.

88. Butz v. Economou, 438 U.S. 478, 491 (1978) (emphasis added).

89. *Id.* (discussing *Kendall v. Stokes*, 44 U.S. (3 How.) 87, 97-98 (1845)).

as asking whether officials acted under "obvious[ly]" or "manifestly erroneous" interpretations of their authority, acted "manifestly beyond their line of duty," or "stray[ed] beyond the plain limits of their statutory authority."[90] So rather than rejecting a good-faith defense across the board, *Little v. Barreme* just held that officers lack immunity when they *clearly* have no delegated authority for their discretionary actions.[91]

The nineteenth-century treatises canvassed in this Article endorse this limited scope of the clear-absence-of-jurisdiction exception. As Bishop said, "not everything which it is common to speak of as want of jurisdiction" satisfies this exception.[92] Instead, the test "distinguished between acts in excess of [the officer's delegated] jurisdiction, and those in the clear absence of any jurisdiction."[93] And this doctrine applied to both judicial acts and discretionary executive ("quasi-judicial") acts.[94]

The treatises never suggested that this clear-absence-of-jurisdiction exception to officer immunity was satisfied just because an officer exercised a discretionary duty under a law that was later invalidated by a court.[95] Multiple

90. *Id.* at 494-95 (discussing *Spalding v.* Vilas, 161 U.S. 483 (1896), and *Barr v. Matteo*, 360 U.S. 564 (1959)).

91. *Little v. Barreme* is also plausibly explained as a ministerial-duty case, as Captain Little's defense was just that he obeyed the "orders" of his "superiors." *See* 6 U.S. (2 Cranch) at 179. The Supreme Court later explained that "it can never be maintained that a military officer can justify himself for doing an unlawful act, by producing the order of his superior." Mitchell v. Harmony, 54 U.S. (13 How.) 115, 137 (1852). The D.C. Circuit in 1938 suggested *Little v. Barreme* was a ministerial-duty case. Cooper v. O'Connor, 99 F.2d 135, 137 & n.2 (D.C. Cir. 1938).

92. BISHOP, *supra* note 25, § 783, at 363; *see also* COOLEY, *supra* note 24, at 417 (explaining that immunity does not extend to a judge who "decide[s] cases of a class which the law withholds from his cognizance").

93. BISHOP, *supra* note 25, § 783, at 364; *see also* MECHEM, *supra* note 26, § 629, at 410; THROOP, *supra* note 27, § 718, at 679-80. When Cooley spoke of "an authority which the law does not warrant him in exercising," he appears to have been referring to the clear-absence-of-jurisdiction exception. COOLEY, *supra* note 24, at 688 & n.3. Cooley cited two Supreme Court cases holding that military officials wholly lacked jurisdiction to confiscate private property. *See id.* (citing Planters' Bank v. Union Bank, 83 U.S. (16 Wall.) 483 (1873); and *Mitchell*, 54 U.S. (13 How.) 115).

94. *See* BISHOP, *supra* note 25, § 790, at 367; MECHEM, *supra* note 26, § 641, at 427-28.

95. Unlike with laws that delegated discretionary duties or determined how an "officer is appointed to an office legally existing," if a law "attempting to *create the office*" was later held unconstitutional, then the person who nominally acted in that nonexistent office was not treated as a government officer at all by the common law. Norton v. Shelby County, 118 U.S. 425, 441-42, 446 (1886) (emphasis added); *see also* MECHEM, *supra* note 26, §§ 326-328, at 217-19 (discussing when an officer could be treated as "de facto," such that the person's prior official actions were treated as valid, even if there were certain legal defects in how that person was appointed).

Additionally, the Takings Clause would provide a constitutional remedy if a statute unconstitutionally authorized an official to take property without just compensation.

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precedents throughout the latter part of the nineteenth century explained that an officer's *discretionary* acts were subject to at least a good-faith defense even if the officer's authority was later ruled unconstitutional.[96] The Supreme Court eventually adopted this approach.[97] And various situations could exist where it is not clear—when an officer acts before litigation—whether a statutory delegation of power is unconstitutional, so the common law's clear-absence-of-jurisdiction exception would not be satisfied in those situations.

In contrast, nineteenth-century cases collected by the treatises rejected immunity for *ministerial* acts performed under statutes later declared unconstitutional by courts.[98] There would have been no reason for these

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See, e.g., Cammeyer v. Newton, 94 U.S. 225, 234 (1877) ("Public employment is no defence to the employé for having converted the private property of another to the public use without his consent and without just compensation."); Belknap v. Schild, 161 U.S. 10, 18 (1896) (citing *Cammeyer*, 94 U.S. 225); Meigs v. M'Clung's Lessee, 13 U.S. (9 Cranch) 11, 18 (1815) ("The land is certainly the property of the Plaintiff below; and the United States cannot have intended to deprive him of it by violence, and without compensation.").

96. *See, e.g.*, Tillman v. Beard, 80 N.W. 248, 248 (Mich. 1899); Goodwin v. Guild, 29 S.W. 721, 723 (Tenn. 1895); Gilbertson v. Fuller, 42 N.W. 203, 204 (Minn. 1889); Van Buren v. Downing, 41 Wis. 122, 127, 133 (1876); Hartwell v. Armstrong, 19 Barb. 166, 175 (N.Y. Spec. Term 1854); Dwight v. Rice, 5 La. Ann. 580, 580 (1850).

97. *See* Pierson v. Ray, 386 U.S. 547, 555 (1967) (allowing a defense of good faith for an arrest made under a statute later invalidated).

98. MECHEM, *supra* note 26, § 662, at 444-45, 445 n.1 (citing, for example, *Board of Liquidation v. McComb*, 92 U.S. 531 (1876), and *Sumner v. Beeler*, 50 Ind. 341 (1875)); *id.* § 901, at 602-03, 603 n.2; THROOP, *supra* note 27, § 723, at 687-88, 687 n.2; *id.* § 730, at 694 & n.1. Texas and Maine, however, extended immunity even to "ministerial" officers in this situation. *See, e.g.*, Sessums v. Botts, 34 Tex. 335, 349 (1871); State v. McNally, 34 Me. 210, 221 (1852).

These treatises identified—as *ministerial*-duty rulings—a few earlier cases holding that justices of the peace lacked immunity when issuing warrants under unconstitutional statutes (even though *issuing* warrants probably would have been considered *discretionary* duties by 1871). *See* Kelly v. Bemis, 70 Mass. (4 Gray) 83, 84 (1855); Kendall v. Stokes, 44 U.S. (3 How.) 87, 87 annot. 2 (1845) (Stewart Rapalje ed., New York, Banks L. Pub'g 2d ed. reprt. 1903) (1884) (citing *Kelly*, 70 Mass. (4 Gray) 83); and Ely v. Thompson, 10 Ky. (3 A.K. Marsh) 70, 76 (Ky. 1820)). *Kelly* was premised on the Kentucky Supreme Court's earlier holding that constables *executing* warrants lacked immunity where the warrants had been issued by justices of the peace under unconstitutional statutes. *See* Fisher v. McGirr, 67 Mass. (1 Gray) 1, 29 (1854). And constables executing warrants were discharging *ministerial* duties at common law. *See supra* note 66 and accompanying text. *Ely* involved the further complication of a previously repealed statute, and the court cited its earlier holding that a justice of the peace is liable when issuing a warrant with a "total defect" in jurisdiction. *Ely*, 10 Ky. (3 A.K. Marsh) at 76 (citing Kennedy v. Terrill, 3 Ky. (1 Hard.) 490, 493 (1808)). In all events, Kentucky later clarified that justices of peace had absolute immunity when issuing warrants because that is a judicial act. *See* Moser v. Summers, 189 S.W. 715, 716-17 (Ky. 1916) (collecting historical cases, including *Ely*); Pepper v. Mayes, 81 Ky. 673, 675-76 (1884) (citing COOLEY, *supra* note 24, at 408-09). Other jurisdictions did too. *See, e.g.*, Henke v.

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treatises to expressly distinguish "ministerial" duties in this way if the common law also withheld immunity for discretionary duties performed under laws later held unconstitutional.[99] More fundamentally, a "ministerial officer" acts in excess of authority under an "unconstitutional law" because it was, "in legal effect, no law at all."[100] But with discretionary duties under laws later held unconstitutional, it would not be *clear* or *obvious* before litigation that the officer lacked authority to take that type of action.

II. Absolute Immunity at Common Law for Legislators and Judges

Discretionary government duties arguably within an officer's jurisdiction, as explained above, were owed primarily to the public and thus entailed some immunity from tort-damages liability. The common law accorded two different forms of immunity—absolute or qualified—depending on the discretionary duty at issue. Qualified immunity did not exempt a government official acting with subjective bad faith. But absolute immunity did, so it prohibited any judicial inquiry into an officer's subjective motives. This Part examines the common law's creation of absolute immunity first, as the principles animating absolute immunity also generated qualified immunity.

A. Legislators

The common law accorded members of legislative bodies absolute immunity from tort liability for legislative acts.

In 1881, the Supreme Court interpreted the Constitution's Speech or Debate Clause and recognized the common law basis for the doctrine of legislative immunity.[101] *Kilbourn v. Thompson* held that the Clause extended protection beyond "words spoken in debate" to "things generally done in a

McCord, 7 N.W. 623, 625-26 (Iowa 1880) (rejecting *Kelly* while quoting Cooley, *supra* note 24, at 403, 419).

99. If a subsequent determination of unconstitutionality had satisfied the clear-absence-of-jurisdiction exception for discretionary duties, this would also would have negated *absolute* immunities in this circumstance. *See supra* notes 72-76 and accompanying text; *cf.* MECHEM, *supra* note 26, § 989, at 660 (explaining that a court cannot enjoin a judge from conducting a proceeding under an unconstitutional law).

100. MECHEM, *supra* note 26, § 662, at 444-45. Mechem cited, among other things, *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824), for the proposition that "ministerial officer[s]" could not rely on unconstitutional statutes. *See id.* at 840, 847-48, 868. The Supreme Court subsequently confirmed that cases such as *Osborn* and *Board of Liquidation v. McComb*, 92 U.S. 531 (1876), involved officers acting "contrary to a plain official duty requiring no exercise of discretion"—that is, a ministerial duty. Belknap v. Schild, 161 U.S. 10, 18 (1896).

101. *See* Kilbourn v. Thompson, 103 U.S. 168, 201, 203-04 (1880).

session of the House by one of its members in relation to the business before it."[102]

The nineteenth-century treatises confirmed absolute immunity for officers exercising legislative power.[103] Cooley explained that "their rightful exemption from liability is very plain" because "[t]he legislature has full discretionary authority in all matters of legislation."[104] This "[d]iscretionary power is, in its nature, independent," so tort liability would "take away discretion and destroy independence."[105] Legislative immunity entailed "no inquiry into the motives," so "malice, bad faith or corruption" were irrelevant.[106]

The treatises also cited state cases extending legislative immunity to "inferior legislative bodies, such as boards of supervisors, county commissioners, city councils, and the like."[107] So whenever an officer was "vested with legislative powers" and "exercise[d] them," the common law accorded that officer absolute immunity.[108]

Legislative absolute immunity under the American common law around 1871, however, was limited to *members* of legislative bodies themselves; it did not extend to their aides or to other nonmembers.[109] Thomas Jefferson's *Manual of Parliamentary Practice* recognized that "the framers of our constitution . . . have only privileged 'Senators and Representatives' *themselves*."[110] But "[t]he privileges of the members of Parliament, from small and obscure beginnings, have been advancing for centuries with a firm and never yielding pace"—such that the English parliamentary privilege had protected not only "a member himself," but also his "wife" and "his servants" from certain process.[111] The Supreme Court in *Kilbourn* did not extend immunity to the U.S. House of

102. *Id.* at 204.

103. COOLEY, *supra* note 24, at 376; BISHOP, *supra* note 25, § 777, at 360-61; MECHEM, *supra* note 26, §§ 644-645, at 431-32; THROOP, *supra* note 27, § 709, at 670-71.

104. COOLEY, *supra* note 24, at 376.

105. *Id.*

106. *Id.* at 689; *see also* BISHOP, *supra* note 25, § 777, at 360-61; MECHEM, *supra* note 26, § 645, at 432.

107. COOLEY, *supra* note 24, at 376; *see also* MECHEM, *supra* note 26, § 646, at 432; THROOP, *supra* note 27, § 709, at 670-71.

108. MECHEM, *supra* note 26, § 646, at 432 (quoting Jones v. Loving, 55 Miss. 109, 111 (1877)).

109. *Cf.* Anderson v. Creighton, 483 U.S. 635, 644 n.5 (1987) ("Of course, it is the American rather than the English common-law tradition that is relevant . . . .").

110. THOMAS JEFFERSON, A MANUAL OF PARLIAMENTARY PRACTICE FOR THE USE OF THE SENATE OF THE UNITED STATES § 3 (Washington, D.C., Samuel Harrison Smith 1801) (emphasis added) (quoting U.S. CONST. art. I, § 6, cl. 1), *reprinted in* H.R. DOC. NO. 115-117, at 131 (2019).

111. *Id.*, H.R. DOC. NO. 115-117, at 130.

Representatives' "sergeant-at-arms," who had arrested an individual at the (invalid) direction of the House.[112] The nineteenth-century treatises similarly discussed this immunity as covering "members" of legislative bodies.[113] Mechem directly stated that "the privilege is confined to the *member alone*."[114] As discussed below, however, the discretionary duties of government officers like legislative aides would have been deemed "quasi-judicial" acts, which entailed qualified immunity at common law.[115]

B. Judges and Other Judicial Actors

Like legislative immunity, absolute immunity for judges' exercise of judicial power was well established at common law around 1871. In 1872, the Supreme Court in *Bradley v. Fisher* held, by a 7–2 vote, that judges have absolute immunity for their judicial acts.[116]

A few years earlier, in *Randall v. Brigham*, the Court had explained that some form of judicial immunity "is as old as the law, and its maintenance is essential to the impartial administration of justice."[117] Then *Bradley v. Fisher* held that "this exemption of the judges from civil liability [cannot] be affected by the motives with which their judicial acts are performed."[118] In *Bradley*, the Court reasoned that judicial absolute immunity, which prevents litigation about judges' motives altogether, both preserves "judicial independence" and avoids "vexatious litigation."[119]

The treatises all agreed that judges' exercise of judicial power entailed absolute immunity. Cooley said "it is always to be assumed" that judicial power "has been honestly exercised and applied."[120] And Cooley collected many cases—including *Bradley*—recognizing that judicial immunity "applies to the highest judge in the State or nation, but it also applies to the lowest officer who sits as a court and tries petty causes."[121] This judicial immunity, moreover, could extend beyond "judges proper"; for example, it applied to military officers constituting "courts-martial" and to "grand and petit jurors in the

112. Kilbourn v. Thompson, 103 U.S. 168, 170, 196-97, 205 (1880).

113. COOLEY, *supra* note 24, at 376; *see also* BISHOP, *supra* note 25, § 777, at 360; MECHEM, *supra* note 26, § 653, at 436; THROOP, *supra* note 27, § 709, at 670.

114. MECHEM, *supra* note 26, § 653, at 436 (emphasis added).

115. *See infra* Parts III.B.1-.2.

116. 80 U.S. (13 Wall.) 335, 347, 357 (1872).

117. Randall v. Brigham, 74 U.S. (7 Wall.) 523, 536 (1869).

118. *Bradley*, 80 U.S. (13 Wall.) at 347.

119. *Id.* at 348, 354.

120. COOLEY, *supra* note 24, at 377-78.

121. *Id.* at 409 & nn.1-2 (footnote omitted); *see also* BISHOP, *supra* note 25, § 781, at 362.

discharge of their duties as such."[122] The other treatises agreed—with Bishop, for example, clarifying that immunity protected "any judicial act within his jurisdiction, however erroneous, mistaken, or even corrupt."[123]

III. Executive-Officer Immunity at Common Law

The common law around 1871 accorded absolute immunity to high-ranking executive officers' discretionary duties and a freestanding qualified immunity for all other executive officers' discretionary duties. While the common law readily ascertained that legislative and judicial officers necessarily had discretionary duties warranting absolute immunity, courts grappled with the line between executive officials' discretionary duties owed primarily to the public and mandatory, ministerial duties owed primarily to individuals. To accommodate discretionary duties performed by executive officers, the common law by 1871 had established another category of government actions entailing some immunity: "quasi-judicial" acts.

