RECONSTRUCTING SECTION 1983

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Conventional wisdom holds that Section 1983, a statute making state officials liable for constitutional violations in federal court, created a federal cause of action governed by federal law. Disputes concerning secondary issues like qualified immunity are downstream from that conclusion. But the conventional narrative is ahistorical. Enacted in 1871, Section 1983 arose in a world in which federal courts were limited to adjudicating state-law causes of action governed by non-preempted state law. In this context, Section 1983 would have required a plaintiff to identify and bring a state-law cause of action—satisfying all the non-preempted state-law requirements for that cause of action—in addition to identifying and proving a constitutional violation.

One might question the relevance of this conclusion: We live in a different legal world than that of 1871, and, even setting that difference aside, federal courts have treated Section 1983 as creating a federal cause of action governed by federal law for more than sixty years. But that perspective would be mistaken. Section 1983's original understanding is likely binding today. None of the legal changes since 1871 have altered the basic premise that Section 1983 relies on state-law causes of action governed by state law rather than providing a federal one. And as for stare decisis, assuming it applies, the modern test is overcome. The precedent is egregiously wrong and poorly reasoned, is unworkable, has been undermined by subsequent legal developments, and has engendered no cognizable reliance interests.

A return to the original understanding of Section 1983 would bring with it a state-law-focused regime. Plaintiffs would likely need to use contemporary state-law

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causes of action and would have to satisfy the corresponding, non-preempted state-law requirements. But, of course, state law could not conflict with the Constitution or federal law. This new regime would also flip the current relationship between state courts and federal courts on its head—instead of state courts following precedent from federal courts, federal courts would at times need to follow state-court precedent. And the reframing would provide firmer ground for giving states—but not necessarily their municipalities and local bodies—immunity from damages in actions arising under Section 1983.

INTRODUCTION

Section 1983 is one of the primary bases for civil-rights litigation in the United States today. It serves the vital purpose of providing recourse to individuals for misconduct by state officials. Yet, despite the fact that it was enacted in 1871 (more than 150 years ago) and was brought to the forefront in modern civil-rights litigation in 1961 (more than sixty years ago), questions about the intricacies of Section 1983 litigation and disputes about whether courts are even asking the right questions abound.[1]

These disputes affect real individuals in material ways. Consider, for example, the story of Larry Thompson.[2] Thompson lived with his then-fiancée and her sister in Brooklyn.[3] The sister suffered from mental illness, and shortly after Thompson's daughter was born, the sister called the police alleging that Thompson had sexually abused his daughter.[4] She then led Emergency Medical Technicians into Thompson's apartment.[5] After Thompson turned them away, four police officers arrived.[6] Thompson refused them entry, but the officers forcibly entered the home over Thompson's resistance.[7] Thompson was arrested and, on authority of a criminal complaint filed by one of the officers, spent two days in jail.[8] Medical professionals ultimately concluded that there had not been any abuse, and the charges against Thompson for "obstructing governmental administration" and "resisting arrest" were eventually dismissed.[9] In response, Thompson sued, alleging that the officers had violated the Fourth Amendment because there was no probable cause for the criminal complaint.[10] After his claim was initially rejected, the Supreme Court held that Thompson did not need to show that the termination of his criminal action (here dismissal) affirmatively established his innocence.[11] However, on remand, the district court rejected his claim yet again on the ground that one of the two charges in the criminal complaint was supported by probable cause and that, in any event, the officer was entitled to

1 *See* Tyler B. Lindley, *Anachronistic Readings of Section 1983*, 75 ALA. L. REV. 897, 903–08, 921 (2024) (surveying modern interpretations and their complexities).

2 For the recounting of this story, see *id.* at 898–99.

3 Thompson v. Clark, 364 F. Supp. 3d 178, 182 (E.D.N.Y. 2019).

4 *Id.* at 182–83.

5 *Id.*

6 *See id.*

7 *Id.* at 183.

8 *Id.* at 183–84.

9 *Id.* at 183–85.

10 *See* Lindley, *supra* note 1, at 899 (citing Thompson v. Clark, 142 S. Ct. 1332, 1336 (2022)).

11 *Thompson*, 142 S. Ct. at 1341.

qualified immunity on the other charge.[12] On appeal to the Second Circuit, that judgment was vacated and the case remanded because the appellate court concluded that a reasonable jury could find a lack of probable cause, and it disregarded the district court's determination on qualified immunity because the officer did not adequately brief the issue in the district court.[13] The parties settled on remand.[14]

Despite nearly six decades of separation, Thompson's situation is not much different than that of the Monroe family in the late 1950s and early 1960s. In 1958, a white man was murdered in Chicago.[15] At the scene, the victim's wife said two black men had intruded into their home, "killed her husband," and took some of their belongings.[16] The next day, the victim's wife "tentatively identified" James Monroe out of a pile of photographs.[17] Early the following morning, Chicago police officers approached the Monroe home without a search or arrest warrant.[18] One of the Monroe children answered the door, and the officers proceeded to take James Monroe out of his bed and arrest him.[19] The entire family was required to stay back, and officers used force and threats in an attempt to keep the family confined to one part of the house.[20] Despite finding none of the allegedly stolen items in the Monroes' house, officers brought Monroe to the police station.[21] The victim's wife, however, was unable to identify Monroe in a lineup, and he was cleared of the murder.[22] Monroe remained in lockup on vague allegations of suspicion for a robbery but was eventually released later that day.[23] Ultimately, the victim's wife confessed to the premeditated murder of her husband.[24]

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12 Thompson v. Clark, 673 F. Supp. 3d 261, 265 (E.D.N.Y. 2023), *vacated and remanded*, No. 23-900-cv, 2024 WL 2720230 (2d Cir. May 28, 2024).

13 *Thompson*, 2024 WL 2720230, at *3–5.

14 Order Dismissing Case, Thompson v. Clark, No. 1:14-cv-7349 (E.D.N.Y. Aug. 21, 2024), ECF 200.

15 *See* Monroe v. Pape, 221 F. Supp. 635, 638 (N.D. Ill. 1963). This district court decision reported the evidence eventually offered at trial. When the Supreme Court heard the case considering the scope of Section 1983, it took the facts alleged in the complaint as true in evaluating the defendants' motion to dismiss. *See* Monroe v. Pape, 365 U.S. 167, 169–70 (1961), *overruled on other grounds by* Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978). However, the facts do not vary materially between the two stages of litigation.

16 *Monroe*, 221 F. Supp. at 638; *see also Boston Story: Press Fumbling at Its Worst*, CHI. TRIB. (Jan. 20, 1990).

17 *Monroe*, 221 F. Supp. at 638.

18 *Id.*

19 *See id.* at 638–39.

20 *Id.* at 639.

21 *Id.* at 638–39.

22 *Id.* at 639.