Quasi-judicial acts were neither ministerial duties nor judicial acts performed by courts, and they covered "any officer [with] the duty of looking into facts, and acting upon them, not in a way which [the law] specifically directs."[124] These "official acts involving policy discretion but not consisting of adjudication" still required officers to determine whether certain facts satisfied legal contingencies or prerequisites[125]—that is, the mode of analysis typically performed by judges.[126] As Cooley explained, "there are various duties lying along the borders between those of a ministerial and those of a judicial nature, which are usually intrusted to inferior officers, and in the performance of which it is highly important that they be kept as closely as possible within strict rules."[127] So "courts lean[ed] against recognizing in them full discretionary powers," instead "hold[ing] them strictly within the limits of good faith."[128]

This was the origin of "qualified" immunity: Immunity protected discretionary "quasi-judicial" duties if the officer acted in good faith. In other

122. COOLEY, *supra* note 24, at 410; *see also* BISHOP, *supra* note 25, § 781, at 362.

123. BISHOP, *supra* note 25, § 781, at 362; *see also* MECHEM, *supra* note 26, §§ 619-623, at 400-07; THROOP, *supra* note 27, § 713, at 673-76.

124. BISHOP, *supra* note 25, §§ 785-786, at 365.

125. Burns v. Reed, 500 U.S. 478, 500 (1991) (Scalia, J., concurring in the judgment in part and dissenting in part) (citing BISHOP, *supra* note 25, § 786, at 365-66 & 366 n.1; and COOLEY, *supra* note 24, at 411-13).

126. *See, e.g.*, Wilkes v. Dinsman, 48 U.S. (7 How.) 89, 129 (1849).

127. COOLEY, *supra* note 24, at 413.

128. *Id.*

words, this quasi-judicial immunity was "qualified" in the sense that it would not apply if the officer acted with subjective "malice"—distinguishing it from judicial absolute immunity.[129] At common law, malice could be shown by establishing "any improper or wrongful motive, and it [was] not essential that actual malevolence or corrupt design be shown."[130] So common law malice "is any evil or unlawful purpose, as distinguished from that of promoting the justice of the law," and it is "not necessarily . . . ill will to the individual."[131] Reliance on "advice of counsel" was "almost conclusive that there was no malice."[132] Objective factors could also be relevant, although not determinative, in assessing subjective motive at common law: "If a want of probable cause [that is, objective unreasonableness] is shown, malice may be inferred; *but the deduction is not a necessary one* . . . ."[133] So if an objectively reasonable officer would have known they were violating the law, that would have been one piece of evidence that the factfinder could consider in assessing whether the defendant officer acted with a subjective improper motive. But that ultimate determination about the particular officer's subjective motive would have been decided by the factfinder, and other evidence could have shown that the officer acted in good faith.

At the same time, the common law around 1871 would have accorded absolute immunity to high-ranking executive officers—those exercising core, fully discretionary executive powers. But courts around 1871 had not yet begun to grant government prosecutors absolute immunity. Rather, prosecutors and all other lower-ranking executive officers performing discretionary duties had a freestanding qualified immunity, which could be overcome if a plaintiff established clear evidence of subjective malice.

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129. *Wilkes*, 48 U.S. (7 How.) at 123, 129, 130-31.

130. COOLEY, *supra* note 24, at 185 & n.6 (collecting cases); *cf.* Masson v. New Yorker Mag., Inc., 501 U.S. 496, 510 (1991) ("Actual malice under the *New York Times* standard should not be confused with the concept of [common law] malice as an evil intent or a motive arising from spite or ill will." (citing N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964))).

131. BISHOP, *supra* note 25, § 232, at 92 & n.8 (collecting cases). This could include "guilty knowledge or wilful ignorance." Hotchkiss v. Nat'l Banks, 88 U.S. (21 Wall.) 354, 359 (1875); *see also* Murray v. Lardner, 69 U.S. (2 Wall.) 110, 121 (1865). Mere "ignorance of the law" was not sufficient. *See, e.g.*, Burgtorf v. Bentley, 41 P. 163, 164 (Or. 1895); McDaniel v. Cain, 48 So. 52, 54 (Ala. 1908). Although "gross ignorance" was. Griffin v. Chubb, 7 Tex. 603, 616 (1852).

132. BISHOP, *supra* note 25, § 236, at 93-94 (capitalization altered); *see also* COOLEY, *supra* note 24, at 183-84; Monaghan v. Cox, 30 N.E. 467, 467 (Mass. 1892) ("It has been commonly held that the advice of counsel is a protection . . . ." (collecting cases)).

133. COOLEY, *supra* note 24, at 185 (emphasis added); *see also* Wyatt v. Cole, 504 U.S. 158, 173 (1992) (Kennedy, J., concurring); State v. Stalcup, 24 N.C. (2 Ired.) 50, 52 (1841) (per curiam); *cf.* Golden v. State, 1 S.C. 292, 303 (1869) ("Although the intent is of the essence of the crime, yet that is to be inferred by the jury from the acts proved.").

A. Absolute Immunity at Common Law for High-Ranking Executive Officers

Absolute immunity for certain executive officials was not as definitively established as absolute immunity for legislators and judges under the common law in 1871. But the Supreme Court's 1896 decision in *Spalding v. Vilas* declared that "the head of an Executive Department . . . should not be under an apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry in a civil suit for damages."[134] And the nineteenth-century treatises—particularly Cooley's influential 1879 treatise—provide strong support that *Spalding* accurately stated the common law rule that would have applied around 1871 if plaintiffs had pressed damages claims against high-ranking executive officers. The common law in 1871, though, had not recognized absolute immunity for prosecutors, and courts split on that issue into the early twentieth century.[135]

1. U.S. Supreme Court precedent

The Supreme Court decided three main cases in the nineteenth century that bear on whether executive officers could have absolute immunity[136]:

134. 161 U.S. 483, 498 (1896).

135. *See infra* Part III.A.3.

136. For additional discussion of nineteenth-century Supreme Court cases analyzing when mandamus and *injunctive* relief—as opposed to monetary *damages*—were permitted against government officials, see Woolhandler, *supra* note 33, at 414-24. Woolhandler acknowledged that "there was no perfect symmetry between the availability of damages and coercive relief." *Id.* at 420. But Engdahl frequently conflated the two by referring simply to "liability." *See* Engdahl, *supra* note 79, at 47.

Woolhandler argued that the Taney Court's mandamus cases expanded the definition of "discretionary" executive duty and then applied it to damages cases—in a manner that the earlier Marshall Court never would have done. Woolhandler, *supra* note 33, at 422-24; *see also, e.g.*, Decatur v. Paulding, 39 U.S. (14 Pet.) 497, 515 (1840); Reeside v. Walker, 52 U.S. (11 How.) 272, 290 (1851). But the Marshall Court's position was not that uniform. *See* Otis v. Watkins, 13 U.S. (9 Cranch) 339, 355-56 (1815) (holding that an officer was not liable for a discretionary act made without "malice"). Regardless, the common law by 1871 had readily accepted a broad definition of discretionary duties—while permitting mandamus relief for officers' legal violations even if tort immunity barred damages. *See* COOLEY, *supra* note 24, at 26, 376-77 (discussing immunity from "respond[ing] in damages" or being "responsible in damages"—rather than immunity from suit for "[p]reventive remedies, such as injunction and mandamus"); MECHEM, *supra* note 26, § 990, at 660 & n.3 (explaining that an injunction was permitted if the law granting authority was "unconstitutional or otherwise invalid," and collecting cases to support this point); THROOP, *supra* note 27, § 814, at 777 ("[I]t is well settled, that the writ [of mandamus] lies to enforce the performance of quasi judicial acts; and it also lies, in certain cases, against a judge or other judicial officer, to compel him to do his duty in judicial proceedings."); *id.* § 822, at 787 (explaining that mandamus was permitted for abuse of discretionary power).

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Kendall v. Stokes (1845),[137] *Wilkes v. Dinsman* (1849),[138] and *Spalding v. Vilas* (1896).[139] *Wilkes* repeatedly recognized that at least qualified immunity applies to executive officials' discretionary acts.[140] After *Wilkes*, the remaining question was whether any executive officials have absolute immunity instead of just qualified immunity. Then *Spalding* confirmed that high-ranking executive officers have absolute immunity.[141]

In 1845, *Kendall* granted damages immunity to the federal Postmaster General, who was both the "head" of "the Post-office Department" and a cabinet member.[142] The plaintiffs sued the Postmaster General for revoking congressionally mandated credits to their account for contractual services rendered.[143] *Kendall* described the established common law distinction between discretionary and ministerial duties in terms applying to all officers:

> But a public officer is not liable to an action if he falls into error in a case where the act to be done is not merely a ministerial one, but is one in relation to which it is his duty to exercise judgment and discretion; even although an individual may suffer by his mistake. A contrary principle would indeed be pregnant with the greatest mischiefs. It is unnecessary, we think, to refer to the many cases by which this doctrine has been established.[144]

Applying that principle, *Kendall* granted immunity to the Postmaster General because the "settlement of the accounts" required the Postmaster General "to

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The law today still provides that plaintiffs can obtain injunctions against officers even if immunities bar damages. *See, e.g.*, Pulliam v. Allen, 466 U.S. 522, 536, 541-42 (1984); Scheuer v. Rhodes, 416 U.S. 232, 237-38 (1974); *Ex parte* Young, 209 U.S. 123, 159 (1908); United States v. Lee, 106 U.S. 196, 208-09 (1882). Official-capacity suits implicate sovereign immunity (and thus the *Ex parte Young* and *Lee* exceptions to sovereign immunity for injunctive relief), while individual-capacity suits for damages under § 1983 entail common law tort immunities. *See* Lewis v. Clarke, 137 S. Ct. 1285, 1292 (2017) ("Defendants in an official-capacity action may assert sovereign immunity. An officer in an individual-capacity action, on the other hand, may be able to assert *personal* immunity defenses . . . ." (citation omitted)); Hafer v. Melo, 502 U.S. 21, 30-31 (1991) ("[T]he Eleventh Amendment does not erect a barrier against suits to impose 'individual and personal liability' on state officials under § 1983." (quoting *Scheuer*, 416 U.S. at 238)); *Scheuer*, 416 U.S. at 238 (noting that damages claims "seeking to impose individual and personal liability" are "not barred by the Eleventh Amendment").

137. 44 U.S. (3 How.) 87 (1845).

138. 48 U.S. (7 How.) 89 (1849).

139. 161 U.S. 483 (1896).

140. *See infra* notes 148-56 and accompanying text.

141. *See* Papagianakis v. Samos, 186 F.2d 257, 260 (4th Cir. 1950) (citing *Spalding*, 161 U.S. 483).

142. *Kendall*, 44 U.S. (3 How.) at 96, 98-99.

143. *Id.* at 94, 99.

144. *Id.* at 98.

exercise his judgment."[145] The Court might have accepted the Postmaster General's argument that the opposing parties conceded the Postmaster General acted without malice: "But *as the case admits* that he acted from a sense of public duty and without malice, his mistake in a matter properly belonging to the department over which he presided can give no cause of action against him."[146] This single mention of "without malice" in *Kendall* is at most dicta, and the Court did not resolve whether malice could overcome a high-ranking executive officer's assertion of immunity from tort damages.[147]

Four years later, in 1849, *Wilkes v. Dinsman* granted immunity to a Navy squadron commander who was sued in trespass by a marine under his command for unlawful punishment and detention.[148] The Court reasoned that the commander acted in good faith because he was "looking to the preservation of sound discipline, and the safe imprisonment of the plaintiff till he consented to return to his duties."[149]

In a series of passages, *Wilkes* recognized that executive officials had at least qualified immunity when exercising discretionary duties, and *Wilkes* repeatedly identified that this immunity inquiry turned on whether the government official acted with "malice."[150] For example, the Court clarified that "[an officer] is to be protected under mere errors of judgment in the discharge of his duties."[151] This included low-ranking executive officers exercising discretionary duties.[152] *Wilkes* distinguished "mere errors of judgment," which were "protected," from unprotected acts of "malice, cruelty,

145. *Id.* at 98-99.

146. *Id.* (emphasis added). The parties disagreed on this point. *See id.* at 90 (argument of the petitioners) ("But as the case is now presented by the record, it is a *concessum*, that the defendant's motives for the acts complained of were clear of all malice"); *id.* at 92 (argument of the respondents) (denying "that it was a *concessum* that there was no malice").

147. Engdahl suggests that *Kendall v. Stokes* could not have meant what it said, arguing that Justice Story joined the *Kendall* opinion, and that its discussion of immunity would have contradicted Justice Story's treatise on agency law. Engdahl, *supra* note 79, at 48 (discussing Joseph Story, *Commentaries on the Law of Agency, as a Branch of Commercial and Maritime Jurisdiction* (Boston, Charles C. Little & James Brown 1839)). This appears to be another place in which Engdahl conflated injunctive with damages relief. In all events, Engdahl's discussion relegated the Supreme Court's following decision in *Wilkes v. Dinsman*—and its multiple mentions of a good-faith defense—to a mere footnote. *See id.* at 48 n.235.

148. Wilkes v. Dinsman, 48 U.S. (7 How.) 89, 122 (1849).

149. *Id.* at 128.

150. *See, e.g.*, *id.* at 129.

151. *Id.* at 123.

152. *Id.* (recognizing this protection for "[t]he humblest seaman or marine" in addition to "the highest in office").

or any species of oppression, founded on considerations independent of public ends."[153]

Nor was that the only articulation of this immunity principle in *Wilkes*. The Court later reiterated that "a public officer, invested with certain discretionary powers, never has been, and never should be, made answerable for any injury, when acting within the scope of his authority, and not influenced by malice, corruption, or cruelty."[154] *Wilkes* expressly based this holding on the common law's recognition of discretionary executive duties that were "quasi judicial" rather than "ministerial."[155] As the Court summarized, "[i]n short, it is not enough to show he committed an error in judgment, but it must have been a malicious and wilful error."[156]

Because *Wilkes* granted immunity while recognizing that the commander acted without malice, the Court's discussion of malice is arguably dicta.[157] That is, *Wilkes* did not need to resolve whether absolute immunity applied, because the officer had at least qualified immunity. But it is difficult to square *Wilkes*'s multiple lengthy references to malice with a holding that the Navy squadron commander could have had absolute immunity even if he had acted with malice.

Near the end of the nineteenth century, the Supreme Court in *Spalding v. Vilas* unanimously announced that "the head of an Executive Department" had absolute immunity from tort damages when acting within the scope of his duties.[158] Like *Kendall*, *Spalding* involved another suit against the Postmaster General—this time for libel.[159] *Spalding*'s discussion of immunity also was arguably dicta, as the Court first explained that the Postmaster General's written circular at issue did not include any factually inaccurate statements.[160] Nevertheless, *Spalding* expressly resolved whether the damages action against "the head of one of the departments of the government" could "be maintained

153. *Id.*

154. *Id.* at 129 (citing, for example, *Kemp v. Coughtry*, 11 Johns. 107, 108 (N.Y. Sup. Ct. 1814) (per curiam), *Kendall v. United States*, 37 U.S. (12 Pet.) 524 (1838), and *Decatur v. Paulding*, 39 U.S. (14 Pet.) 497, 516 (1840)).

155. *Id.*

156. *Id.* at 131 (citing *Harman v. Tappenden* (1801) 102 Eng. Rep. 214, 217, 218 n.(a)[2]; 1 East 555, 562, 565 n.(a)[2], and *Hannaford v. Hunn* (1825) 172 Eng. Rep. 68, 72 n.*; 2 Car. & P. 148, 158 n.*, which discussed Lord Mansfield's unreported opinion in *Wall v. M'Namara*).

157. *See* Butz v. Economou, 438 U.S. 478, 519 (1978) (Rehnquist, J., concurring in part and dissenting in part).

158. 161 U.S. 483, 498-99 (1896).

159. *Id.* at 488-89, 497-98.

160. *See id.* at 491-92; *see also Butz*, 438 U.S. at 493 n.19 (citing Barr v. Matteo, 360 U.S. 564, 587 n.3 (1959) (Brennan, J., dissenting)). R.J. Gray suggested that *Spalding*'s discussion was mere "obiter" dictum because "the issue as to whether an official should be liable for his illegal acts was clearly not before the Court." R.J. Gray, *Private Wrongs of Public Servants*, 47 CALIF. L. REV. 303, 336 (1959).

because of the allegation that what that officer did was done maliciously."[161] The Court immediately observed that "[t]his precise question has not, so far as we are aware, been the subject of judicial determination."[162] So the Court in *Spalding* apparently believed that neither *Kendall* nor *Wilkes* resolved this issue, and it cited neither case.

Spalding began by examining "cases[] in which principles have been announced that have some bearing upon the present inquiry"—namely, the Court's judicial immunity decisions, *Randall v. Brigham* and *Bradley v. Fisher*.[163] After noting that *Bradley* recognized absolute judicial immunity,[164] the Court found "the same general considerations of public policy and convenience" applicable to actions of "heads of Executive Departments."[165] The Court thus recognized:

> In exercising the functions of his office, the head of an Executive Department, keeping within the limits of his authority, should not be under an apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry in a civil suit for damages. It would seriously cripple the proper and effective administration of public affairs as entrusted to the executive branch of the government, if he were subjected to any such restraint.[166]

Accordingly, the Supreme Court's nineteenth-century executive-officer-immunity cases, taken on their own terms, support the following rule: High-ranking executive officials with discretionary duties at least equivalent to those of department heads had absolute immunity (*Spalding*), while all other executive officials' discretionary duties entailed qualified immunity—including, probably, a Navy squadron commander (*Wilkes*).

2. Nineteenth-century treatises

Three of the four nineteenth-century treatises—all of which preceded *Spalding v. Vilas*—confirmed that certain executive officials had absolute immunity for their discretionary acts.

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161. *Spalding*, 161 U.S. at 493, 498-99.

162. *Id.* at 493.

163. *Id.* at 493-94 (citing Randall v. Brigham, 74 U.S. (7 Wall.) 523, 535 (1869); and Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 350-51 (1872)).

164. *Id.* at 493-94.

165. *Id.* at 498.

166. *Id.* Nielson and Walker suggested that *Spalding* "arguably recognized something akin to *Harlow*'s objective standard," although they rightly "d[id] not want to overstate [their] position." Nielson & Walker, *supra* note 11, at 1867 & n.90. It is true that *Spalding* found immunity without looking at the officer's subjective motive. But that was because *Spalding* applied *absolute* immunity—not the modified version of *qualified* immunity in which the Court (in *Harlow*) replaced the subjective bad-faith inquiry with a different objective inquiry potentially limiting the scope of immunity.

Cooley ardently stated that the heads of executive branches had absolute immunity just like legislators:

> The governor of the State is vested with a power to grant pardons and reprieves, to command the militia, to refuse his assent to laws, and to take the steps necessary for the proper enforcement of the laws; but neglect of none of these can make him responsible in damages to the party suffering therefrom. No one has any legal right to be pardoned, or to have any particular law signed by the governor, or to have any definite step taken by the governor in the enforcement of the laws. The executive, in these particulars, exercises his discretion, and he is not responsible to the courts for the manner in which his duties are performed. Moreover, he could not be made responsible to private parties without subordinating the executive department to the judicial department, and this would be inconsistent with the theory of republican institutions. Each department, within its province, is and must be independent.[167]

Relatedly, Cooley's treatise stated that the President and state governors' "official utterances" entailed an absolute privilege in defamation cases.[168] Cooley, however, did not cite any accompanying authority supporting his discussion of absolute immunity for the President and state governors. Instead, Cooley applied the common law's initial premise that discretionary judgments should be shielded particularly when judicial oversight would significantly encroach on the powers vested in another branch of government. As Justice Cooley reasoned for the Michigan Supreme Court:

> [I]t is not customary in our republican government to confer upon the governor duties merely ministerial, and in the performance of which he is to be left to no discretion whatever; and the presumption in all cases must be, where a duty is devolved upon the chief executive of the State rather than upon an inferior officer, that it is so because his superior judgment, discretion, and sense of responsibility were confided in for a more accurate, faithful, and discreet performance than could be relied upon if the duty were devolved upon an officer chosen for inferior duties.[169]

Bishop, though, said nothing about absolute immunity for executive officials, and he never addressed Cooley's position on this point. Instead, Bishop implied that executive officials had only qualified immunity (for their "quasi judicial" acts).[170]

But Mechem later explained that the "President," "cabinet officers and heads of department," "governors of states," and possibly other executive

167. COOLEY, *supra* note 24, at 377.

168. *Id.* at 214.

169. People *ex rel.* Sutherland v. Governor, 29 Mich. 320, 323 (1874).

170. BISHOP, *supra* note 25, § 786, at 365-66, 366 n.1.

officers had absolute immunity.[171] He cited *Marbury v. Madison* for the President;[172] three Supreme Court cases dealing with mandamus injunctions (rather than damages) for the heads of departments;[173] and Cooley's treatise, plus state cases dealing with mandamus injunctions, for state governors.[174]

Throop then referred to some of the cases Mechem cited (and to Cooley's treatise) as evidence that the President, heads of departments, and state governors had absolute immunity for discretionary acts.[175] He thought that "it is almost impossible to conceive a case" where a "private action" for damages would be sustained against "the president or the governor of a state."[176]

The treatises thus provide substantial support that the common law around 1871 recognized absolute immunity for high-ranking executive officials' discretionary duties. Most prosecutors, though, did not fit within that classification, as discussed in the next section.

3. No absolute immunity for government prosecutors

The Supreme Court did not decide any prosecutorial-immunity cases in the nineteenth century, and the treatises said nothing about absolute immunity for government prosecutors. To the contrary, Cooley described the scope of malicious prosecution claims in broad terms: "[I]t is a duty which every man owes to every other not to institute proceedings maliciously, which he has no good reason to believe are justified by the facts and the law."[177]

As Justice Scalia noted, "[t]here was, of course, no such thing as absolute prosecutorial immunity when § 1983 was enacted" in 1871.[178] For malicious-prosecution claims, the common law's immunity principles would have treated prosecutors' discretionary duties in choosing to *initiate* prosecutions as "quasi-

171. MECHEM, *supra* note 26, §§ 607-611, at 395-97 (capitalization altered). Mechem also explained that a "governor" probably could be sued for damages regarding "ministerial" duties. *Id.* § 610, at 396-97.

172. *Id.* § 607, at 395 & n.1 (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803)).

173. *Id.* § 608, at 395 & n.2 (citing United States v. Comm'r, 72 U.S. (5 Wall.) 563 (1867); Decatur v. Paulding, 39 U.S. (14 Pet.) 497 (1840); and Life & Fire. Ins. Co. of N.Y. v. Adams, 34 U.S. (9 Pet.) 573 (1835)).

174. *Id.* § 609, at 395-96, 396 nn.1-2 (citing COOLEY, *supra* note 24, at 377).

175. THROOP, *supra* note 27, § 711, at 672 & nn.2-4.

176. *Id.* § 712, at 673. Throop acknowledged that it might be an "open question" whether mandamus could issue against a state governor. *Id.* Throop suggested that a damages claim against the President or state governor "probably would be governed" by the same rule about whether mandamus could issue against such officers. *Id.* But as discussed above, that assumption does not follow. *See supra* note 136.

177. COOLEY, *supra* note 24, at 180.

178. Kalina v. Fletcher, 522 U.S. 118, 132 (1997) (Scalia, J., concurring).

judicial" functions entailing qualified immunity.[179] That said, all actors in a judicial proceeding—witnesses, jurors, judges, and lawyers—had an absolute privilege at common law against defamation claims for relevant statements made *during the judicial proceeding*.[180]

Government prosecutors were fairly rare in 1871, as most prosecutions were performed by private individuals "before the office of public prosecutor in its modern form was common."[181] But at least one case by 1871—an 1854 decision of the Supreme Judicial Court of Massachusetts—addressed government-prosecutor immunity, holding that prosecutors lacked absolute immunity from malicious prosecution claims.[182] Malice, of course, was one of the elements of malicious prosecution, so this tort itself incorporated the equivalent of qualified immunity (for both government and private prosecutors).[183]

The first American case granting prosecutors absolute immunity came in 1896.[184] In the early twentieth century, states split on whether government prosecutors had absolute immunity.[185] While absolute immunity was frequently extended to government prosecutors throughout the rest of the twentieth century,[186] the common law of 1871 had not recognized any such immunity.

* * *

The best reading of the case law and treatises suggests that the common law in 1871 would have extended absolute immunity to the discretionary acts of high-ranking executive officers but not government prosecutors.

179. *See* Imbler v. Pachtman, 424 U.S. 409, 423 n.20 (1976); *Kalina*, 522 U.S. at 132 (Scalia, J., concurring); *see, e.g.*, *In re* Nicely, 18 A. 737, 738 (Pa. 1889) ("The district attorney is a quasi judicial officer."); Engle v. Chipman, 16 N.W. 886, 887 (Mich. 1883) ("The prosecuting attorney is a very responsible officer, selected by the people, and vested with personal discretion intrusted to him as a minister of justice, and not as a mere legal attorney.").

180. *See* COOLEY, *supra* note 24, at 211-12; BISHOP, *supra* note 25, §§ 295-300, at 123-25; *Kalina*, 522 U.S. at 132 (Scalia, J., concurring); Hoar v. Wood, 44 Mass. (3 Met.) 193, 197 (1841).

181. *See Kalina*, 522 U.S. at 124 n.11.

182. *See* Parker v. Huntington, 68 Mass. (2 Gray) 124, 128 (1854) ("The plaintiff can maintain his case by proof of a malicious prosecution by both or either of the defendants."); *id.* at 125 (statement of the case) (noting that the defendant was the "district attorney").

183. *See* COOLEY, *supra* note 24, at 180-81.

184. Griffith v. Slinkard, 44 N.E. 1001 (Ind. 1896); *see also Imbler*, 424 U.S. at 421.

185. *See* Venckus v. City of Iowa City, 930 N.W.2d 792, 816, 819-20 (Iowa 2019) (Appel, J., concurring in part and dissenting in part) ("Public prosecutors remained subject to suit in many states well into the twentieth century." (collecting cases)); Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 BYU L. REV. 53, 114-15, 115 n.461 (collecting cases).

186. *See, e.g.*, *Imbler*, 424 U.S. at 424 n.21 (collecting cases); Yaselli v. Goff, 12 F.2d 396, 407 (2d Cir. 1926), *aff'd mem.*, 275 U.S. 503 (1927).

Admittedly, there is little nineteenth-century case law on these issues. But it appears that no court permitted a damages claim against a high-ranking executive officer; three of the four treatises expressly recognized absolute immunity for high-ranking executive officers; and the Supreme Court took the same view in *Spalding v. Vilas* at the end of the nineteenth century. In contrast, at least one mid-nineteenth-century case allowed a damages suit to go forward against a government prosecutor based on subjective malice allegations; courts were split on prosecutorial absolute immunity into the twentieth century; and a specific common law tort (malicious prosecution) applied solely to this exercise of the sovereign's prosecutorial authority.

B. Qualified Immunity at Common Law for Other Officials' Discretionary Acts

While there may have been some ambiguity about *absolute* immunity for certain executive officials around 1871, the common law definitively accorded at least *qualified* immunity to all executive officers' discretionary duties. Recent commentary has disputed whether the common law in 1871 recognized such a freestanding qualified immunity.[187] But it did, as shown by the historical sources examined in this Subpart.[188] The common law also presumed that government officers acted in good faith, and the plaintiff in a qualified immunity case had the burden to overcome that presumption with clear evidence.

1. U.S. Supreme Court precedent

As early as 1815, the Marshall Court held in *Otis v. Watkins* that an executive official with discretionary duties (a deputy customs collector) was not liable in tort (for trespass) unless the plaintiff showed "malice."[189] The Court cited *Crowell v. McFadon*, which had likewise stated, one year earlier, that "[t]he law places a confidence in the opinion of the officer, and he is bound to act according to his opinion; and when he *honestly* exercises it, as he must do in the execution of his duty, he cannot be punished for it."[190] So even if an

187. *See supra* note 34.

188. Damages immunity that turned on malice also traces back to earlier English cases. *See, e.g.*, Harman v. Tappenden (1801) 102 Eng. Rep. 214, 217 & n.(a)[2]; 1 East 555, 562-63, 563 n.(a)[2]; Hannaford v. Hunn (1825) 172 Eng. Rep. 68, 72 n.*; 2 Car. & P. 148, 158 n.* (discussing Lord Mansfield's unreported opinion in *Wall v. M'Namara*); R v. Young (1758) 97 Eng. Rep. 447, 448; 1 Burr. 556, 559; Turner v. Sterling (1671) 86 Eng. Rep. 287, 288; 2 Vent. 25, 25-26.

189. Otis v. Watkins, 13 U.S. (9 Cranch) 339, 355-56 (1815). This holding prompted a rare dissent from Chief Justice Marshall. *See id.* at 356-58 (separate opinion of Marshall, C.J.).

190. Crowell v. M'Fadon, 12 U.S. (8 Cranch) 94, 98 (1814) (emphasis added). The federal statute at issue in both *Otis* and *Crowell* allowed officials to temporarily detain vessels

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executive official's "opinion under which he acted" was "incorrect and formed hastily or without sufficient grounds," the official's discretionary acts were still "entitled" to "protection."[191] *Otis* reasoned that courts could not scrutinize whether officers' discretionary acts were "made unadvisedly or without reasonable care and diligence," or else "no public officer would be hardy enough to act."[192]

By the 1840s, the Court, in *Kendall*, thought it "unnecessary" to cite "the many cases" establishing that "a public officer" has some form of immunity for duties requiring the "exercise [of] judgment and discretion."[193] And as detailed above, *Wilkes* in 1849 repeatedly recognized a qualified immunity, which could be overcome by "malice," for all executive officers' discretionary acts.[194] *Wilkes* involved a Navy squadron commander, but its reasoning was not limited to military or even federal officers. *Wilkes* discussed immunity for discretionary ("quasi judicial") duties of any "public officer," and the breadth of its holding was emphatic: "[A] public officer, invested with certain discretionary powers, never has been, and never should be, made answerable for any injury, when acting within the scope of his authority, and not influenced by malice, corruption, or cruelty."[195]

Commentators, however, have suggested that the Supreme Court's 1915 decision in *Myers v. Anderson*[196] may have subsequently rejected, under the Civil Rights Act of 1871, all forms of immunity across the board for executive

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whenever, "in their opinions," they suspected an intention to violate or evade embargo laws—until the President made a final determination. *Otis*, 13 U.S. (9 Cranch) at 354-55; *see also Crowell*, 12 U.S. (8 Cranch) at 98 ("The law places a confidence in the opinion of the officer . . . ."). From this, Woolhandler suggests that *Otis* turned on whether the official's actions were legal under federal law, rather than on a common law tort defense. *See* Woolhandler, *supra* note 33, at 421-22, 421 n.123. But the officer in *Otis* expressly argued that the common law required "malice," which was "the *gist* of prosecutions against a public officer at common law for malfeasance in office." *Otis*, 13 U.S. (9 Cranch) at 344-45. Also, any time executive officials act under discretionary duties, they must determine whether legal predicates are satisfied in their "judgment or opinion." Seaman v. Patten, 2 Cai. 312, 317 (N.Y. Sup. Ct. 1805). So the statute's "in their opinions" language may have simply clarified that this was a discretionary duty. If anything, the federal statute's use of "in their opinions" could have meant that the officers' opinions were wholly unreviewable by the courts. But instead *Otis* applied the common law's "malice" standard—which did not appear in the statute—to hold that the officer had a defense to trespass.

191. *Otis*, 13 U.S. (9 Cranch) at 356.

192. *Id.* at 355-56.

193. 44 U.S. (3 How.) 87, 98 (1845).

194. *See supra* notes 148-56 and accompanying text.