23 *See id.*

24 *Id.*

No one disputed that the officers' alleged actions were unlawful or that the Monroes were entitled to a remedy in state court.[25] Rather, the question was whether the Monroes could sue in federal court under Section 1983 even though the officers had violated *state* law.[26] After the Monroes' complaint was initially dismissed, which dismissal was affirmed by the Seventh Circuit,[27] the Supreme Court held that Section 1983 covered officer misconduct unauthorized by state law.[28] At trial, Mr. and Mrs. Monroe were awarded $13,000, but the children lost on their claims.[29]

Under current precedent concerning Section 1983, however, the officers might have been able to defend themselves against the Monroes' claims by asserting qualified immunity, which requires plaintiffs to establish that the officers' actions were clearly unlawful in light of judicial precedent.[30] This protection is one of the most hotly debated issues in Section 1983 litigation, but deep debate also attends questions about the elements in a Section 1983 claim.[31] The Supreme Court has pointed to the common law of 1871, when Section 1983 was enacted, as the source of qualified immunity.[32] And it similarly has directed lower courts to look to that same 1871 common law to derive the elements of a Section 1983 claim.[33]

But why the general common law of 1871? On the standard story, Congress created a federal cause of action in Section 1983 to be litigated by reference to federal law.[34] Of course, Section 1983 is relatively skeletal; it simply states that:

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25 *See* Monroe v. Pape, 272 F.2d 365, 366 (7th Cir. 1959), *rev'd*, 365 U.S. 167 (1961), *overruled on other grounds by* Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978); *Monroe*, 365 U.S. at 172.

26 *See Monroe*, 365 U.S. at 172.

27 *See Monroe*, 272 F.2d at 366.

28 *See Monroe*, 365 U.S. at 183.

29 *Monroe*, 221 F. Supp. at 639.

30 *See* Hope v. Pelzer, 536 U.S. 730, 739 (2002) (citing Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). In addition to judicial precedent, the Court has (albeit rarely) recognized that some legal violations are obvious in light of the constitutional provision itself. *See id.* at 740–41.

31 *See, e.g.*, Timothy Tymkovich & Hayley Stillwell, *Malicious Prosecution as Undue Process: A Fourteenth Amendment Theory of Malicious Prosecution*, 20 GEO. J.L. & PUB. POL'Y 225, 245, 267–81 (2022); Thompson v. Clark, 142 S. Ct. 1332, 1337–41 (2022); *id.* at 1341–44 (Alito, J., dissenting); Tlapanco v. Elges, 969 F.3d 638, 659 (6th Cir. 2020) (Thapar, J., concurring); Jacques L. Schillaci, Note, *Unexamined Premises: Toward Doctrinal Purity in § 1983 Malicious Prosecution Doctrine*, 97 NW. U. L. REV. 439, 455–56 (2002).

32 *See* Pierson v. Ray, 386 U.S. 547, 553–57 (1967).

33 *See Thompson*, 142 S. Ct. at 1334, 1336–38.

34 Even when state law is relevant, it is relevant only because another provision, 42 U.S.C. § 1988(a), explicitly directs courts to look to state law on that question. *See* 42 U.S.C. § 1988(a) (2018).

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .[35]

Nothing in this section explicitly speaks of a cause of action; it gives no direction as to the rules that should govern a case based on Section 1983 (or even the source of those rules); and it is silent about limits on the stated liability. In sum, it appears to "direct[] that rights be vindicated, yet it fails to erect any remedial structure."[36] The Court has reconciled these apparent contradictions by concluding that Section 1983 does create an express cause of action[37] and that federal common law—which in turn borrows from the general law of torts in 1871—fills in the details.[38]

But the standard story of Section 1983 is wrong. Section 1983 did not create a cause of action. And Congress did not intend the common law of 1871 to fill in the details. The Supreme Court has sought answers in 1871, but the message that courts should take from 1871 is that courts should focus on modern law—both state and federal—not 1871 law and not general common law.

A closer examination of the enactment of Section 1983 and the surrounding context undermines the conventional wisdom. Section 1983 was enacted against a backdrop in which federal courts were required by federal statute to use state-law causes of action. Section 1983 did nothing to displace that general rule and fits perfectly within it. In fact, the language itself makes an indirect reference to this rule in stating that liability attaches in *any* "action at law, suit in equity, or other proper proceeding for redress"—that is, whatever cause of action would otherwise be required.[39] In addition, background legal rules and a federal statute directed courts to look to state law for other substantive rules of decision—such as causation, damages, and official immunities—unless a federal statute provided a contrary rule and thereby preempted state law.

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35 42 U.S.C. § 1983 (2018).

36 Seth F. Kreimer, *The Source of Law in Civil Rights Actions: Some Old Light on Section 1988*, 133 U. PA. L. REV. 601, 605 (1985).

37 *See* Health & Hosp. Corp. of Marion Cnty. v. Talevski, 143 S. Ct. 1444, 1450 (2023).

38 *See* Thompson v. Clark, 142 S. Ct. 1332, 1337 (2022).

39 42 U.S.C. § 1983.

So Section 1983 would not originally have been understood to have created a new federal cause of action, rather, it would have allowed federal courts to hear only preexisting causes of action. And federal legislation dictated that the only causes of action federal courts could hear were those from state law. Moreover, within those state-law causes of action, the state law applicable to that cause of action would have applied absent a preemptory federal statute.

Of course, beyond historical curiosity, one might question what relevance this rediscovery has today, in a completely different legal world and long after courts started down a different path with Section 1983. But, perhaps surprisingly, the original legal effect of Section 1983 remains largely unchanged. Notwithstanding drastic changes in the legal landscape, none of those changes have altered the basic structure of Section 1983. Although federal law no longer requires federal courts to use state-law causes of action, Section 1983 still does not provide one and must be invoked in federal court via state-law causes of action. Moreover, the rules governing that cause of action—although premised on a violation of the rights mentioned in Section 1983—would be provided by state law unless that state law was preempted by the Constitution or federal statute.

To be sure, stare decisis is a formidable obstacle to a return to the original understanding of Section 1983, but it is unclear whether statutory stare decisis applies. First, there are still open questions, and previous judicial presumptions or conclusions made in answering other questions might not control in a case presenting different questions. Second, in the same breath the Court has reached its ahistorical conclusions about Section 1983, it has also said that Section 1983's original understanding controls. So, perhaps the relevant precedent is the Court's interpretive methodology, which in turn points to factual questions concerning the original understanding. And third, some Justices have argued that written law such as statutes is not subject to stare decisis when the precedent is sufficiently erroneous.

But even assuming statutory stare decisis applies in its full force to the precedent interpreting Section 1983 as having created a federal cause of action governed by federal law, the factors for overcoming stare decisis and overturning precedent all point in the same direction: The Court should follow the original, state-law-centric understanding rather than its anachronistic and erroneous federal-law-focused rewriting. The precedent is grievously wrong in light of the original context and was never seriously reasoned. It has become unworkable and has been undermined by subsequent legal developments. And there are no serious cognizable reliance interests that counsel against overturning it.