195. Wilkes v. Dinsman, 48 U.S. (7 How.) 89, 129 (1849).

196. 238 U.S. 368 (1915).

officials' discretionary duties.[197] But *Myers* did not attempt to identify the common law of 1871, and *Myers* can be explained either as a ministerial-duty case or as a holding tailored to the voting context.[198]

Myers sustained a Fifteenth Amendment damages claim when two (out of three) city-election-board officials refused to register three black plaintiffs to vote under an unconstitutional grandfather clause, which had incorporated an express racial voting classification.[199] The Supreme Court "did not spend much time"[200] addressing the officials' arguments for "non-liability."[201] In a single line, the Court explained this argument was "fully disposed of by the ruling this day made in the *Guinn Case* and by the very terms of [52 U.S.C. § 10101], when considered in the light of the inherently operative force of the Fifteenth Amendment as stated in the case referred to."[202] *Guinn v. United States*, in turn, had held that the Fifteenth Amendment and its enforcement legislation invalidated an Oklahoma literacy test, rejecting those election officials' arguments that the literacy test was valid because it did not mention race.[203]

Myers, which was decided forty-four years after the Civil Rights Act of 1871, did not purport to examine the common law around 1871. If *Myers* had examined the common law around 1871, it would have found a split of authority on whether election officials had ministerial or discretionary duties—a split recognized in the treatises.[204] But this split might have been

197. *See, e.g.*, Baude, *supra* note 4, at 57-58; *cf.* Woolhandler, *supra* note 33, at 457 (noting that the court "did not seriously consider" the arguments for immunity).

198. The Supreme Court decided cases other than *Myers* in the earlier part of the twentieth century involving damages claims against election officials under the Civil Rights Act of 1871. *See, e.g.*, Lane v. Wilson, 307 U.S. 268, 274 (1939); Nixon v. Herndon, 273 U.S. 536, 540 (1927). In 1900, *Wiley v. Sinkler* held that a federal court had jurisdiction over such a claim, although the Court noted without resolving "the difficulty of subjecting election officers to an action for damages for refusing a vote which the statute under which they are appointed forbids them to receive." 179 U.S. 58, 66-67 (1900); *see also* Swafford v. Templeton, 185 U.S. 487, 494 (1902) (recognizing "jurisdiction" without "expressing any opinion as to the sufficiency of the declaration"); *cf.* Giles v. Harris, 189 U.S. 475, 486 (1903) (distinguishing damages claims from "equitable relief").

199. *Myers*, 238 U.S. at 376-78.

200. Baude, *supra* note 4, at 57.

201. *Myers*, 238 U.S. at 378.

202. *Id.* at 379.

203. 238 U.S. 347, 364-65 (1915).

204. *See* COOLEY, *supra* note 24, at 413 ("Whether officers having charge of elections, and of the preliminary registration and other proceedings, should be shielded by the same immunity that protects judicial officers in general, is a disputed question."); BISHOP, *supra* note 25, § 31, at 13 ("[E]lection officers, in any manner depriving of voting one who is entitled to vote, are civilly answerable to him; though, by some opinions, and in some of our States, to render them so, their functions being deemed judicial, their actions must also be malicious." (footnote omitted)); MECHEM, *supra* note 26, §§ 695-696, at 459-60 ("[I]nspectors of elections are usually held to act in at least a quasi-judicial

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illusory, as these decisions may have turned on the particular duties given to the relevant election officials by the specific state law at issue. The unconstitutional Maryland law at issue in *Myers* "provided for the mode in which [the election registrars] should perform their duties."[205] State law there provided that the defendants "were required to refuse registration to the plaintiffs," and thus "command[ed]" the deprivation of voting rights on account of race.[206] That suggests those election officers were performing ministerial, nondiscretionary duties under this unconstitutional law.

The holding in *Myers* aligns with the common law of 1871 if these election officers were treated as exercising ministerial, rather than discretionary, duties. As discussed above, an officer had no immunity when performing ministerial duties under a statute later declared unconstitutional, so good faith was not a defense in such circumstances.[207] And the lower court's decision in *Myers* was expressly based on the fact that state law "command[ed]" a constitutional violation, and was thus "nugatory," so that "no allegation of malice need be alleged or proved."[208]

Finally, *Myers* addressed a Fifteenth Amendment racial-discrimination claim, which necessarily implicates invidious discrimination.[209] As Ann Woolhandler has acknowledged, "one does not get the impression that the defendants failed to share the discriminatory animus evident on the face of the rules they enforced," and "[c]ommon law malice would seem to inhere in use of racial criteria."[210] So substantial arguments suggest that *Myers*' holding was tailored to that voting context. Seen in that light, *Myers* aligns with the nineteenth-century cases granting qualified immunity to government officers' discretionary acts.

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capacity . . . and for an erroneous decision are liable . . . where they have acted wilfully, corruptly, or maliciously. In some States, however . . . , they act ministerially merely, and are liable if they wrongfully refuse to receive [a vote], even though they had no ill motive."); *cf.* Carey v. Piphus, 435 U.S. 247, 264 n.22 (1978) ("The common-law rule of damages for wrongful deprivations of voting rights embodied in *Ashby v. White* would, of course, be quite relevant to the analogous question under § 1983." (citing Ashby v. White (1703) 1 Eng. Rep. 417; 1 Bro. P.C. 62)).

205. *Myers*, 238 U.S. at 376.

206. Anderson v. Myers, 182 F. 223, 226-27, 230 (C.C.D. Md. 1910), *aff'd*, 238 U.S. 368.

207. *See supra* notes 98-100 and accompanying text.

208. *Anderson*, 182 F. at 230.

209. *See* Reno v. Bossier Parish Sch. Bd., 520 U.S. 471, 481 (1997) (noting that, since 1980, a plaintiff bringing a Fifteenth Amendment vote-dilution claim need only show "discriminatory purpose"); White v. Regester, 412 U.S. 755, 756 (1973) (applying the pre-1980 standard, which still required plaintiffs to show "invidious[]" discrimination).

210. Woolhandler, *supra* note 33, at 462.

2. Nineteenth-century treatises and state cases

The treatises and state cases also thoroughly established qualified immunity for all executive officers' discretionary duties under the common law around 1871.

Cooley identified the following executive officials as having at least some duties owed to the public, warranting a qualified immunity: "the policeman,"[211] "highway" officers, "the quarantine officer," "the Postmaster General," "a sheriff," "assessors of lands for taxation," "the members of a school board," "a county clerk," and "a wharfmaster."[212] The other treatises, too, collected

211. COOLEY, *supra* note 24, at 381; *see, e.g.*, Mayo v. Sample, 18 Iowa 306, 310-11 (1865) (holding that "the head of the police department" had a "good faith" defense when acting "without malice").

The common law regarding warrantless arrests gave government officers a greater defense than it accorded private citizens. A private citizen conducting a warrantless arrest was liable for false imprisonment if the arrested person did not actually commit a felony, and malice was not an element of the false-imprisonment tort. *See* COOLEY, *supra* note 24, at 175. But peace officers conducting warrantless arrests for suspected felonies did have a good-faith defense to false-imprisonment claims—even if the charge ultimately was unfounded. *See id.*; *see also, e.g.*, Rohan v. Sawin, 59 Mass. (5 Cush.) 281, 284, 287-88 (Mass. 1851) (holding that a trespass and false-imprisonment claim failed—even in light of constitutional unreasonable-search-and-seizure provisions cited—where a peace officer had "reasonable grounds" to suspect that a felony had occurred); O'Connor v. Bucklin, 59 N.H. 589, 591 (1879) ("[T]he statute reënacts the common-law rule of this state, which authorizes an arrest by an officer, without a warrant, in good faith, for a proper purpose, and on reasonable grounds."); Winkler v. State, 32 Ark. 539, 548 (1877) (holding that a constable can arrest a felon "with or without a warrant, when it is done in good faith"); *see also* United States v. Watson, 423 U.S. 411, 419-20 (1976) (collecting cases and discussing this rule); *cf.* Shanley v. Wells, 71 Ill. 78, 83 (1873) (holding that this warrantless-felony-arrest defense did not apply where the "offense charged was a misdemeanor, not committed in the presence of the defendant"). As with the broader concept of quasi-judicial immunity, this greater defense for government officers' warrantless arrests was based on the "discretion" they were given to determine whether sufficient grounds existed to suspect a felony justifying a warrantless arrest. *See* Mitchell v. Hughes, 176 P. 26, 30 (Wash. 1918) (Holcomb, J., concurring) ("While an officer may arrest without a warrant under certain circumstances, as already seen, he may not act arbitrarily, but must exercise his discretion in a legal manner, using all reasonable means to avoid mistakes. The reasonable and probable grounds that will justify an officer in arresting without a warrant one whom he suspects of felony must be such as would actuate a reasonable man acting in good faith." (quoting 5 C.J. *Arrest* § 46, at 416-17 (1916))).

There are "few cases" contemporaneous with the Civil Rights Act of 1871 dealing with the common law on damages immunity for police officers' uses of excessive force. Ilan Wurman, *Qualified Immunity and Statutory Interpretation*, 37 SEATTLE U. L. REV. 939, 971 (2014). This may be because, at common law, "[m]ost American jurisdictions also imposed a flat prohibition against the use of deadly force to stop a fleeing misdemeanant, coupled with a general privilege to use such force to stop a fleeing felon." Tennessee v. Garner, 471 U.S. 1, 12 (1985) (collecting cases).

212. COOLEY, *supra* note 24, at 381-82, 391-92, 411-12.

examples of the "multitudes of other official persons" with some discretionary executive duties warranting qualified immunity.[213] The Supreme Court recently collected some of these same nineteenth-century state cases in recognizing the various "individuals receiving immunity for actions taken while engaged in public service on a temporary or occasional basis."[214]

Cooley also collected state cases providing that the immunity for these "quasi judicial" duties was qualified based on improper motive[215]: "There are certainly many cases which hold, and more which assume, that the law will hold such officers liable if they act maliciously to the prejudice of individuals."[216] Interestingly, a reporter's annotation subsequently added to the

213. BISHOP, *supra* note 25, § 788, at 366-67 (collecting cases about "an assessor of taxes," "a school board," "a town board of equalization," "commissioners for straightening a river," and "arbitrators"); MECHEM, *supra* note 26, § 639, at 421-24 (collecting cases about "arbitrators," "jurors," "assessors," "town-boards," "commissioners appointed to determine and award damages for property taken by virtue of the right of eminent domain," "highway officers," "municipal boards," "collectors of customs," "school officers," "aldermen," "county commissioners," "supervisors," "pilot officers," "commissioners authorized to straighten a river," "inspectors of election," "boards of registration," "notaries," "inspectors of provisions," "boards of health," "boards of prison commissioners," and "wardens and inspectors of prisons"); THROOP, *supra* note 27, § 715, at 677-78; *see also* Louis L. Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 HARV. L. REV. 209, 220-21 (1963) ("The extension of immunity has come to cover not only all judges, including justices of the peace, but prosecutory, licensing, public works, school, and a general catchall of 'political' and 'administrative' officers." (footnotes omitted)).

214. Filarsky v. Delia, 566 U.S. 377, 388-89 (2012).

215. For private individuals, motive generally mattered in tort cases only if the elements of the tort required subjective malice (for example, defamation cases where the privilege to speak in good faith applied, or malicious prosecution). *See* COOLEY, *supra* note 24, at 690-92. Motive could, however, limit the *extent* of damages against private individuals. *See id.* at 694.

216. *Id.* at 411 & n.6 (citing Hoggatt v. Bigley, 25 Tenn. (6 Hum.) 236 (1845); Baker v. State, 27 Ind. 485 (1867); Chickering v. Robinson, 57 Mass. (3 Cush.) 543 (1849); Gregory v. Brooks, 37 Conn. 365 (1870); Wall v. Trumbull, 16 Mich. 228 (1867); Seaman v. Patten, 2 Cai. 312 (N.Y. Sup. Ct. 1805); Tompkins v. Sands, 8 Wend. 462 (N.Y. Sup. Ct. 1832); Reed v. Conway, 20 Mo. 22 (1854); and Lilienthal v. Campbell, 22 La. Ann. 600 (1870)).

Bishop agreed that a "malicious" motive could negate immunity for quasi-judicial acts. BISHOP, *supra* note 25, § 786, at 365-66, 366 n.1. Bishop also said this immunity could be overcome if the act was "negligent," *id.* at 366, but the cases Bishop cited do not support that proposition, *see id.* at 366 n.1, and two of them expressly held that "negligence" claims could not proceed without "malice," Schoettgen v. Wilson, 48 Mo. 253, 258 (1871); *Seaman*, 2 Cai. at 317. No other treatise mentioned that mere negligence could negate immunity for quasi-judicial acts, and Throop expressly stated that the immunity applied to claims of "negligent performance" of public duties, THROOP, *supra* note 27, § 711, at 672.

Mechem explained that "many cases" both assumed and held that "improper motive" overcame immunity for quasi-judicial acts, although Mechem recognized that some cases granted absolute immunity in these situations when motive would have been

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Supreme Court's 1845 *Kendall v. Stokes* opinion cited those same state cases—and other cases including the Supreme Court's *Otis v. Watkins* decisions—for the proposition that if an officer "is actuated by malice, cruelty or wilful oppression, the action does lie."[217]

A quick overview of just a few state supreme court cases cited by Cooley and in the *Kendall* reporter's annotation shows how this immunity applied to various executive officials and could be overcome by subjective malice. One year before passage of the Civil Rights Act of 1871, the Connecticut Supreme Court held that a public official "will be protected by the presumptions of the law in the performance of the duties required of him, unless it is clearly shown that his motives are private and malicious."[218] The Indiana Supreme Court ruled that public officials were not liable "unless they acted corruptly."[219] Justice Cooley, writing for the Michigan Supreme Court, recognized that immunity extended beyond judges to executive officials—collecting cases granting immunity to "road commissioners," "an overseer of highways," "the trustees of a school district," and "assessors."[220] The Missouri Supreme Court traced the immunity doctrine back to seventeenth-century English law, explaining that a public official "is not responsible to any one receiving an injury from such act, unless the officer act maliciously and wilfully wrong"—and that this doctrine "is most clearly established and maintained."[221] And as early as 1805, the New York Supreme Court (then the state's highest court) stated that "it seems cruel not to protect [officials] when they conduct themselves with integrity, and without abusing their authority, or manifesting any symptoms of malice."[222]

Almost all these cases discussed in the treatises involved claims where malice was not an element of the underlying tort but was instead part of the

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irrelevant. MECHEM, *supra* note 26, § 640, at 424. Mechem went on to cite certain other cases saying that motive did not matter, but these mostly appear to have involved legislative or judicial duties that would have entailed absolute immunity—and Mechem himself categorized them as "judicial" acts. *See id.* § 640, at 425-27.

Throop, too, stated that "civil actions for damages" could not be maintained against officers' quasi-judicial acts "as long as they act in good faith." THROOP, *supra* note 27, § 715, at 678 (discussing *Waldron v. Berry*, 51 N.H. 136 (1871)).

217. Kendall v. Stokes, 44 U.S. (3 How.) 87, 87 annot. 2 (1845) (Stewart Rapalje ed., New York, Banks L. Pub'g 2d ed. reprt. 1903) (1884).

218. *Gregory*, 37 Conn. at 372.

219. *Baker*, 27 Ind. at 489 (citing Weaver v. Devendorf, 3 Denio 117 (N.Y. Sup. Ct. 1846); Vail v. Owen, 19 Barb. 22 (N.Y. Gen. Term 1854); and Landt v. Hilts, 19 Barb. 283 (N.Y. Gen. Term 1855)).

220. *Trumbull*, 16 Mich. at 235-36 (Cooley, J.).

221. *Reed*, 20 Mo. at 43-44 (citing Turner v. Sterling (1671) 86 Eng. Rep. 287, 288; 2 Vent. 25, 25-26).

222. Seaman v. Patten, 2 Cai. 312, 315 (N.Y. Sup. Ct. 1805).

common law's freestanding qualified immunity to tort damages that government officers enjoyed for quasi-judicial acts.[223] If there were any doubt, state courts additionally noted that the Supreme Court in *Wilkes v. Dinsman* recognized qualified immunity broadly for all officers exercising quasi-judicial duties.[224]

3. Presumption of good faith and plaintiffs' clear-evidence burden of proof

The existence of "malice," at common law, ultimately was a question for the jury—not "a question of law for the court."[225] But when courts confronted whether government officers acted with malice, the common law recognized an important legal presumption that officers act in good faith. This presumption tempered qualified immunity's malice inquiry by placing a heightened evidentiary burden of proof on the plaintiff.

As early as 1827, the Supreme Court recognized a legal "presumption" that the authorities of "[e]very public officer" are "exercised in pursuance of law."[226] *Martin v. Mott* held that a plaintiff could not challenge—and therefore a jury could not second-guess—the existence of an exigency recognized by the President, given "the high qualities which the Executive must be presumed to possess, of public virtue, and honest devotion to the public interests."[227] *Martin* concluded that this particular exigency finding was completely unreviewable because it involved the highest-ranking executive officer—the President.[228] Courts examining quasi-judicial qualified immunity, of course, can review the actions of lower-ranking executive officers, yet *Martin*'s presumption of honest motives expressly extended to all government officers.

So while *Wilkes* discussed malice as overcoming qualified immunity, *Wilkes* simultaneously applied *Martin*'s presumption in officer-immunity cases:

223. *But see* Baude, *supra* note 4, at 58-59 (suggesting that historical cases involved torts where malice was an element).

224. *See, e.g.*, Waldron v. Berry, 51 N.H. 136, 142 (1871); Schoettgen v. Wilson, 48 Mo. 253, 257-58 (1871); Wall v. Trumbull, 16 Mich. 228, 235-36 (1867).

225. BISHOP, *supra* note 25, § 234, at 93; *see also* Wyatt v. Cole, 504 U.S. 158, 173 (1992) (Kennedy, J., concurring) (citing Stewart v. Sonneborn, 98 U.S. 187, 194 (1879)).

226. Martin v. Mott, 25 U.S. (12 Wheat.) 19, 32-33 (1827).

227. *Id.* at 31-33.

228. *See id.* at 29 (noting that the President's power was "of a very high and delicate nature"); *id.* at 32-33; *see also* Vanderheyden v. Young, 11 Johns. 150, 157-58 (N.Y. Sup. Ct. 1814).

- The "well settled" rule is "that the acts of a public officer on public matters, within his jurisdiction, and where he has a discretion, are to be presumed legal, till shown by others to be unjustifiable."[229]
- "Every public officer is presumed to act in obedience to his duty, until the contrary is shown."[230]
- "[A]ll his acts within the limits of the discretion given to him are to be regarded as prima facie right till the opposite party disprove this presumption."[231]

Wilkes thus explained that the plaintiff had the burden to prove that an officer's act either entailed "no discretion" or "was done from malice."[232] It was therefore "erroneous" to "require[] the defendant . . . in the first instance to prove details rebutting any error or excess."[233] Mechem's treatise cited *Wilkes* for the "presumption constantly attending the performance of official duty, that the officer has not neglected his duty, nor misapplied nor abused his powers. The burden of proving the default complained of rests therefore upon the party alleging it."[234] And "the evidence to overthrow [this presumption] must be clear."[235]

In accordance with this presumption that officers acted with honest motives and did not neglect their duties, multiple state supreme courts in the nineteenth century imposed a heightened burden on plaintiffs to show malice through clear evidence:

- *Connecticut*: "[An officer] will be protected by the presumptions of the law in the performance of the duties required of him, unless it is *clearly shown* that his motives are private and malicious, and that he has wantonly and unnecessarily used the power incident to his official station to gratify a personal spirit of revenge. We discover nothing in this case which rebuts the presumption that the defendant was acting

229. Wilkes v. Dinsman, 48 U.S. (7 How.) 89, 130 (1849) (citing Gidley v. Palmerston (1822) 129 Eng. Rep. 1290, 1294-95; 3 Br. & B. 275, 285-87; *Vanderheyden*, 11 Johns. 150; and *Martin*, 25 U.S. (12 Wheat.) at 31).

230. *Id.* at 132 (quoting *Martin*, 25 U.S. (12 Wheat.) at 33).

231. *Id.*

232. *Id.*

233. *Id.*; *cf.* COOLEY, *supra* note 24, at 184-85 (recognizing that a plaintiff had the burden to prove probable cause and malice for the tort of malicious prosecution); BISHOP, *supra* note 25, § 225, at 90 & nn.2-3 ("There must be both malice and the want of probable cause combining. And these must be affirmatively shown by the plaintiff." (footnote omitted) (collecting cases)).

234. MECHEM, *supra* note 26, § 677, at 451 (footnote omitted).

235. *Id.* § 579, at 379 & n.5 (citing Commonwealth *ex rel.* Bowman v. Slifer, 25 Pa. 23, 29 (1855)).

under a sense of official responsibility and with a view to an honest discharge of public duty."[236]

- *Indiana*: "[T]he presumption is that what was done was done rightfully and in good faith," so the plaintiff must show "*clearly*" contrary "facts."[237]
- *Louisiana*: "But, when the subject-matter is within the scope of [the defendant's] [governmental] powers and duties, the presumption is ever in favor of the propriety and good faith of their conduct, and the complainant must make out a *clear* case of willful oppression to obtain relief from the courts."[238]
- *Oklahoma*: "In the absence of a *clear* showing to the contrary, it will be presumed that the taxing officers acted in good faith and with honest motives."[239]
- *Tennessee*: "[T]here must be *undoubted* evidence of malice, oppression, and wanton persecution . . . to hold a public official liable for errors in the execution of his official duties."[240]

As explained above, the common law recognized that officers complied with—and did not neglect—their duties even if they made honest mistakes.[241] So in presuming officers' good faith, the common law did not simply place the burden of proof on the plaintiff—as that would have been no presumption at all. Rather, the common law also imposed a heightened, clear-evidence standard on plaintiffs in qualified immunity cases.

* * *

In sum, the common law of 1871 had relatively developed doctrines for officer immunity from tort-damages claims. Ministerial duties neglected or in excess of authority categorically lacked immunity. Discretionary acts also categorically lacked immunity if there was a clear absence of jurisdiction or delegated authority. Otherwise, legislators, judges, and high-ranking executive officers had absolute immunity for their discretionary duties. All other executive officials' discretionary duties entailed a freestanding qualified immunity that plaintiffs could overcome only with clear evidence of subjective improper purpose.

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236. Gregory v. Brooks, 37 Conn. 365, 372 (Conn. 1870) (emphasis added).

237. Bd. of Comm'rs v. Cincinnati Steam-Heating Co., 27 N.E. 612, 613-14 (Ind. 1891) (emphasis added).

238. Reynolds v. City of Shreveport, 13 La. Ann. 426, 429 (1858) (emphasis added).

239. Bardrick v. Dillon, 54 P. 785, 790-91 (Okla. 1898) (emphasis added).

240. Goodwin v. Guild, 29 S.W. 721, 723 (Tenn. 1895) (emphasis added).

241. *See supra* note 64 and accompanying text.

IV. The Supreme Court's § 1983 State-Officer-Immunity Doctrines' Departure from the Common Law of 1871

Canvassing the nineteenth-century sources' historical treatment of officer immunity makes clear that the Supreme Court's modern immunity doctrines depart from the common law of 1871 in more ways than previously recognized. Any discussion of modifying the Supreme Court's *qualified* immunity precedents must account for interrelated *absolute* immunity doctrines. In fact, the qualified immunity doctrine's largest divergence from the common law—*Harlow v. Fitzgerald*'s replacement of the subjective good-faith defense with the clearly-established-law test—compensated for the Court's prior departure from the common law that denied high-ranking executive officers absolute immunity.

The Supreme Court recognized state-officer immunities in 42 U.S.C. § 1983 based on Congress's intent, implied in the Civil Rights Act of 1871, to retain immunities that existed under the common law at that time: The Court proceeds "on the assumption that common-law principles of . . . immunity were incorporated into our judicial system and that they should not be abrogated absent clear legislative intent to do so."[242] Yet historical sources confirm Justices Scalia and Thomas's observation that the modern Court's "approach to 42 U.S.C. § 1983 immunity questions has produced some curious inversions of the common law as it existed in 1871, when § 1983 was enacted."[243] Current doctrine diverges from the common law in three significant ways discussed below: (1) absolute immunity currently extends to prosecutors and legislative aides but not to high-ranking executive officials; (2) qualified immunity's modern clearly-established-law test does not lead to the same results as the common law's subjective malice standard; and (3) currently there is confusion over the burden of proof in qualified immunity cases, while a plaintiff at common law had the burden to prove subjective malice with clear evidence.

A. The Current Absolute Immunity Doctrine

As discussed above, the common law around 1871 granted absolute immunity to legislators and judges, and the Supreme Court's twentieth-century § 1983 cases recognized these "common-law immunities."[244] The common law also would have granted absolute immunity to high-ranking

242. Filarsky v. Delia, 566 U.S. 377, 389 (2012) (quoting Pulliam v. Allen, 466 U.S. 522, 529 (1984)); *see also* Imbler v. Pachtman, 424 U.S. 409, 417-18 (1976); Pierson v. Ray, 386 U.S. 547, 554-55 (1967); Tenney v. Brandhove, 341 U.S. 367, 377 (1951).

243. Kalina v. Fletcher, 522 U.S. 118, 132 (1997) (Scalia, J., concurring).

244. *Pierson*, 386 U.S. at 554-55 (judges and legislators); *Tenney*, 341 U.S. at 377 (legislators).

executive officials but only qualified immunity to lower-ranking prosecutors and legislative aides, yet the Supreme Court's current absolute immunity doctrines do the opposite.

1. High-ranking executive officials

The Court's twentieth-century cases rejected absolute immunity for high-ranking executive officials "without considering the common law," as Justice Thomas recently noted.[245] Likewise, Justice White, joined by Justices Brennan and Marshall, acknowledged decades ago that, "at least with respect to high executive officers, absolute immunity from suit for damages would have applied at common law."[246] It appears that the Supreme Court has never sustained a damages award against a high-ranking executive official.

As explained above, *Spalding v. Vilas* in 1896 declared that a cabinet member (the Postmaster General) had absolute immunity.[247] The D.C. Circuit in 1938 extended *Spalding*, holding that *all federal* executive officials had absolute immunity from tort claims.[248] Other lower federal courts in the mid-twentieth century similarly extended *Spalding*'s absolute immunity beyond high-ranking executive officials.[249]

Justice Harlan's 1959 plurality opinion in *Barr v. Matteo* then favorably cited this line of lower-court decisions, arguing that absolute immunity under *Spalding* should be extended beyond "executive officers of cabinet rank" to certain "officers of lower rank in the executive hierarchy"—including for torts beyond "libel."[250] Chief Justice Warren, joined by Justice Douglas, dissented in *Barr*, positing that *Spalding*'s conferral of absolute immunity should be limited to high-ranking executive officers:

245. Baxter v. Bracey, 140 S. Ct. 1862, 1863 (2020) (Thomas, J., dissenting from the denial of certiorari).

246. *Imbler*, 424 U.S. at 434 (White, J., concurring in the judgment) (citing Spalding v. Vilas, 161 U.S. 483 (1896); and Alzua v. Johnson, 231 U.S. 106 (1913)); *see also* Anderson v. Creighton, 483 U.S. 635, 661-62 (1987) (Stevens, J., dissenting) ("The suggestion that every law enforcement officer should be given the same measure of immunity as a Cabinet officer or a senior aide to the President of the United States is not compelling.").

247. *See supra* notes 158-66 and accompanying text.

248. *See* Cooper v. O'Connor, 99 F.2d 135, 141 (D.C. Cir. 1938).

249. *See* Gregoire v. Biddle, 177 F.2d 579, 580-81 (2d Cir. 1949) (Hand, J.); Taylor v. Glotfelty, 201 F.2d 51, 51 (6th Cir. 1952) (per curiam); *see also* Butz v. Economou, 438 U.S. 478, 494 n.21 (1978) (recognizing this line of lower-court decisions).

250. Barr v. Matteo, 360 U.S. 564, 572-74, 572 n.9 (1959) (Harlan, J.) (plurality opinion); *see id.* at 592 (Stewart, J., dissenting) (remarking that the plurality provided "a lucid and persuasive analysis of the principles that should guide decision in this troublesome area of law," but maintaining that the particular press release at issue was not "'action in the line of duty'" (quoting the plurality opinion)).

> *Spalding v. Vilas* presents another situation in which absolute privilege may be justified. There the Court was dealing with the Postmaster General—a Cabinet officer personally responsible to the President of the United States for the operation of one of the major departments of government. The importance of their positions in government as policymakers for the Chief Executive and the fact that they have the expressed trust and confidence of the President who appointed them and to whom they are personally and directly responsible suggest that the absolute protection partakes of presidential immunity. Perhaps the *Spalding v. Vilas* rationale would require the extension of such absolute immunity to other government officials who are appointed by the President and are directly responsible to him in policy matters even though they do not hold Cabinet positions. But this extension is not now before us, since it is clear that petitioner Barr was not appointed by the President nor was he directly responsible to the President.[251]

Yet without much analysis of the common law, the Supreme Court subsequently retreated drastically from *Spalding v. Vilas*. Beginning in the 1970s, the Court held that the President, prosecutors, and legislative aides have absolute immunity[252]—while state governors, cabinet members, senior White House officials, and virtually all other executive officials have only qualified immunity.[253]

Scheuer v. Rhodes (1974) marked the initial departure from the common law regarding absolute immunity for high-ranking executive officials, as the Court held that a state governor (and other lower-ranking executive officials) lacked absolute immunity.[254] *Scheuer* began by discussing legislative absolute immunity and citing *Spalding v. Vilas* for the proposition that "[i]mmunity for the other two branches—long a creature of the common law—remained committed to the common law."[255] But the Court seems to have taken this as an invitation to create law rather than to identify and apply the common law of 1871.

Much of what the Court said in *Scheuer* favors absolute immunity for high-ranking executive officials. It likened executive "officials with a broad range of duties and authority" to "legislators and judges," because "higher officers of the executive branch" face a "range of decisions and choices—whether the formulation of policy, of legislation, of budgets, or of day-to-day decisions—

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251. *Id.* at 582-83 (Warren, C.J., dissenting) (footnote omitted) (citations omitted).

252. *See* Nixon v. Fitzgerald, 457 U.S. 731, 757 (1982) (President); Imbler v. Pachtman, 424 U.S. 409, 430-31 (1976) (prosecutors); Gravel v. United States, 408 U.S. 606, 618 (1972) (legislative aides).

253. *See* Harlow v. Fitzgerald, 457 U.S. 800, 809 (1982) (senior White House officials); Butz v. Economou, 438 U.S. 478, 482, 485 (1978) (cabinet members); Scheuer v. Rhodes, 416 U.S. 232, 234-35, 248 (1974) (governors).

254. *Scheuer*, 416 U.S. at 234-35, 248.

255. *Id.* at 241 (citing Spalding v. Vilas, 161 U.S. 483, 498-99 (1896)).

[that] is virtually infinite."[256] The *Scheuer* majority cited *Spalding v. Vilas* as "not[ing] the similarity in the controlling policy considerations in the case of high-echelon executive officers and judges."[257] The Court distinguished "local police officer[s]" as "that segment of the executive branch of a state government that is most frequently and intimately involved in day-to-day contacts with the citizenry."[258] It continued: "In short, since the options which a chief executive and his principal subordinates must consider are far broader and far more subtle than those made by officials with less responsibility, the range of discretion must be comparably broad."[259] The Court's opinion in *Scheuer* even quoted Justice Harlan's plurality opinion in *Barr*, which would have extended absolute immunity beyond high-ranking executive officers: "[T]he occasions upon which the acts of the head of an executive department will be protected by the privilege are doubtless far broader than in the case of an officer with less sweeping functions."[260]

From those passages, one would think *Scheuer* was about to recognize absolute immunity for high-ranking executive officials like state governors. But abruptly the Court then held that "[t]hese considerations suggest that, in varying scope, a *qualified* immunity is available to officers of the executive branch of government" based on a "good-faith" defense.[261] *Scheuer* explained that "§ 1983 would be drained of meaning were [the Court] to hold that the acts of a governor or other high executive officer have 'the quality of a *supreme and unchangeable edict, overriding all conflicting rights* of property and *unreviewable* through the judicial power of the Federal Government.'"[262] But the issue was just whether a high-ranking executive officer could face tort *damages*—not whether such officers' actions were wholly unreviewable by the courts. Courts may issue *injunctions* against high-ranking state executive officers under *Ex parte Young*'s sovereign-immunity exception, which is precisely what occurred in *Sterling v. Constantin*,[263] the case *Scheuer* quoted.[264] Relatedly, high-ranking executive officers could have absolute immunity even if other "officers of state

256. *Id.* at 246.