In the light of the rediscovered original meaning of Section 1983, one might also question whether the foundation from which the mistaken current approach flowed is also mistaken, or at least incomplete. It is commonly believed that Reconstruction was a time of massive congressional dislocation of state substantive law and creation of new federal law, consistent with the current view of Section 1983. As one commentator recently summarized, "The Reconstruction Amendments realigned the balance of power between the judicial and legislative branches" and "empowered Congress to enforce national civil rights policies."[40] That is, the "Reconstruction Amendments provide that the American people's representatives in Congress"—not the states—are to "take the *lead* in the advancement of life, liberty, and the pursuit of freedom."[41] Another article characterizes this prevailing view as remembering that federalism, whatever its status at the Founding, was forever changed during Reconstruction when "the country almost cracked at the fissures of its federalism failure."[42]

Operating under this foundation, one might readily think that Section 1983 must have been a creation of federal law, enacted by those in Reconstruction Congress who viewed Congress's role as defining and creating federal law to repudiate state law. As one leading scholar on Section 1983 said, any argument suggesting that state law might have a substantial role in Section 1983 litigation represents "an incongruous historical vision to picture the Reconstruction Congress establishing the local law of the recently-rebelling states as the linchpin of an avowedly nationalist enforcement program."[43]

However, this prevailing conception of Reconstruction is more likely to be the "incongruous" and anachronistic one. The original understanding of Section 1983 was focused more on ensuring adequate enforcement of preexisting law (including state law) than on changing the substance of that law or the underlying substantive rights being protected. Section 1983 was designed to enable federal courts to equally and vigorously enforce state and other preexisting law rather than to supplant that law with federal law. This statutory conclusion is consistent with recent Fourteenth Amendment scholarship that argues that the Fourteenth Amendment might have been more about redeeming and restoring state and general law than about creating new federal law.[44]

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40 Alexander Tsesis, *Enforcement of the Reconstruction Amendments*, 78 WASH. & LEE L. REV. 849, 851 (2021).

41 *Id.* at 853–54 (emphasis added).

42 Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Race, Federalism, and Voting Rights*, 2015 U. CHI. LEGAL F. 113, 137.

43 Kreimer, *supra* note 36, at 616.

44 *See* discussion and sources *infra* Section IV.A.

These broader conclusions, paired with understanding how the original meaning of Section 1983 carries forward through our law to today, raise questions about the nature of our federalism and how Reconstruction altered that federalism. Although I take no position here on the outer constitutional limits of Congress's power under the Reconstruction Amendments, the fact that the Reconstruction Congress did not view even "the local law of the recently-rebelling states"[45] as worthy of displacing should guide discussions about when such displacement is warranted.

I. THE ORIGINAL MEANING OF SECTION 1983

Modern Section 1983 litigation was born in 1961 with the Supreme Court's decision in *Monroe v. Pape*.[46] Before *Monroe v. Pape*, in the ninety years between that decision and Section 1983's enactment, plaintiffs rarely brought claims under Section 1983.[47] Some of those cases appear to have assumed that Section 1983 created a separate cause action.[48] But it was still unclear—at least at some level—whether Section 1983 extended to misconduct that violated state law.[49] After the Court answered the question in the affirmative in *Monroe v. Pape*,[50] the number of Section 1983 claims exploded, and the questions about the substance of such claims have abounded.[51] Some judges, Justices, and scholars have responded to the explosion and subsequent confusion by questioning *Monroe v. Pape*'s holding.[52] But *Monroe v. Pape*'s

45 Kreimer, *supra* note 36, at 616

46 Monroe v. Pape, 365 U.S. 167 (1961), *overruled by* Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978).

47 Justice Scalia stated that Section 1983 "generated only 21 cases in the first 50 years of its existence." Crawford-El v. Britton, 523 U.S. 574, 611 (1998) (Scalia, J., dissenting); *see also* Comment, *The Civil Rights Act: Emergence of an Adequate Federal Civil Remedy?*, 26 IND. L.J. 361, 363 (1951). Recently, however, Professor Matteo Godi has asserted that there were around thirty lawsuits (also limited to 1871–1921). *See* Matteo Godi, *Section 1983: A Strict Liability Statutory Tort*, 113 CALIF. L. REV. 1933, 1948 n.102 (2025). Regardless of the true count, Section 1983 was not a frequent source of litigation before 1961.

48 *See, e.g.*, Lane v. Wilson, 307 U.S. 268, 272–74 (1939).

49 The Court granted certiorari in *Monroe* because it thought the lower court's holding inconsistent with Supreme Court precedent. *Monroe*, 365 U.S. at 170. However, there was not an explicit decision one way or another on the issue whether Section 1983 covered misconduct that was unauthorized by state law. *See id.* at 190–91.

50 *See id.* at 187.

51 *See supra* note 31 and accompanying text; Godi, *supra* note 47, at 1949 & n.103.

52 *See, e.g.*, *Crawford-El*, 523 U.S. at 611 (Scalia, J., dissenting); Tah v. Glob. Witness Publ'g, Inc., 991 F.3d 231, 252 (D.C. Cir. 2021) (Silberman, J., dissenting in part); Eric H. Zagrans, *"Under Color of" What Law: A Reconstructed Model of Section 1983 Liability*, 71 VA. L. REV. 499, 559 (1985); Elliott Averett, *An Unqualified Defense of Qualified Immunity*, 21 GEO. J.L. & PUB. POL'Y 241, 253–54 (2023); Cole v. Carson, 935 F.3d 444, 477–78 (5th Cir. 2019)

narrow interpretive holding is correct, and the confusing questions that resulted would arise under a narrower interpretation (even if they would arise less often). In other words, the problems that arose after *Monroe v. Pape* stem not from its holding about the relevance of state-law authorization, but rather from the assumption—made by both the majority and dissent in *Monroe v. Pape*—that Section 1983 created a federal cause of action governed wholly by federal law.[53]

A. Monroe v. Pape*: Rediscovering Section 1983*

James Monroe and his family responded to their alleged mistreatment by suing the Chicago police officers under Section 1983 on the grounds that the officers unreasonably searched their home and seized them.[54] The lower courts held that a Section 1983 action was unavailable because the officers' actions were not authorized by Illinois law.[55] In fact, their actions were specifically prohibited by Illinois law, and that law provided the Monroe family with a remedy.[56]

The answer to the question presented—whether Section 1983 applied to violations of state law—hinged on the proper interpretation of the part of Section 1983 that requires the defendant's challenged action to have been taken "under color of" a state "statute, ordinance, regulation, custom, or usage."[57] The Monroes argued that the phrase "under color of" did not require the officers' actions to have been authorized by state law—rather, merely taken while under the imprimatur of state authority and under claim to it.[58] The officers disagreed; they argued that Section 1983 gave a federal cause of action only for unconstitutional actions that were authorized by state law.[59]

The Court, over the strident dissent of Justice Frankfurter, agreed with the Monroes.[60] The Court first rejected the argument that Congress's legislative power did not reach "those who carry a badge of authority of a State and represent it in some capacity" even when they

(Ho & Oldham, JJ., dissenting); McKinney v. City of Middletown, 49 F.4th 730, 747–48 (2d Cir. 2022) (Menashi, J.).

53 *See Monroe*, 365 U.S. at 187; *id.* at 202–03 (Frankfurter, J., dissenting).

54 *See* Monroe v. Pape, 272 F.2d 365, 365–66 (7th Cir. 1959), *rev'd*, 365 U.S. 167.

55 *See id.* at 366.

56 *See id.* ("Plaintiffs are not without their remedy in the state court."); *Monroe*, 365 U.S. at 224–25 (Frankfurter, J., dissenting) ("Illinois law appears to offer a civil remedy for unlawful searches; [the Monroes] do not claim that none is available." (footnote omitted)).

57 42 U.S.C. § 1983 (2018); *see also Monroe*, 365 U.S. at 172.

58 *See Monroe*, 365 U.S. at 169.

59 *See id.* at 170, 172.

60 *Compare id.* at 183, *with id.* at 237 (Frankfurter, J., dissenting).

"misuse it."[61] The question was not about Congress's power to reach those unauthorized state officials but whether it had done so.[62]

In addressing that question, the Court barely discussed the text of Section 1983.[63] Instead, the majority started with the aims of the provision.[64] It determined that the relevant aim here was to "provide a federal remedy where the state remedy, though adequate in theory, was not available in practice."[65] That aim cut in favor of interpreting Section 1983 broadly because the legal availability of a state remedy—for unauthorized actions, for example—was not dispositive.[66] The majority next went to the legislative history where it found much support for this aim.[67] The debates surrounding Section 1983 evoked a statement that, if credited, was all but conclusive: "The offenses committed against [an individual suing under Section 1983] may be the common violations of the municipal law of his State."[68] After surveying precedent construing a similar phrase in another statute and purported congressional reliance on that interpretation, the majority concluded that "the fact that Illinois by its constitution and laws outlaws unreasonable

61 *Id.* at 172 (majority opinion); *id.* at 171–72 ("There can be no doubt . . . that Congress has the power to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State . . . . The question with which we now deal is the narrower one of whether Congress . . . . did so intend."). The contrary argument is supported in part by the proposition that a state officer acting without authority—that is, acting in contradiction to the state's commands—cannot be said to be acting as the state, and therefore cannot implicate the substantive provisions of the Fourteenth Amendment, which only apply to states. *See* Steven L. Winter, *The Meaning of "Under Color of" Law*, 91 MICH. L. REV. 323, 331–32, 332 n.41 (1992). This theory, sometimes called the "reductive approach" to state action, *id.* at 332, is outside the scope of this Article. For a recent thought-provoking foray into the issue, see Larry Alexander, *"Under Color of Law"? Rogue Officials and the Real State Action Problem*, 23 J. CONTEMP. LEGAL ISSUES 523 (2022).

62 *See Monroe*, 365 U.S. at 171–72 (citing *Home Tel. & Tel. Co. v. Los Angeles*, 227 U.S. 278, 284 (1913)). The Court has long since abandoned the idea that unlawful acts were not state action (the reductive approach). *See id.* However, some precedent still supported the reductive approach, *see, e.g.*, Barney v. City of New York, 193 U.S. 430, 437 (1904), and Justice Frankfurter was likely influenced by it, *see Monroe*, 365 U.S. at 238 (Frankfurter, J., dissenting) (granting merely that "pretense of authority *might* suffice to sustain congressional legislation" (emphasis added)); Winter, *supra* note 61, at 376–84 (discussing the private memoranda and draft opinions and concluding that Justice Frankfurter might have been trying to resurrect the reductive approach through his interpretation of the phrase "under color of" law in Section 1983 and other civil rights statutes).

63 *Cf.* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2291–94 (2024) (criticizing *Chevron* for similarly not having engaged in an interpretation of the text and using that failure as a reason to overrule the decision).

64 *See Monroe*, 365 U.S. at 172–83.

65 *Id.* at 174.

66 *See id.* at 174–76.

67 *See id.* at 174–83.

68 CONG. GLOBE, 42d Cong., 1st Sess. app. at 50 (1871) (statement of Rep. Michael C. Kerr).

searches and seizures is no barrier to the present suit in the federal court."[69]

Justice Frankfurter dissented.[70] Although he did not engage with the text, either, his examination of the legislative history led him to a different conclusion: "Wrongs susceptible of adequate redress before the state courts evidently did not concern Congress, and Congress in 1871 did not attempt to reach those wrongs."[71] He argued that "the line of distinction between state-authorized and unauthorized actions" was a compromise position targeting the worst offenses and the offenses least likely to get fair review in state court—that is, offenses that were authorized or even required by state law.[72]

Justice Frankfurter, however, did depart to some extent from the officers' position on the relevance of a state-law remedy. For him, "the conclusion that police activity which violates state law is not 'under color' of state law does not turn upon the existence of a state tort remedy."[73] Because Section 1983 "was not designed to cure and level all the possible imperfections of local common-law doctrines,"[74] the question was whether a "State affirmatively . . . sanction[ed]" the challenged action.[75] In other words, whether an act was taken "'under color' of state law" turned on legal authorization, not legal remedies.[76]

But, of course, as the majority pointed out, some remedies, though existing on paper and "adequate in theory," were nonetheless "not available in practice."[77] Justice Frankfurter responded by arguing that if a state, through "custom" or "practice," immunized state officials in state-law suits for violations of state law, Section 1983 would be implicated.[78] Under Justice Frankfurter's view, then, a state official could be outside Section 1983—that is, not acting under color of state law—with respect to conduct, but nonetheless be acting under color of state law (and thus within Section 1983) with respect to liability.[79]

69 *Monroe*, 365 U.S. at 183–87.

70 *Id.* at 202 (Frankfurter, J., dissenting).

71 *Id.* at 226–34, 230 n.46.

72 *Id.* at 248–50.

73 *Id.* at 245.

74 *Id.*

75 *Id.* at 211 (quoting Wolf v. Colorado, 338 U.S. 25, 28 (1949), *overruled by* Mapp v. Ohio, 367 U.S. 643 (1961)).

76 *Id.* at 245.

77 *Id.* at 174 (majority opinion).

78 *See id.* at 235–36 (Frankfurter, J., dissenting).

79 *See id.* I have explained elsewhere why it is textually implausible that a state official can be acting "under color of" immunity from damages. Lindley, *supra* note 1, at 925–26, 926 n.233. This is especially true when interpreting "under color of" to mean "claim of authority," as the *Monroe* majority does. *See Monroe*, 365 U.S. at 187. An official does not make a claim of authority by looking past the state law barring his conduct and to a state law immunizing him from civil liability.

Justice Frankfurter's argument on this front, though, faces textual difficulties because immunization from damages has little (or nothing) to do with whether state law authorized or sanctioned the action. For example, a state may make the policy choice to immunize an official from private liability in favor of strict criminal liability. It can hardly be said that this hypothetical state has authorized or sanctioned the official's conduct. So the question is not about "color of" law but rather whether a state can completely immunize its officials from private liability without offending the Due Process or Privileges or Immunities Clauses.[80]

Although Justice Frankfurter's argument for a state-authorization requirement pays little attention to the text and is difficult to reconcile with his exception for actual or effective immunity, he does identify three odd features of Section 1983 litigation the majority's interpretation created:

First, the legislative history does indicate that the proponents of the bill did not understand Section 1983 to have overtaken the states' role even when it came to regulating officials' conduct and official liability. As Justice Frankfurter described, "Proponents of the bill, addressing themselves to the charge of federal overreaching, insisted that they could support the measure only because they understood that it did not presume to enter upon that realm of protection of rights traditionally reserved to the States."[81] But, of course, the majority's interpretation put the federal government, specifically federal courts, squarely in that realm.