257. *Id.* at 246 n.8 (citing *Spalding*, 161 U.S. at 498).

258. *Id.* at 244-45.

259. *Id.* at 247.

260. *Id.* (quoting Barr v. Matteo, 360 U.S. 564, 573 (1959) (Harlan, J.) (plurality opinion)).

261. *Id.* at 247-48 (emphasis added).

262. *Id.* at 248 (emphasis added) (quoting Sterling v. Constantin, 287 U.S. 378, 397 (1932)). It appears that *Scheuer* mistranscribed the word "unchallengeable," used in *Sterling*, as "unchangeable."

263. 287 U.S. 378; *see also Ex parte* Young, 209 U.S. 123 (1908).

264. *See Sterling*, 287 U.S. at 393 (citing *Ex parte Young*, 209 U.S. at 155-56).

government [could] be subject to liability under [§ 1983]."[265] So the issue was not necessarily whether *all* "government officials, as a class," were "totally exempt, by virtue of some absolute immunity."[266]

Scheuer's conclusion might have turned on the Court's observation that "the decision to invoke military power has traditionally been viewed with suspicion and skepticism."[267] But *Scheuer* cited nothing for this proposition, and it ignored the precept that a governor's direction of state militia is a core executive power.[268] Cooley's treatise even highlighted a governor's exercise of the power "to command the militia" as an instance in which the governor should have absolute immunity.[269] Under that view, damages claims against other lower-ranking state officials could proceed if the plaintiffs overcame qualified immunity, but subjecting the governor to damages claims would, according to Cooley, disrupt the separation of powers by "subordinating the executive department to the judicial department."[270]

A few years later, in 1978, *Butz v. Economou* extended *Scheuer* by a 5–4 vote, rejecting absolute immunity for almost all *federal* executive officials.[271] *Butz* involved a cabinet member plus other lower-ranking executive officials.[272] Then–Associate Justice Rehnquist's dissent would have applied *Spalding v. Vilas* to grant "high-ranking executive officials" absolute immunity.[273]

The majority in *Butz* reasoned that because state executive officials lacked absolute immunity (under *Scheuer*), "federal officials should receive no greater degree of protection from *constitutional* claims than their counterparts in state

265. *Scheuer*, 416 U.S. at 243.

266. *Id.*

267. *Id.* at 246.

268. One of the cases *Scheuer* quoted, *see id.* at 248, rejected a challenge to a governor's imprisonment of an individual when the governor "had declared a county to be in a state of insurrection." Moyer v. Peabody, 212 U.S. 78, 82 (1909). In dicta, *Moyer* said that "[s]o long as such arrests are made in good faith and in the honest belief that they are needed in order to head the insurrection off, the Governor is the final judge and cannot be subjected to an action after he is out of office on the ground that he had not reasonable ground for his belief." *Id.* at 85. But *Moyer* also acknowledged that "[i]t is not alleged that his judgment was not honest, *if that be material*." *Id.* (emphasis added).

269. COOLEY, *supra* note 24, at 377.

270. *Id.*

271. Butz v. Economou, 438 U.S. 478, 507 (1978) ("We therefore hold that, in a suit for damages arising from unconstitutional action, federal executive officials exercising discretion are entitled only to the qualified immunity specified in *Scheuer*, subject to those exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of the public business.").

272. *Id.* at 482.

273. *Id.* at 519 (Rehnquist, J., concurring in part and dissenting in part).

government."[274] This reasoning assumed that *Scheuer* correctly rejected absolute immunity for high-ranking state executive officers, which is what prompted the Court to hold that the same officer immunities should apply in both § 1983 state-officer and *Bivens* federal-officer cases.[275] *Butz* also assumed the existence of a broad damages cause of action against federal officers. In particular, *Butz* relied heavily on the implied damages action against federal officers for Fourth Amendment violations,[276] which was created by the Court's 1971 decision *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*.[277] But the Court has since limited *Bivens*, so today state officers under § 1983 are in effect subject to a much wider array of damages claims than federal officers.[278]

Butz at least tried to grapple with the Supreme Court's nineteenth-century precedents, but it never examined the common law around 1871. Instead, *Butz* held that the absolute-immunity inquiry in the *Bivens* suit depended on "public policy."[279] The Court did correctly identify the common law's threshold clear-absence-of-jurisdiction exception—thus reconciling *Little v. Barreme*,[280] *Kendall v. Stokes*,[281] *Wilkes v. Dinsman*,[282] and *Spalding v. Vilas*[283] on this point, as explained above.[284] But from the mere existence of that exception for "actions manifestly

274. *Id.* at 498 (majority opinion). *Butz* echoed *Scheuer*'s straw man in asserting that "a federal official may not with impunity ignore the limitations which the controlling law has placed on his powers," *id.* at 489, all while invoking *Ex parte Young*'s counterpart doctrine permitting *injunctive* relief against federal officers, *see id.* at 490-91, 491 n.16 (citing United States v. Lee, 106 U.S. 196, 218-23 (1882); and Virginia Coupon Cases, 114 U.S. 269, 285-92 (1885)). *Butz* also relied on *Atchison, Topeka & Santa Fe Railway Co. v. O'Connor*, 223 U.S. 280, 287 (1912). *See Butz*, 438 U.S. at 491 n.16. But *Atchison* was not a traditional claim for compensatory tort damages, as it involved recouping a tax payment made under protest from a tax collector, and it expressly relied on *Ex parte Young*. *See Atchison*, 223 U.S. at 286-87; *see also* Elliott v. Swartwout, 35 U.S. (10 Pet.) 137, 159 (1836) ("[T]he collector . . . is liable to an action to recover back an excess of duties paid to him as collector . . . ."); MECHEM, *supra* note 26, § 689, at 456 ("The collector of taxes is a ministerial officer whose duty it is to collect of the persons and in the amounts set down in his warrant the taxes which have been assessed by the proper officers."); *id.* § 693, at 458-59.

275. *See Butz*, 438 U.S. at 500.

276. *Id.* at 485-86, 501-05.

277. 403 U.S. 388, 397 (1971).

278. *See* Ziglar v. Abbasi, 137 S. Ct. 1843, 1857 (2017) (stating that "expanding the *Bivens* remedy is now a 'disfavored' judicial activity" and that "the Court has refused to do so for the past 30 years" (quoting Ashcroft v. Iqbal, 556 U.S. 662, 675 (2009))).

279. *Butz*, 438 U.S. at 506.

280. 6 U.S. (2 Cranch) 170 (1804).

281. 44 U.S. (3 How.) 87 (1845).

282. 48 U.S. (7 How.) 89 (1849).

283. 161 U.S. 483 (1896).

284. *Butz*, 438 U.S. at 491-94, 493 n.18; *see also supra* notes 88-91 and accompanying text.

beyond their line of duty" or "beyond the plain limits of their statutory authority," the Court reasoned that "it would be incongruous" to grant high-ranking federal executive officers absolute immunity from inquiry into their motives.[285] This just assumes the conclusion, and it is actually an argument against absolute immunity for *any* government officers—including judges, for example.[286] The clear-absence-of-jurisdiction exception permits only an objective inquiry into the scope of power delegated to a particular official. The entire point of absolute immunity is to additionally render irrelevant an officer's subjective motives. Allowing some objective inquiry into whether officers acted clearly outside their delegated authority does not require a separate subjective inquiry into officers' motives.

The Supreme Court in 1982 did, however, grant the President absolute immunity by a 5–4 vote in *Nixon v. Fitzgerald*.[287] Many of *Nixon*'s arguments supporting presidential absolute immunity seem to apply to state governors.[288] But the Court distinguished *Scheuer* due to the "President's unique status under the Constitution" and "the singular importance of the President's duties."[289]

At the same time, *Harlow v. Fitzgerald* rejected absolute immunity for senior White House presidential aides.[290] The Court's reasoning turned on *Butz*'s prior rejection of absolute immunity for cabinet members,[291] coupled with its observation that "Members of the Cabinet are direct subordinates of the President, frequently with greater responsibilities, both to the President and to the Nation, than White House staff."[292] Chief Justice Burger's dissent contested that observation, asserting that absolute immunity should be accorded because "[a] senior Presidential aide works more intimately with the President on a daily basis than does a Cabinet officer, directly implementing Presidential decisions literally from hour to hour."[293] And Justice Rehnquist

285. *Butz*, 438 U.S. at 495.

286. *See id.* at 520 (Rehnquist, J., concurring in part and dissenting in part).

287. 457 U.S. 731, 749 (1982).

288. *See id.* at 749-50 (discussing "'incidental powers, belonging to the executive department'"; "the chief constitutional officer of the Executive Branch"; and "management of the Executive Branch" (quoting 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1563, at 418-19 (Boston, Hilliard, Gray & Co. 1833))).

289. *Id.* at 750-51. The leading dissent accused the *Nixon* majority of applying "the dissenting view in *Butz* to the Office of the President." *Id.* at 764 (White, J., dissenting). Its discussion of the common law referred to eighteenth-century English common law and the American Founding—not the American common law of 1871. *See id.* at 771-78.

290. 457 U.S. 800, 802, 808-13 (1982).

291. *Id.* at 810.

292. *Id.* at 809.

293. *Id.* at 828 (Burger, C.J., dissenting).

urged the Court to reconsider *Butz*'s rejection of absolute immunity for high-ranking federal executive officials, presumably on the view that senior White House presidential aides should have absolute immunity if *Butz* were overturned.[294]

2. Prosecutors and legislative aides

In stark contrast, the Supreme Court's twentieth-century cases granted absolute immunity to prosecutors and legislative aides while relying on precedents and arguments that the Court rejected when denying absolute immunity to high-ranking executive officials.

The Supreme Court in 1927 cited judicial immunity decisions in summarily affirming a Second Circuit decision, *Yaselli v. Goff*, that granted absolute immunity to federal prosecutors.[295] This Second Circuit opinion came during the era when lower courts were extending *Spalding v. Vilas*'s grant of absolute immunity beyond high-ranking executive officials.[296] *Yaselli* involved federal prosecutors, so the claim did not arise under the Civil Rights Act of 1871. Nevertheless, the Second Circuit analyzed some—though not all—of the available state common law precedents on prosecutorial immunity from 1896 onward.[297] As explained above, states were split on the issue at that time, though the trend by 1926 favored granting prosecutors absolute immunity.[298]

In 1976, *Imbler v. Pachtman* recognized § 1983 absolute immunity for state prosecutors.[299] The *Imbler* majority noted that the § 1983 analysis requires "a considered inquiry into the immunity historically accorded the relevant official at common law."[300] It even cited the one Massachusetts case addressing (and rejecting) absolute prosecutorial immunity before 1871, *Parker v. Huntington*.[301] The Court attempted to distinguish *Parker*, asserting that it "involved the elements of a malicious prosecution cause of action rather than the immunity of a prosecutor."[302] But that is a distinction without a difference given the context. The elements of malicious prosecution include subjective malice, and *Parker* held that "[t]he plaintiff *can maintain his case* by proof of a

294. *See id.* at 822 (Rehnquist, J., concurring).

295. Yaselli v. Goff, 275 U.S. 503, 503 (1927) (mem.) (relying on the authority of *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347 (1872), and *Alzua v. Johnson*, 231 U.S. 106, 111 (1913)), *aff'g* 12 F.2d 396 (2d Cir. 1926).

296. *See supra* notes 247-49 and accompanying text.

297. *Yaselli*, 12 F.2d at 404-06.

298. *See supra* note 185 and accompanying text.

299. 424 U.S. 409, 410 (1976).

300. *Id.* at 421.

301. *Id.* at 421 n.18 (citing 68 Mass. (2 Gray) 124 (1854)).

302. *Id.*

malicious prosecution by both or either of the defendants"—one of whom was the "district attorney."[303] If the government prosecutor had absolute immunity, the case should have been over and proof of malice should have been irrelevant.

In deciding *Imbler*, the Court admitted that the first American case to grant absolute prosecutorial immunity was not decided until 1896—twenty-five years after the Civil Rights Act of 1871 was enacted.[304] The Court did correctly assert that this "view on prosecutorial immunity became the clear majority rule on the issue."[305] But if the common law around 1871 is the relevant time frame for § 1983's officer-immunity analysis, then *Imbler* misleadingly stated that "[t]he common-law rule of immunity is thus well settled."[306]

Furthermore, when the Court said the immunity rule was "well settled," it cited two circuit decisions, both of which granted absolute immunity for many other executive officials beyond prosecutors.[307] First, Judge Learned Hand's opinion for the Second Circuit in *Gregoire v. Biddle* granted absolute immunity to two U.S. Attorneys General, two Enemy Alien Control Unit Directors, and the Ellis Island District Director of Immigration.[308] Justice Rehnquist's *Butz* dissent later relied heavily on *Gregoire* in arguing for absolute immunity for high-ranking executive officials.[309] The *Butz* majority opinion did not even mention *Gregoire*, though *Imbler* had relied on it two years earlier.[310] Second, the D.C. Circuit in 1938 held that all federal executive officers had absolute immunity, including the defendants there—the "Comptroller of the Currency" and their "Deputy," the "Receiver of the Commercial National Bank," an agency "General Counsel," a "United States Attorney," an "Assistant United States Attorney," and an FBI "Special Agent."[311]

Imbler also analyzed "public policy" considerations, remarking that immunity prevented "harassment by unfounded litigation" and the "possibility that [an officer] would shade his decisions instead of exercising the independence of judgment required by his public trust."[312] Of course, the same could be said for high-ranking executive officers, if not lower-ranking officers

303. *Parker*, 68 Mass. (2 Gray) at 125, 128 (emphasis added).

304. *Imbler*, 424 U.S. at 421.

305. *Id.* at 422.

306. *See id.* at 424.

307. *Id.* at 424 & n.21.

308. Gregoire v. Biddle, 177 F.2d 579, 579-81 (2d Cir. 1949) (Hand. J.).

309. Butz v. Economou, 438 U.S. 478, 518, 521, 528, 530 (1978) (Rehnquist, J., concurring in part and dissenting in part).

310. *Imbler*, 424 U.S. at 424.

311. Cooper v. O'Connor, 99 F.2d 135, 137 & n.1, 142 (D.C. Cir. 1938).

312. 424 U.S. at 423-25.

too.[313] To be fair, *Imbler* did discuss concerns arising particularly for prosecutors. The Court wanted to protect prosecutors' "judgment both in deciding which suits to bring and in conducting them in court," to prevent "energy and attention" from being "diverted from the pressing duty of enforcing the criminal law," and to avoid "a virtual retrial of the criminal offense in a new forum."[314] Perhaps the Court in *Imbler* could also have argued that prosecutions are such core executive powers that courts would disrupt the separation of powers without absolute prosecutorial immunity. But at common law, private individuals prosecuted offenses in the sovereign's name, and the malicious-prosecution tort existed precisely to put bounds on the exercise of prosecutorial power.[315]

Further compounding the inversions of common law immunities, the Supreme Court granted legislative aides absolute immunity in *Gravel v. United States*.[316] *Gravel* analyzed the federal Speech or Debate Clause's "fundamental purpose" rather than the common law.[317] The common law agreed on the fundamental purpose of legislative immunity—"freeing the legislator from executive and judicial oversight that realistically threatens to control his conduct as a legislator."[318] But the American common law resolved this by granting absolute legislative immunity only to *members* of legislative bodies.[319]

Chief Justice Burger's *Harlow* dissent used *Gravel* to great effect, noting the discrepancy in granting legislative aides absolute immunity but denying absolute immunity to senior White House presidential aides. Both opinions explained that "in view of the complexities of the modern legislative process," it was impossible "for Members of Congress to perform their legislative tasks *without the help of aides* and assistants."[320] Chief Justice Burger protested that the same could easily be said of "[t]he function of senior Presidential aides," who "as the 'alter egos' of the President, [are] an integral, inseparable part of the function of the President."[321] This same rationale extends to cabinet members and possibly other high-ranking executive officials, although *Butz* denied them absolute immunity without ever mentioning *Gravel*.[322]

313. *See id.* at 436-37 (White, J., concurring in the judgment).

314. *Id.* at 424-25 (majority opinion).

315. *See supra* note 181 and accompanying text.

316. 408 U.S. 606, 616-22 (1972).

317. *Id.* at 618.

318. *Id.*; *see supra* notes 103-06 and accompanying text.