Second, Justice Frankfurter points out that the textual structure of Section 1983, with its requirement that the defendant have acted with some relation to state law, "appears on its face designed to leave all questions of the nature and extent of liability of individuals to the laws of the several States."[82] But the majority's interpretation forgoes any reliance on state law, as a private citizen can don a police uniform and lay claim to state authority as much as a police officer can.[83]

Perhaps one might respond that this focus ensures the constitutionality of the statute under Section 5 of the Fourteenth Amendment by requiring state action. But the majority's interpretation does not strictly require such state action. Regardless, the requirement that a

80 *See infra* Section III.B.2.

81 *Monroe*, 365 U.S. at 229 n.44 (Frankfurter, J., dissenting) (citing CONG. GLOBE, 42d Cong., 1st Sess. 800 (1871)); *see also id.* at 242 (arguing that states should be in charge of defining the liability for state-law violations, for the "individual hoodlum intruder" as much as an unauthorized "policeman").

82 *Id.* at 239.

83 *Cf. id. But see* Winter, *supra* note 61, at 401 (arguing that the two situations can be distinguished using a "color of office" analysis (emphasis removed)).

plaintiff identify a deprivation of constitutional right might already ensure state action, rendering the "color of" state law requirement constitutionally unnecessary. Justice Frankfurter, though, took a different approach to the relevance of state law, making a familiar analytical move. He implied a statutory limitation for "when a State seeks to shield those individuals under the special barrier of state authority."[84] If he is merely referring here to actual authority, then the Constitution would nullify such an authorization and a plaintiff could proceed to state court.[85] So it is unclear why section 1 of the Ku Klux Klan Act would target solely this scenario. If, instead, Justice Frankfurter is referring to the immunity exception set out above, then it would fail for the same reasons.

Third, Justice Frankfurter questioned the "[]wisdom" of "extending federal civil jurisdiction into the traditional realm of state tort law."[86] For Justice Frankfurter, federalizing these actions created a glut of law, as Section 1983 did not provide any rules for its assumed cause of action.[87] In a post-*Erie* world,[88] federal courts could not recognize general law to fill this gap.[89] But in a post-*Clearfield Trust* world,[90] these questions are nonetheless governed by federal law.[91] For Justice Frankfurter, the decisions whether to use state rules for assault or trespass or to create new federal rules "are matters of policy in its strictly legislative sense, not for determination by this Court."[92] The majority did reject pure policymaking by finding another source of law to fill the gaps: "Section [1983] should be read against the background of tort

84 *Monroe*, 365 U.S. at 239 (Frankfurter, J., dissenting).

85 *See generally* E. Garrett West, *Refining Constitutional Torts*, 134 YALE L.J. 858, 873–75 (2025) (describing the traditional nullification framework).

86 *Monroe*, 365 U.S. at 239 (Frankfurter, J., dissenting).

87 *See id.* at 239–40; Kreimer, *supra* note 36, at 605 (noting that Section 1983 "directs that [certain] rights be vindicated, yet it fails to erect any remedial structure").

88 Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

89 *See Monroe*, 365 U.S. at 239 (Frankfurter, J., dissenting); *see also Erie*, 304 U.S. at 78.

90 Clearfield Tr. Co. v. United States, 318 U.S. 363 (1943).

91 *Clearfield Trust* itself held simply that "[t]he rights and duties of the United States . . . are governed by federal rather than local law," *id.* at 366, which "[i]n absence of" a statute federal courts are to "fashion . . . according to their own standards," *id.* at 367. However, it has come to be known for the more general proposition that federal law governs federal causes of action and other federal statutory schemes. *See* United States v. Kimbell Foods, Inc., 440 U.S. 715, 727–28 (1979); *see also* Holmberg v. Armbrecht, 327 U.S. 392, 395 (1946) ("We have the duty of federal courts . . . to apply their own principles in enforcing an equitable right created by Congress.").

92 *Monroe*, 365 U.S. at 239 (Frankfurter, J., dissenting).

liability . . . ."[93] And thus began the quest to use the common law of 1871 to give content to Section 1983's supposed cause of action.[94]

B. The Missing Context

The majority and dissenting opinions in *Monroe v. Pape* might be compared to the blind men in the Indian folk tale, "The Blind Men and the Elephant."[95] Both opinions are grasping at real features of Section 1983, and they each make compelling arguments about those respective features. But they are both "blinded" by the assumption, explicit or implicit, that Section 1983 creates a federal cause of action. The majority did not explicitly state that Section 1983 created a cause of action, but it assessed the defendants' argument that the plaintiffs could not satisfy the Section 1983 cause of action and concluded that the "complaint state[d] a cause of action."[96] Justice Frankfurter's dissent was more explicit: "[Section 1983] does create a 'substantive' right to relief."[97] With this blindness to the full picture of Section 1983, both opinions could only grasp at portions of the "truth."

One must become situated in the very different legal world of 1871 to understand how Section 1983 would have worked and been understood at the time.[98] Start first with the "cause of action." In actions at law,[99] the cause of action was roughly synonymous with the "form of action" a plaintiff would have to use to bring his legal claim.[100] A plaintiff wishing to bring a legal claim would have needed to pick

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93 *Id.* at 187 (majority opinion).

94 This conclusion, though, does not leave the precedent free of *Erie-Clearfield Trust* tension, as looking to the well-established common law rules of 1871 looks awfully similar to looking to frozen-in-time general law. *See* Caleb Nelson, *The Persistence of General Law*, 106 COLUM. L. REV. 503, 545–46, 546 n.208 (2006) (identifying use of the common law in Section 1983 litigation with general law).

95 "The Blind Men and the Elephant" is an Indian folk tale in which blind men examine an elephant. *See* JOHN GODFREY SAXE, *The Blind Men and the Elephant*, *in* THE POEMS OF JOHN GODFREY SAXE 135, 135–36 (Boston, Houghton, Mifflin & Co. 1882) (1868). Each man declares his opinion that the "animal" is a snake (trunk), spear (tusk), rope (tail), and so on. *See id.* Of course, each man has grasped an element of the truth, but absent a complete understanding of the nature of the elephant, the men are unable to arrive at the truth.

96 *Monroe*, 365 U.S. at 187.

97 *Id.* at 251–52 (Frankfurter, J., dissenting).

98 The historical points summarized here are developed more fully in Lindley, *supra* note 1.

99 Suits in equity, both then and now, differed somewhat. Most Section 1983 cases are actions at law, so I focus on those here. However, similar principles would apply to suits in equity, swapping modern state law (for actions at law) with general equitable principles of 1789. *See id.* at 909 n.93.

100 This form of action was also often referred to as the "form of proceeding" or the "mode of proceeding." Anthony J. Bellia Jr., *Article III and the Cause of Action*, 89 IOWA L. REV. 777, 783, 843 n.298 (2004).

from among a handful of available forms of action, such as the writ of trespass, an action on the case, or an action for replevin.[101] These forms of action dictated the burdens of proof, the necessary causation, and the measure of damages, among other things.[102] To successfully bring such an action, a plaintiff would have identified his substantive right that was infringed, adequately alleged that the facts of his case fit into the requirements of the selected form of action, and then requested the predetermined damages allowed by that form.[103] Of course, then the plaintiff would need to prove the facts alleged, but the dispute was narrowed substantially by the requirements of the form of action.[104] Importantly, a violation of a substantive right was not sufficient, even when that right was judicially enforceable.[105] If a plaintiff could not fit his claim into a form of action, he would have no remedy.[106] Finally, these forms of action were governed by local law (that of the state), not general law (that of a larger community of shared legal systems).[107] So looking for general principles concerning these forms might have been useful evidence of what the local law was, but any evidence of divergent local law would have overridden even the best evidence from another jurisdiction.[108]

A couple of concrete examples: Thompson, if he were transposed to the late eighteenth and early nineteenth century, would have had to first identify a substantive right, in his case "his common-law right to be free from prosecution without probable cause."[109] He then would have needed to fit the facts of the violation of that right into a form of action, which would have been an action on the case for malicious prosecution.[110] "The form must have alleged that the officer caused the original prosecution, that the charge was without probable cause and made with malice, that the proceedings ended in Thompson's favor, and that Thompson was damaged."[111] Similarly, the Monroes, to vindicate their rights to property and bodily security, would have

101 *See* Lindley, *supra* note 1, at 909–10.

102 *See id.* at 944.

103 *See id.* at 918.

104 *See id.* at 909–10.

105 *See id.* at 910.

106 *See id.*

107 *See* Anthony J. Bellia Jr. & Bradford R. Clark, *The Original Source of the Cause of Action in Federal Courts: The Example of the Alien Tort Statute*, 101 VA. L. REV. 609, 629–31 (2015).

108 *See id.* at 670–74.

109 Lindley, *supra* note 1, at 911.

110 *See* 2 WILLIAM WAIT, A TREATISE UPON SOME OF THE GENERAL PRINCIPLES OF THE LAW 105 (Albany, William Gould, Jr., & Co. 1885).

111 Lindley, *supra* note 1, at 911–12 (citing JOSEPH H. KOFFLER & ALISON REPPY, HANDBOOK OF COMMON LAW PLEADING 194–95 (1969)).

brought writs of trespass for trespass on property and false arrest.[112] Those writs would have required direct causation from the alleged infringers,[113] unlike Thompson's action on the case, but would not have required any allegation of malice or ill intent on the part of the defendant.[114]

When lower federal courts were initially created by the First Congress, Congress had to choose what causes of action—which, recall, were the forms of action for actions at law—federal courts would use as a matter of the United States's local law.[115] In a pair of acts just days apart, Congress required federal courts to use the forms of action available under state law in the state in which the court sat.[116]

As relevant here, the first Act—the Judiciary Act of 1789—gave two directions to federal courts.[117] It first required federal courts to hear only causes of action—read forms of action—that were recognized at common law or were legislatively enacted.[118] This command was superseded in large part by the second act five days later.[119] However, the Judiciary Act of 1789 also spoke to the law applicable within those forms of action. Section 34 of the Act provided that "the laws of the several states, except where [written federal law] shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply."[120] This section, still in force today as the Rules of Decision Act, has long been difficult to fully understand.[121] But it was originally

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112 *See* ROGER O'DONNELL, PROCEDURE AND FORMS: COMMON LAW PLEADING 62–63 (1934).

113 *See id.*

114 *See* Shanley v. Wells, 71 Ill. 78, 81 (1873).

115 Because forms or causes of action were matters of local law, there would be no residual power for federal courts to borrow on general law. *See* Bellia & Clark, *supra* note 107, at 629–31. This distinction perhaps explains why the Supreme Court very early on disclaimed inherent jurisdiction over common law crimes, *see* United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812), and yet relatively uncontroversially applied general law in civil cases, *see* Swift v. Tyson, 41 U.S. (16 Pet.) 1, 19 (1842), *overruled by* Erie R.R. v. Tompkins, 304 U.S. 64 (1938); *see also* Anthony J. Bellia Jr. & Bradford R. Clark, *General Law in Federal Court*, 54 WM. & MARY L. REV. 655, 687–88 (2013). In the former instance, Congress had made no local law pertaining to common-law crimes, and in the latter, Congress had nearly always authorized and required federal courts to adopt the local law of the relevant state to hear actions at law.

116 *See* Bellia & Clark, *supra* note 107, at 641–42.

117 Judiciary Act of 1789, ch. 20, 1 Stat. 73.

118 *See id.* § 14, 1 Stat. at 81–82; *see also* Lindley, *supra* note 1, at 912; Bellia & Clark, *supra* note 106, at 643–46.

119 Process Act of 1789, ch. 21, 1 Stat. 93; *see also* Lindley, *supra* note 1, at 914; Bellia & Clark, *supra* note 107, at 646.

120 § 34, 1 Stat. at 92.

121 Act of June 25, 1948, ch. 646, § 1652, 62 Stat. 869, 944 (codified at 28 U.S.C. § 1652 (2018)); *see also* Lindley, *supra* note 1, at 913–14, 913 n.123.

understood to merely confirm the rule that the law of the forum applied. That is, it was "uniformly held to be no more than a declaration of what the law would have been without it,"[122] which was that "the law of the forum . . . operates upon all who submit themselves to its jurisdiction."[123] The "forum" in our system includes both the state and federal government, so state law applies in a forum unless displaced by supreme federal law.[124] The Judiciary Act of 1789 simply codified that rule.[125]

The second Act, known as the Process Act of 1789, gave federal courts greater direction about which forms of action (causes of action) to use.[126] The Process Act of 1789 directed courts to use only the state-law forms of action available as of the date of the Act's passage until Congress's next session ended.[127] After being extended in 1790[128] and again 1791,[129] it took its final form in 1792 and remained in force for eighty years.[130] The Process Act of 1792 required conformity to the forms of action available under state law in 1789.[131] It did allow courts to deviate when the old forms of action would have worked injustice, but any deviation must have been to the forms of action accepted under then-current state law.[132]

In the light of the Judiciary Act of 1789 and the Process Act of 1792, against the backdrop of the legal context of 1871, a plaintiff seeking to bring an action in federal court would have had to use the 1789 state-law form of action. That form of action would have been subject to state law (either state statutory law, local common law of that state, or the general law) unless the Constitution or a federal statute

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122 Hawkins v. Barney's Lessee, 30 U.S. (5 Pet.) 457, 464 (1831).

123 M'Cluny v. Silliman, 28 U.S. (3 Pet.) 270, 276–77 (1830); *see also* Lindley, *supra* note 1, at 913 n.118.

124 *See* Lindley, *supra* note 1, at 913.