319. *See supra* notes 109-15 and accompanying text.

320. Harlow v. Fitzgerald, 457 U.S. 800, 824 (1982) (Burger, C.J., dissenting) (quoting *Gravel*, 408 U.S. at 616) (emphasis in *Harlow* added).

321. *Id.* at 828.

322. *See* Butz v. Economou, 438 U.S. 478 (1978).

* * *

The Supreme Court's current absolute immunity jurisprudence for executive officers therefore has multiple contradictions and departs from the common law. Courts can disrupt the separation of powers to a greater extent by sustaining damages claims against governors or cabinet members than against line prosecutors or legislative aides. The Court's denial of absolute immunity for high-ranking executive officers prompted compensating modifications to the qualified immunity doctrine, which itself became divorced from the common law.

B. The Current Clearly-Established-Law Test for Qualified Immunity

The Supreme Court's largest departure from the common law of officer immunities occurred when *Harlow v. Fitzgerald* replaced the subjective good-faith defense for qualified immunity with a clearly-established-law test.[323] *Harlow* "completely reformulated" qualified immunity to purposely depart from the common law, as the Court has since recognized many times.[324] But *Harlow* could have reached the same result, protecting senior White House officials in that case, through several different paths—including the common law's requirement that the plaintiff prove an officer's subjective bad faith with clear evidence.

1. Pre-*Harlow* origins of the clearly-established-law test

To understand how *Harlow* discarded the common law's good-faith defense for qualified immunity, it is necessary to examine the Supreme Court's earlier development of § 1983 qualified immunity.

Long before the Civil Rights Act of 1871, *Wilkes v. Dinsman* repeatedly explained that the common law granted a good-faith defense to discretionary ("quasi-judicial") actions performed by lower-ranking executive officials.[325] Before 1961, when *Monroe v. Pape* established that § 1983 covers state-officer actions even if they violate state law,[326] federal courts generally had not addressed the § 1983 immunity of state executive officials.[327] But state cases throughout the twentieth century extensively applied the common law's

323. *See Harlow*, 457 U.S. at 819; *see also* Baude, *supra* note 4, at 60-61.

324. *See, e.g.*, Wyatt v. Cole, 504 U.S. 158, 165-66 (1992) ("That *Harlow* 'completely reformulated qualified immunity along principles not at all embodied in the common law,' *Anderson v. Creighton*, 483 U.S. 635, 645 (1987), was reinforced by our decision in *Mitchell v. Forsyth*, 472 U.S. 511 (1985).").

325. *See supra* notes 150-56.

326. 365 U.S. 167, 187 (1961).

327. Baude, *supra* note 4, at 63.

freestanding qualified immunity based on a subjective good-faith defense—without suggesting this historical approach was unworkable.[328]

Against that backdrop, the Warren Court's 1967 decision *Pierson v. Ray* first held that § 1983 granted qualified immunity—a "defense of good faith"—to state executive officers.[329] Unfortunately, *Pierson*'s methodology distorted the proper § 1983 analysis. Although *Pierson* acknowledged that § 1983 accorded immunities recognized at "common law," the Court did not address nineteenth-century precedents or treatises.[330] Instead, the Court cited only contemporaneous cases and treatises.[331] That may have been because the parties did not dispute that the historical and contemporary "common law" did not hold police officers "liable if they acted in good faith and with probable cause in making an arrest."[332] The Supreme Court held that this same common law defense applied to the federal § 1983 claims there, which alleged unlawful arrests preempted by a federal statute.[333]

Within a decade, *Scheuer v. Rhodes* recognized a freestanding qualified immunity to "officers of the executive branch,"[334] and *Wood v. Strickland* extended this immunity beyond arrests or seizures to an expelled student's due-process claims against public-school officials.[335] Public-school officials at common law had a freestanding good-faith defense for their discretionary acts, and Bishop and Mechem expressly noted that "a school board, in expelling a scholar," had qualified immunity.[336] *Wood* collected various state common law cases—including three that Mechem cited—recognizing that "public school officials . . . should be protected from tort liability under state law for all good-faith, nonmalicious action taken to fulfill their official duties."[337] Because these school officials' "functions necessarily involve[d] the exercise of discretion,"[338]

328. *See* Gray, *supra* note 160, at 342 & n.246 (collecting cases); *see also, e.g.*, Bedrock Founds., Inc. v. Geo. H. Brewster & Son, Inc., 155 A.2d 536, 544-45 (N.J. 1959) (retaining the common law's qualified immunity good-faith defense while expressly rejecting the approach taken during that era by lower federal courts, which extended absolute immunity to all executive officers).

329. 386 U.S. 547, 557 (1967).

330. *Id.* at 555.

331. *See id.* at 555 & n.10.

332. *Id.* at 555. The court of appeals below applied that common law defense in dismissing the separate state false-arrest and false-imprisonment claims. *Id.* at 557.

333. *Id.* at 557.

334. 416 U.S. 232, 247 (1974).

335. 420 U.S. 308, 309-10, 318, 322 (1975).

336. BISHOP, *supra* note 25, § 788, at 366; *accord* MECHEM, *supra* note 26, §§ 638-639, at 421-22; *see also* COOLEY, *supra* note 24, at 412 n.1.

337. *Wood*, 420 U.S. at 318 & n.9; *see also* MECHEM, *supra* note 26, § 639, at 422 & n.13.

338. *Wood*, 420 U.S. at 319.

the officials could not under the common law be liable in damages for "mistakes made in good faith in the course of exercising [their] discretion within the scope of [their] official duties."[339]

But then *Wood*, by a 5–4 vote, departed from the common law in holding that § 1983's qualified immunity "good faith" defense is "based not only on permissible intentions," but incorporates "elements of both" an "objective" and a "subjective" test.[340] The Court cited no common law sources for this holding. The lower courts' confusion about this test stemmed from a pre-*Pierson* Second Circuit decision that refused to extend any absolute immunity under § 1983 to officers beyond legislators and judges;[341] the Seventh and Eighth Circuits then applied that Second Circuit decision to supplant the immunity inquiry with just the objective *merits* inquiry (whether "plaintiffs were discharged on justifiable grounds").[342] In contrast, the Ninth and Tenth Circuits accurately identified that *Pierson* recognized an immunity extending beyond legislators and judges, and they applied the common law's subjective good-faith standard.[343] As discussed above, immunity for discretionary executive actions, at common law, was "qualified" in that improper subjective motive could override this immunity.[344] Subjective motive, therefore, was the common law's singular element for qualified immunity's good-faith defense—although objective unreasonableness could permit, but did not require, an inference of subjective malice.[345] If anything, a plaintiff at common law had to prove subjective bad faith *plus* objective unreasonableness (if that were an element of the underlying tort).[346]

Worse yet, *Wood* invented the much-maligned clearly-established-law test.[347] *Wood*'s objective test was not derived from the common law's assessment of how a person of "'ordinary caution and prudence'" would make

339. *Id.*

340. *Id.* at 321-22.

341. Jobson v. Henne, 355 F.2d 129, 133 (2d Cir. 1966).

342. McLaughlin v. Tilendis, 398 F.2d 287, 290-91 (7th Cir. 1968) (citing *Jobson*, 355 F.2d at 133); Strickland v. Inlow, 485 F.2d 186, 191 n.12 (1973) (citing *McLaughlin*, 398 F.2d 287), *vacated sub nom.* Wood v. Strickland, 420 U.S. 308; *see also Wood*, 420 U.S. at 314-15 (discussing the Eighth Circuit's decision below).

343. Smith v. Losee, 485 F.2d 334, 343-44 (10th Cir. 1973); Handverger v. Harvill, 479 F.2d 513, 516 (9th Cir. 1973).

344. *See supra* notes 129-33 and accompanying text.

345. *See supra* notes 129-33 and accompanying text.

346. *See* COOLEY, *supra* note 24, at 411-12 ("[T]he members of a school board may be held responsible for the dismissal of a teacher, if they act maliciously *and* without cause . . . ." (emphasis added)).

347. *See Wood*, 420 U.S. at 322.

"reasonable deductions from the facts."[348] Nor did it track the common law's threshold, objective clear-absence-of-jurisdiction exception. As explained above in Part I.B, the clear-absence-of-jurisdiction exception examines only whether the sovereign arguably delegated authority to the officer—as opposed to the contemporaneous state of judicial precedents interpreting individual rights. Instead, *Wood* held that an officer's "ignorance or disregard of settled, indisputable law" would also overcome qualified immunity separately from "actual malice."[349] *Wood*'s holding therefore charged officers with "knowledge of the basic, unquestioned constitutional rights."[350] So under *Wood*, a plaintiff could overcome qualified immunity by showing either subjective malice or that the officer "reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected."[351]

Justice Powell's dissent asserted that this new, objective test would eliminate qualified immunity for many officials who acted in good faith because "ignorance of the law is explicitly equated with 'actual malice.'"[352] The dissent elaborated: "This harsh standard, requiring knowledge of what is characterized as 'settled, indisputable law,' leaves little substance to the doctrine of qualified immunity. The Court's decision appears to rest on an unwarranted assumption as to what lay school officials know or can know about the law and constitutional rights."[353] The dissent charged that this standard would deny immunity even for officers' "good-faith reliance on the advice of counsel"[354]—which was generally a defense at common law.[355] And in what would presage modern criticism of the clearly-established-law test for qualified immunity, Justice Powell observed:

> The Court states the standard of required knowledge in two cryptic phrases: "settled, indisputable law" and "unquestioned constitutional rights." Presumably these are intended to mean the same thing, although the meaning of neither phrase is likely to be self-evident to constitutional law scholars—much less the average school board member. One need only look to the decisions of this Court—

348. COOLEY, *supra* note 24, at 181 (quoting Bacon v. Towne, 58 Mass (4 Cush.) 217, 238-39 (1849)) (discussing the elements of probable cause).

349. *Wood*, 420 U.S. at 321.

350. *Id.* at 322.

351. *Id.*

352. *Id.* at 328 (Powell, J., concurring in part and dissenting in part) (quoting the majority opinion).

353. *Id.* at 329.

354. *Id.* at 329 n.2; *cf.* Messerschmidt v. Millender, 565 U.S. 535, 554-55 (2012) (concluding that a magistrate judge's approval of a warrant "is certainly pertinent" to the qualified immunity analysis).

355. *See supra* note 132 and accompanying text.

> to our reversals, our recognition of evolving concepts, and our five-to-four splits—to recognize the hazard of even informed prophecy as to what are "unquestioned constitutional rights."[356]

Later that Term, the Supreme Court extended *Wood* beyond school officials to a hospital superintendent, confirming that this new, objective test applied to other types of officials.[357] The Court also remarked that an officer had "no duty to anticipate unforeseeable constitutional developments"—implying that an officer did have to anticipate foreseeable developments.[358]

But three years later, *Procunier v. Navarette* significantly cabined the Court's newly divined clearly-established-law test, declaring that both the existence of a right and a violation based on the particular conduct had to be clearly established at a low level of generality.[359] This, too, was not simply the common law assessment of objective reasonableness. *Procunier*'s standard offered much more protection for officers than just asking whether the broader constitutional right was clearly established and whether the officer acted negligently when violating that right.[360] Three Justices would later retreat from requiring clarity about both the "right" and the question whether the "particular actions comported with the constitutional command."[361] But the Supreme Court would ultimately explain that this clearly-established-law test requires the legal violation stemming from the particular conduct to be "beyond debate."[362]

Procunier did not fix the fundamental difficulties with identifying clearly established law that Justice Powell's *Wood* dissent raised, but its accommodation did assuage Justice Powell's separate concern that this objective test could deny many officers immunity. This objective component would rarely negate qualified immunity now that the clearly-established-law test defined the relevant constitutional right at a low level of generality and required a close fit between the particular conduct and that narrowly specified right.[363]

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356. *Wood*, 420 U.S. at 329 (Powell, J., concurring in part and dissenting in part).

357. *See* O'Connor v. Donaldson, 422 U.S. 563, 564, 577 (1975).

358. *Id.* at 577.

359. 434 U.S. 555, 562 (1978); *see also* Laura Oren, *Immunity and Accountability in Civil Rights Litigation: Who Should Pay?*, 50 U. PITT. L. REV. 935, 980-81 (1989) (explaining that *Procunier* "required a very close correspondence between the right asserted in the case at bar and established precedent").

360. *See* Note, *The Proper Scope of the Civil Rights Acts*, 66 HARV. L. REV. 1285, 1299 (1953) (proposing such a test).

361. Anderson v. Creighton, 483 U.S. 635, 655 (Stevens, J., dissenting).

362. Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011).

363. In rare cases, the clearly-established-law test could be satisfied even if an officer acted in good faith. *See, e.g.*, Groh v. Ramirez, 540 U.S. 551, 567 (2004) (Kennedy, J., dissenting) (arguing for qualified immunity when "the officer simply made a clerical error" by

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In fact, such granular, specific, and clear legal violations would have been persuasive evidence of objective unreasonableness capable of supporting an inference of an improper motive, as the common law recognized.[364] This narrow set of objective evidence—based on the clearly-established-law test—also would have been probative under the common law's subjective good-faith test. But it would have been just one form of evidence available to plaintiffs, and plaintiffs still could have overcome qualified immunity by alternatively using more traditional subjective evidence focusing on the particular officer's motive. Until *Harlow*.

2. *Harlow*'s replacement of the common law's good-faith defense with the clearly-established-law test

Harlow could have been decided without discarding the common law of qualified immunity. The Court could have granted senior White House officials absolute immunity. Or it could have limited its modification of the qualified immunity doctrine just to either high-ranking executive officials or federal officials facing *Bivens* claims. *Harlow* also could have held that the lawsuit's First Amendment retaliation claim was not cognizable under *Bivens*—as the Court ruled one year later.[365] And if *Harlow* had adopted the petitioner White House officials' proposed "higher evidentiary burden" for establishing an officer's bad faith, this would have aligned with the common law's approach to qualified immunity.[366]

Instead, Justice Powell's *Harlow* majority opinion eliminated the distinctive feature of "qualified" immunity at common law—its subjective good-faith standard—and replaced it solely with the clearly-established-law test from *Wood* and *Procunier*.[367] Given how stringent this test is, commentators have suggested that *Harlow* transformed nominally "qualified" immunity into something closer to absolute immunity.[368] So if *Harlow* had

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"accidentally enter[ing] a description of the place to be searched in the part of the warrant form that called for a description of the property to be seized").

364. *See* COOLEY, *supra* note 24, at 185.

365. Bush v. Lucas, 462 U.S. 367, 368 (1983). *Harlow* favorably cited the court of appeals decision later affirmed in *Bush v. Lucas* for the proposition that the plaintiff in *Harlow* might not have a cognizable *Bivens* claim. *See* Harlow v. Fitzgerald, 457 U.S. 800, 820 n.36 (1982) (citing Bush v. Lucas, 647 F.2d 573, 576 (5th Cir. 1981), *aff'd*, 462 U.S. 367).

366. Brief for Petitioners Harlow & Butterfield at 44, *Harlow*, 457 U.S. 800 (No. 80-945), 1981 WL 390511 (capitalization altered).

367. *Harlow*, 457 U.S. at 815-18 (citing Procunier v. Navarette, 434 U.S. 555, 565 (1978); and Wood v. Strickland, 420 U.S. 308, 322 (1975)).

368. *See, e.g.*, Oren, *supra* note 359, at 982 ("If clearly-established law is narrowly defined . . . it becomes nearly impossible to overcome qualified official immunity. Under those

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limited its modification of the qualified immunity doctrine to high-ranking executive officials while keeping the subjective good-faith test for all other officers, the doctrine would have approximated the common law.[369] But the Court instead modified the qualified immunity doctrine for all executive officers—including state officers under § 1983.[370]

Harlow's qualified immunity analysis reads like an *absolute* immunity decision. It posited that "public policy" required courts to avoid "substantial costs attend[ing] the litigation of the subjective good faith of government officials."[371] But just a few years earlier, in *Imbler*, the Court recognized that avoiding litigation was the "important" concern for *absolute* immunity, which distinguished it from qualified immunity: "An absolute immunity defeats a suit at the outset," while "qualified immunity depends upon the circumstances and motivations of [an officer's] actions, as established by the evidence at trial."[372] *Harlow* quoted Judge Hand's opinion for the Second Circuit in *Gregoire*, which had granted *absolute* immunity to multiple high-ranking federal executive officials.[373] Justice Powell then explained that *Butz* (an opinion that he had joined and that had ignored *Gregoire*) denied high-ranking executive officials absolute immunity—but only on the "assumption" that qualified immunity "would permit '[i]nsubstantial lawsuits [to] be quickly terminated.'"[374] Instead of reconsidering *Butz* and adjusting absolute immunity law, the Court discarded the common law's "subjective good faith" standard for qualified immunity precisely because malice is a "question of fact" for the "jury" that precluded summary-judgment resolution of some cases.[375] This transformed the "qualified" aspect of this common law immunity for "discretionary" executive acts into something unrecognizable at common law.[376]

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circumstances, the new qualified standard is, in essence, the old absolute defense in a new guise.").