125 I set aside here questions whether and when general law would apply rather than state-specific law under these principles. It is likely that the usual conflict-of-law rules would apply, with the answers depending on the status of general law. Regardless, arguments against applying federal law in Section 1983 litigation apply in either case. *Cf. id.* at 907 n.82.

126 Process Act of 1789, ch. 21, 1 Stat. 93; *see also* Lindley, *supra* note 1, at 914 & n.126 (citing Bank of the U.S. v. Halstead, 23 U.S. (10 Wheat.) 51, 57 (1825)).

127 § 2, 1 Stat. at 93–94.

128 Process Act of 1790, ch. 13, 1 Stat. 123.

129 Process Act of 1791, ch. 8, 1 Stat. 191.

130 Geoffrey C. Hazard, Jr., *Has the* Erie *Doctrine Been Repealed by Congress?*, 156 U. PA. L. REV. 1629, 1640–41 (2008).

131 Process Act of 1792, ch. 36, §§ 1–2, 1 Stat. 275, 275–76; *see also* Lindley, *supra* note 1, at 915. For the 1789 anchor, see Kellen Funk, *The Handmaid of Justice: Power and Procedure in Federal Courts*, *in* APPROACHED TO FEDERAL JUDICIAL HISTORY 31 (Gautham Rao, Winston Bowman, & Clara Altman, eds. 2020).

132 *See* Lindley, *supra* note 1, at 916–17.

preempted that state law. So, to bring his claim in federal court, Thompson would have needed to use the appropriate New York form of action circa 1789 but satisfy 1871 state law concerning the substantive right and other non-form-of-action requirements. The Monroes similarly would have had to have used the applicable Illinois form of action.[133] And 1871 Illinois law would have applied under background law and the Rules of Decision Act.

This context is vital to understanding the original understanding of Section 1983. Section 1983 was designed to fit squarely into this litigation structure. The operative provision of Section 1983 specified that:

> [A]ny person who, under color of any [state] law . . . shall subject, or cause to be subjected, any person . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution . . . shall . . . be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress . . . .[134]

Remember, it was a bedrock concept that a plaintiff must have identified the proper form of action. But Section 1983 "neither specified any particular form of proceeding nor created a new form of proceeding."[135] Congress's omission appears intentional, as another section of the same Act did specify a form of action and preempted some state-law rules pertaining to that form of action that would have otherwise applied.[136] Section 1983, however, left the form of action and source of substantive law to background rules.

If that interpretation is correct, then would-be Section 1983 plaintiffs would have needed to identify the "action[s] at law" referenced by the statute.[137] For that determination, it was not merely permissible or the best choice to look to state law—then-existing federal statutes compelled would-be plaintiffs to do so. Federal courts, even those adjudicating federal claims of right such as those arising under Section 1983, were required to use state-law forms of action (causes of action).[138] Nothing in Section 1983 suggested any deviation from that

133 Unlike claims brought in New York, claims brought in Illinois were required to conform to the forms of proceeding available in 1828, when Congress applied the principle of the Process Act to states admitted after 1789. Act of May 19, 1828, ch. 68, § 1, 4 Stat. 278, 279–81.

134 Ku Klux Klan Act, ch. 22, § 1, 17 Stat. 13, 13 (1871).

135 Lindley, *supra* note 1, at 923.

136 *See id.* at 924–25 (discussing § 6, 17 Stat. at 15).

137 § 1, 17 Stat. at 13.

138 *See* Lindley, *supra* note 1, at 919–20.

requirement, much less provided the clarity for an express or implied repeal of the earlier-in-time statutes.[139]

With this context, even a textualist approach supports the conclusion that Section 1983 relied on state-law causes of action and non-preempted state law. The phrase "shall . . . be liable" is not an isolated phrase and cannot be taken of out of its statutory context.[140] The entire phrase is "shall . . . be liable . . . *in any action at law, suit in equity, or other proper proceeding for redress.*"[141] The question, then, is not what does "liable" mean, but rather what the nature of liability in an action at law is.[142] And in 1871, a reasonable, informed reader would have known that liability in an action at law required a recognized and appropriate form of action, was conditioned on the plaintiff satisfying the requirements of the applicable form of action, and was subject to the defenses that a particular defendant could raise to that form of action.

This interpretation, although perhaps counterintuitive to a modern reader, was not foreign to those at the time. One senator, who opposed the bill but defended Section 1983's constitutionality, explained that Section 1983 "create[d] *no new cause of action.* Its *whole effect* [was] to give to the Federal Judiciary that which now does not belong to it."[143] Other aspects of the legislative debate similarly indicate that Congress was aware of how Section 1983 would interact with background law.[144]

139 *Cf. id.* at 937 n.331.

140 § 1, 17 Stat. at 13.

141 *Id.* (emphasis added).

142 *Id.*

143 CONG. GLOBE, 42d Cong., 1st Sess. app. at 216 (1871) (statement of Sen. Allen G. Thurman) (emphasis added). Godi has argued that Senator Thurman "saw Section 1983 as creating a new (federal statutory) tort and codifying existing forms of action, rather than creating a new form of action for that new tort." Godi, *supra* note 47, at 1945 n.79. It is unclear whether a new federal tort using "existing forms of action," *id.*, is any different from the interpretation offered here, but I am not persuaded that Godi has interpreted Thurman correctly. Thurman referred to extending jurisdiction to federal courts, explained that the provision "transfer[red] the hearing of all *such causes* [of state-law torts] into the Federal courts," discussed concurrent jurisdiction between state and federal courts over these claims, and acknowledged the implicit distrust of state courts to hear the same claims the federal courts would be able to hear under Section 1983. CONG. GLOBE, 42d Cong., 1st Sess. app. at 216 (1871) (statement of Sen. Allen G. Thurman) (emphasis added). To be sure, none of those statements conclusively refutes Godi's interpretation, but when combined with the 1871 context, § 6 of Ku Klux Klan Act of 1871, the Process Act of 1792, and the doctrine of implied repeals, they strongly suggest that the well-educated lawyer, Thurman, recognized the federal courts' statutory obligation to hear state-law forms (causes) of action.

144 *See* Lindley, *supra* note 1, at 935–40. The legislative debates contained in the *Congressional Globe* were materially different from modern legislative history. Speeches contained or directly lodged in the *Globe* were often targeted to constituents, both reflecting and influencing the understanding of those who relied on those speeches. *See* Rachel A. Shelden, *Finding Meaning in the Congressional Globe: The Fourteenth Amendment and the Problem of Constitutional Archives,* 2 J. AM. CONST. HIST. 715, 732–33 (2024). Thus, in addition to

A court decision in 1891 reveals the same understanding. There, a northern Republican judge explained that Section 1983 did not "change the rules of pleading or mode of proceeding in any respect."[145] He then stated that "[n]o new mode of proceeding [was] enacted" by Section 1983, and "no new right created."[146]

Returning to Thompson's and the Monroes' claims against the respective offending officers, Thompson and the Monroes would have first identified their underlying substantive right, just like the hypothetical litigation pre-Section 1983. In order to bring the action under Section 1983, though, that right must have been one secured by the Constitution. By identifying the substantive rights codified in Section 1983 as the rights being vindicated by the form of action, plaintiffs would have satisfied the Constitution's requirements for federal question jurisdiction. Then Thompson and the Monroes would have proceeded as they had before, this time in federal court, but nevertheless using the appropriate form of action under 1789 New York law or 1828 Illinois law, respectively. And 1871 New York law or Illinois law would have governed questions that were outside both the substantive right (defined through federal law via Section 1983) and the form of action (defined by older and static state law under the Process Act of 1792).