369. And if *Harlow*'s approach had been limited to *federal* officers, the Court would have reached a result similar to the lower federal courts in the mid-twentieth century that granted absolute immunity to many—if not all—federal executive officers. *See supra* text accompanying notes 248-49.

370. *Harlow*, 457 U.S. at 818 n.30 (citing Butz v. Economou, 438 U.S. 478, 504 (1978)).

371. *Id.* at 813, 816.

372. *See* Imbler v. Pachtman, 424 U.S. 409, 419 n.13 (1976); *see also* Oren, *supra* note 359, at 958 ("Avoidance of litigation, however, was not the sine qua non of qualified immunity. Instead, there was a remedy for official misconduct which exceeded the good faith defense.").

373. *Harlow*, 457 U.S. at 814 (citing Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949)).

374. *Id.* at 814 (alterations in original) (quoting Butz v. Economou, 438 U.S. 478, 507 (1978)); *see also id.* at 808.

375. *Id.* at 815-16.

376. *See id.*

Harlow sought to "avoid excessive disruption of government"—particularly from "separation-of-powers concerns" regarding discovery and apex depositions of "a President's closest aides" that could be "peculiarly disruptive of effective government."[377] And *Harlow* quoted at length a D.C. Circuit concurrence by Judge Gesell recognizing that damages suits had proliferated "against high government officials," which implicated "traditionally protected areas, such as their deliberations preparatory to the formulation of government policy and their intimate thought processes and communications at the presidential and cabinet levels."[378] But if discovery from high-ranking executive officials would, in Cooley's words, "subordinat[e] the executive department to the judicial department" and undermine this "independent" branch of government, then the common law would have granted those officials absolute immunity.[379]

Harlow's reliance on "public policy" to discard the common law's subjective good-faith test might have been permissible for *Bivens* claims against *federal* officers.[380] The factors for rejecting an implied *Bivens* remedy are remarkably similar to *Harlow*'s rationale for the clearly-established-law test.[381] But this *Bivens* public-policy rationale cannot displace § 1983's implied congressional intent to incorporate *state*-officer immunities recognized by the common law of 1871. Unlike § 1983, the implied *Bivens* remedy is the Court's own creation, so the Court could calibrate federal *Bivens* officer immunities to achieve policy goals as if it were creating modern common law.[382] For *Bivens* claims, the Court could choose to use the same officer immunities from § 1983 or to create different ones, diverging from the common law of 1871: *Bivens* decisions have "never suggested that the precise contours of official immunity can and should be slavishly derived from the often arcane rules of the common law."[383] And

377. *Id.* at 817-18, 817 n.28.

378. *Id.* at 817 n.29 (quoting Halperin v. Kissinger, 606 F.2d 1192, 1214 (D.C. Cir. 1979) (Gesell, J., concurring), *aff'd in pertinent part by an equally divided court*, 452 U.S. 713 (1981)).

379. COOLEY, *supra* note 24, at 377.

380. *Harlow*, 457 U.S. at 813; *see also* Oren, *supra* note 359, at 984 ("The Court escaped the need to grapple with this well-established methodology and with the common law guide because the reformulation came in *Harlow*, a *Bivens* case against federal officials."); Katherine Mims Crocker, *Qualified Immunity and Constitutional Structure*, 117 MICH. L. REV. 1405, 1410 (2019).

381. *See* Ziglar v. Abbasi, 137 S. Ct. 1843, 1856 (2017) (listing factors that weighed against recognizing an implied *Bivens* remedy).

382. Statutory remedies implicating federal employees, such as the Federal Tort Claims Act, could set liability differently. *See* 28 U.S.C. §§ 1346(b), 2680; United States v. Smith, 499 U.S. 160, 161-63 (1991) (discussing the FTCA's "'exclusive'" statutory remedy for "tort" injuries caused "by a Government employee acting within the scope of his or her employment" (quoting 28 U.S.C. § 2679(b)(1))).

383. Anderson v. Creighton, 483 U.S. 635, 644-45 (1987).

the Court indirectly limited *Bivens* claims in a series of important officer immunity decisions—including *Harlow*.[384]

But the Supreme Court never should have smuggled, back into § 1983, these *Bivens* immunity decisions diverging from the common law of 1871.[385] Ironically, the Supreme Court initially held that the same officer immunities had to apply to both § 1983 and *Bivens* claims due to "the *absence* of congressional direction to the contrary"[386]—even though that absence of clear congressional language is what implicitly incorporated into § 1983 only those immunities existing under the common law of 1871.[387]

3. *Harlow* petitioners' alternative argument for a "higher evidentiary burden" on plaintiffs

Harlow found that the "petitioners advance[d] persuasive arguments that the dismissal of insubstantial lawsuits without trial" required the refining of qualified immunity doctrine, but the Court concocted its own fix rather than adopting the approach advocated by those senior White House officials.[388] If they were not given absolute immunity, the *Harlow* petitioners alternatively pressed for a "higher evidentiary burden" borne by the plaintiff: "a clear and convincing showing of malice or bad faith."[389] *Harlow* recognized that the Court had not resolved "which party bore the burden of proof on the issue of good faith,"[390] and a circuit split persists on the proper burden of proof in qualified immunity cases.[391]

The *Harlow* petitioners did not tie their alternative request to the common law. If the Court in *Harlow* had examined nineteenth-century sources, it would

384. *See, e.g.*, *Anderson*, 483 U.S. at 640-41 (granting immunity from a *Bivens* claim); Mitchell v. Forsyth, 472 U.S. 511, 530, 535 (1985) (same); *Harlow*, 457 U.S. at 818 (same).

385. *Cf.* Davis v. Scherer, 468 U.S. 183, 194 n.12 (1984) ("*Harlow* was a suit against federal, not state, officials. But our cases have recognized that the same qualified immunity rules apply in suits against state officers under § 1983 and in suits against federal officers under *Bivens*." (citation omitted)). Some states still adhere to the common law of 1871's subjective good-faith test for qualified immunity. *See, e.g.*, Odom v. Wayne County, 760 N.W.2d 217, 224-25, 229 (Mich. 2008).

386. Butz v. Economou, 438 U.S. 478, 500 (1978) (emphasis added); *see also id.* at 504 ("Accordingly, without congressional directions to the contrary, we deem it untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials.").

387. *See supra* text accompanying note 242.

388. *See Harlow*, 457 U.S. at 814-15.

389. Brief for Petitioners Harlow & Butterfield, *supra* note 366, at 44-45, 45 n.18.

390. 457 U.S. at 815 n.24 (citing Gomez v. Toledo, 446 U.S. 635, 642 (1980) (Rehnquist, J., concurring)).

391. Kenneth Duval, *Burdens of Proof and Qualified Immunity*, 37 S. ILL. U. L.J. 135, 142-43 (2012).

have found that those common law authorities supported the petitioners' approach and also accounted for the Court's concern "that insubstantial claims should not proceed to trial."[392] But when *Harlow* eliminated the subjective test, the common law's accompanying heightened burden of proof requiring clear evidence became forgotten—because that heightened burden was based on the presumption that officers act with subjective good faith.[393] This is best exemplified by *Crawford-El v. Britton*, which rejected a clear-and-convincing-evidence standard "*separate from* the qualified immunity defense."[394]

As discussed above, the common law presumed that government officials act with honest motives and do not neglect their duties, so the plaintiff had the burden to prove malice through clear evidence.[395] This was essentially the alternative argument pressed by the *Harlow* petitioners, who relied heavily on Judge Gesell's concurrence in *Halperin* in the D.C. Circuit.[396] This concurrence

392. *See* 457 U.S. at 815-16.

393. *See supra* text accompanying notes 226-40.

394. 523 U.S. 574, 588-89, 592, 595 (1998) (emphasis added). *Crawford-El* held that a clear-and-convincing-evidence standard did not apply to a plaintiff's "affirmative case"—that is, merits "element[s]" of the "constitutional claims." *Id.* at 589, 592. There may not have been any "common-law pedigree" for imposing a clear-and-convincing-evidence standard on the various other merits elements of a plaintiff's affirmative case. *Id.* at 595. But there was a strong common law pedigree for imposing a clear-and-convincing-evidence standard for a *subjective* qualified immunity defense based on improper motive. *See supra* notes 226-40 and accompanying text.

The briefing in *Crawford-El* never discussed any of these historical sources from immunity cases. For example, the United States' amicus brief cited a few nineteenth-century cases discussing only "set[ting] aside a written instrument on the basis of fraud." Brief for the United States as Amicus Curiae Supporting Respondent at 20, *Crawford-El*, 523 U.S. 574 (No. 96-827), 1997 WL 606738. No nineteenth-century sources on immunity were cited in the respondent official's brief, in the amicus brief of thirty-six states and territories, or in the amicus brief of two former federal executive officials. *See* Brief for Respondent at 33, *Crawford-El*, 523 U.S. 574 (No. 96-827), 1997 WL 606707; Brief of the States of Missouri et al. at iii-vi, *Crawford-El*, 523 U.S. 574 (No. 96-827), 1997 WL 606717 (table of contents); Brief of J. Michael Quinlan & Loye W. Miller as Amici Curiae in Support of Respondent at 13-15, *Crawford-El*, 523 U.S. 574 (No. 96-827), 1997 WL 597097; *see also* Crawford-El v. Britton, 93 F.3d 813, 852 n.9 (D.C. Cir. 1996) (Edwards, C.J., concurring in the judgment to remand) (noting that amici Quinlan and Miller "offer no legal precedent requiring or supporting such a [clear-and-convincing-evidence] standard"), *vacated*, 523 U.S. 574. The amicus brief of William G. Moore, Jr., stated that "[t]he [D.C. Circuit] plurality does not point to, and amicus has been unable to find, any common law antecedent for the plurality's clear-and-convincing evidence standard." Brief of Amicus William G. Moore, Jr. as Amicus Curiae in Support of Petitioner at 15, *Crawford-El*, 523 U.S. 574 (No. 96-827), 1997 WL 473351. But this Article cites multiple sources that support a clear-and-convincing-evidence standard if the common law's subjective good-faith defense applies to qualified immunity.

395. *See supra* text accompanying notes 226-40.

396. Brief for Petitioners Harlow & Butterfield, *supra* note 366, at 44-45, 45 n.18.

did not examine common law sources, but its reasoning tracked the common law: "[T]o give the immunity doctrine some genuine force and effect, . . . a plaintiff should be required to make a stronger showing . . . ."[397] Judge Gesell therefore would have held that

> the plaintiff must establish after the completion of discovery and before the trial commences, not merely the existence of a genuine dispute as to some material issue of fact but also, by the preponderance of the evidence or through clear and convincing evidence, that the official failed to act with subjective or objective good faith.[398]

This 1979 concurrence offers a glimpse into how qualified immunity summary-judgment motions might have operated under summary-judgment precedents at that time—if the Court had retained the common law's subjective good-faith test while imposing a clear-and-convincing-evidence burden on plaintiffs.[399]

The Supreme Court's summary-judgment precedents since then show that defendants would have significant pretrial opportunities to dismiss insubstantial claims if plaintiffs had the burden to prove bad faith by clear and convincing evidence. Justice Kennedy's *Wyatt v. Cole* concurrence observed that "*Harlow* was decided at a time when the standards applicable to summary judgment made it difficult for a defendant to secure summary judgment regarding a factual question such as subjective intent, even when the plaintiff bore the burden of proof on the question."[400] That difficulty had prompted *Harlow* to "adopt[] an objective standard for qualified immunity."[401] But intervening summary-judgment precedents, such as *Celotex Corp. v. Catrett* in 1986, "alleviated that problem, by allowing summary judgment to be entered against a nonmoving party 'who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.'"[402]

Moreover, the same day *Celotex* was decided, *Anderson v. Liberty Lobby, Inc.* recognized that when a "clear-and-convincing standard of proof" applies, it "should be taken into account in ruling on summary judgment."[403] So "there is no genuine issue if the evidence presented in the opposing affidavits is of

397. Halperin v. Kissinger, 606 F.2d 1192, 1215 (D.C. Cir. 1979) (Gesell, J., concurring), *aff'd in pertinent part by an equally divided court*, 452 U.S. 713 (1981).

398. *Id.*

399. *Cf.* Kenneth Culp Davis, *Administrative Officers' Tort Liability*, 55 MICH. L. REV. 201, 221 (1956) (advocating for summary-judgment dismissals of most malice allegations).

400. 504 U.S. 158, 171 (1992) (Kennedy, J., concurring).

401. *Id.*

402. *Id.* (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986)).

403. 477 U.S. 242, 255 (1986).

insufficient caliber or quantity to allow a rational finder of fact to find [bad faith] by clear and convincing evidence."[404] The Supreme Court has further clarified—in a *Bivens* lawsuit against high-ranking executive officers—that a complaint will not survive even a motion to dismiss where it lacks "facial plausibility": "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."[405]

These post-*Harlow* developments show that officer defendants could pretermit insubstantial claims before trial if the Supreme Court had adopted the common law's requirement that plaintiffs must prove subjective bad faith with clear evidence in qualified immunity cases.[406]

Conclusion

The nineteenth-century historical sources canvassed in this Article confirm that the Supreme Court's modern officer-immunity doctrines depart in three significant ways from the common law around 1871: (1) high-ranking executive officers currently have qualified rather than absolute immunity; (2) qualified immunity is subject to *Harlow v. Fitzgerald*'s clearly-established-law test instead of a subjective good-faith standard; and (3) current law does not place the burden of proof on the plaintiff to provide clear and convincing evidence in qualified immunity cases. These departures are intertwined: *Harlow v. Fitzgerald* replaced the subjective good-faith defense with the clearly-established-law test to compensate for the Court's prior rejection of absolute immunity for high-ranking executive officers. Absolute immunity for high-ranking executive officers would avoid excessive disruption of the separation of powers, rendering qualified immunity for lower-ranking officers based on subjective good faith, rather than clearly established law, much less of a judicial intrusion into core executive power. At the same time, the proper burden of proof would allow dismissal of insubstantial bad-faith claims before trial. Together, these alterations to current immunity doctrines would balance the need to provide

404. *Id.* at 254 (emphasis added).

405. Ashcroft v. Iqbal, 556 U.S. 662, 668, 678 (2009).

406. Courts in various other contexts recognize that only clear evidence can overcome a presumption of good faith for government actors. *See, e.g.*, Flemming v. Nestor, 363 U.S. 603, 617 (1960) (explaining that "only the clearest proof" can overcome "the presumption of constitutionality" that also applies when assessing a legislature's "motives"); United States v. Chem. Found., Inc., 272 U.S. 1, 14-15 (1926) ("The presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties."); Am-Pro Protective Agency, Inc. v. United States, 281 F.3d 1234, 1239 (Fed. Cir. 2002) ("[W]e believe that clear and convincing most appropriately describes the burden of proof applicable to the presumption of the governments [sic] good faith.").

government officers sufficient latitude in carrying out their delegated authorities with the availability of money damages for bad-faith breaches of officers' duties to the public.

All these departures from the common law substantiate Justices Scalia and Thomas's criticism that modern precedents engaged "in the essentially legislative activity of crafting a sensible scheme of qualified immunities for the statute [the Court] invented—rather than applying the common law embodied in the statute that Congress wrote."[407] The Supreme Court recognized state-officer immunities under § 1983 only by holding that Congress had implicitly incorporated the common law of 1871. Restoring that common law could address many modern problems.

407. Crawford-El v. Britton, 523 U.S. 574, 611-12 (1998) (Scalia, J., dissenting).