So, rather than establishing a federal cause of action governed by federal law, Section 1983 would have originally been understood to have required federal courts to enforce plaintiffs' state-law claims seeking to remedy violations of constitutionally secured rights. As the majority correctly observed in *Monroe v. Pape*, "There was . . . no quarrel with the state laws on the books. It was their lack of enforcement that was the nub of the difficulty."[147] Far from being a radical anti-federalism statute, then, Section 1983 was consistent with a "corrective federalism" approach in which Congress steps in when states fail to protect (or even affirmatively abridge) rights held by all citizens of free governments.[148] States were not failing in the substance of their laws; no one "pretended . . . that any State ha[d] passed any laws endangering

providing evidence that a state-law interpretation would not have been absurd to contemporary interpreters, this legislative commentary might be indirectly relevant to the public meaning.

145 Hemsley v. Myers, 45 F. 283, 290 (C.C.D. Kan. 1891); *see also* Lindley, *supra* note 1, at 941 n.369.

146 *Hemsley*, 45 F. at 290. Recall that the "mode of proceeding" was often used synonymously with form of proceeding or form of action and was the basis for the cause of action. *See* Bellia, *supra* note 100, at 781; *see also supra* note 99 and accompanying text.

147 Monroe v. Pape, 365 U.S. 167, 176 (1961), *overruled by* Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978).

148 *See* Michael P. Zuckert, *Toward a Theory of Corrective Federalism: The United States Constitution, Federalism, and Rights*, *in* FEDERALISM AND RIGHTS 75, 76, 75–100 (Ellis Katz & G. Alan Tarr eds., 1996).

the rights or privileges of the colored people."[149] Specific to Section 1983, "It was not the unavailability of state remedies but the failure of certain States to enforce laws with an equal hand" that Congress sought to correct.[150] Congress chose to correct that evil not by creating federal law through a new federal cause of action, but rather by moving state-law causes of action into federal courts, where equal enforcement was much more likely.

II. IS THE ORIGINAL MEANING RELEVANT TODAY?

The original understanding of Section 1983 was lost in large part because it was a creature of the now-foreign legal context of 1871. In 1871, Section 1983 would have been understood as a provision allowing for enforcement in federal court of constitutionally secured rights using state-law causes of action that were largely governed by state law. Rediscovering this original understanding helps makes sense of the puzzles that permeated the opinions in *Monroe v. Pape* and persist today.

But what does that historical conclusion mean for courts adjudicating Section 1983 claims today? Has the original meaning from more than 150 years ago remained despite significant changes to the legal world? Perhaps surprisingly, much of the original understanding of Section 1983 persists today. First, I examine the legal changes since 1871 that might have disrupted or displaced the original meaning. Other statutes or legal changes could change how Section 1983 was or is to be applied even without affecting the original meaning of the provision. Despite minor changes along these lines, however, Section 1983's original understanding largely persists today.

Second, I explain why potential legitimating doctrines also fail to justify modern Section 1983 precedent. Neither supposed congressional acquiescence nor ratification legitimizes the Court's current approach. Moreover, stare decisis should pose no barrier for courts to return to the original understanding. Even assuming that statutory stare decisis applies in full force—and there are reasons to think that it might not—all four factors the Court generally considers point toward overturning modern precedent, including *Monroe v. Pape*'s assumption that Section 1983 created an independent cause of action.

149 CONG. GLOBE, 42d Cong., 1st Sess. app. at 268 (1871) (statement of Rep. Joseph Humphrey Sloss)

150 *Monroe*, 365 U.S. at 174–75.

A. *Legal Changes Post-1871*

1. Conformity Act of 1872

Although the Process Act of 1792 initially functioned well in federal court, the implementation of code pleading in some states confused matters.[151] By introducing code pleading, many states formally abandoned the forms of action in favor of a uniform pleading, but the resulting pleading system looked much like the forms of action.[152] Because the Process Act by default required static conformity with state forms of proceeding in actions at law in 1789, federal courts were then forced to consider whether they could and should adopt code pleading if enacted in their state.[153] Some courts chose to adopt the new, code-pleading system under their residual authority to alter the forms of proceeding.[154] But the Supreme Court was very critical of that practice,[155] and many courts maintained "static conformity" to the 1792 forms of action.[156] So not only were there often two systems in each state (state code pleading and federal "static conformity"), but federal courts were also split on whether they could resolve that nonconformity.[157]

The appropriately named Conformity Act of 1872 attempted to bring conformity by providing that in "causes," "other than equity and admiralty," "the practice, pleadings, and forms and modes of proceeding . . . shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding *existing at the time*" in the state in which the federal court sat.[158] The Conformity Act thus aimed to implement the same forms and modes of proceeding in state court and the federal

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151 Process Act of 1792, ch. 36, 1 Stat. 275; *see also* Lindley, *supra* note 1, at 918.

152 *See* Lindley, *supra* note 1, at 918 & n.169 (collecting sources).

153 *See id.* at 916–18.

154 *See* Charles Warren, *Federal Process and State Regulation*, 16 VA. L. REV. 546, 558–60 (1930).

155 *See id.* at 558–60 (discussing *Randon v. Toby*, 52 U.S. (11 How.) 493 (1851); *Bennett v. Butterworth*, 52 U.S. (11 How.) 669 (1850); and *McFaul v. Ramsey*, 61 U.S. (20 How.) 523 (1858)).

156 Thomas O. Main, *Reconsidering Procedural Conformity Statutes*, 35 W. ST. U. L. REV. 75, 90 (2007) (quoting Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1039 (1982)); *see also* Warren, *supra* note 154, at 560.

157 Main, *supra* note 156, at 90 (quoting Burbank, *supra* note 155, at 1039). For an insightful treatment of this history, see Funk, *supra* note 131, at 34–38.

158 Conformity Act of 1872, ch. 255, § 5, 17 Stat. 196, 197 (emphasis added); *see also* Lowndes v. Huntington, 153 U.S. 1, 18 (1894) (stating that, although the "action [was] one in the nature of an . . . ejectment," New York law recognized only "one form of action"); Michael T. Morley, *The Federal Equity Power*, 59 B.C. L. REV. 217, 237 n.140 (2018) (explaining that the Conformity Act left the Process Act's rules governing equity in place).

court in that state,[159] such that the resulting system would still have had different rules in each federal court based on the variations of state law.[160]

Although the statute was obligatory for federal courts[161] and applied "irrespective of the fact that the cause is founded on a federal or state statute,"[162] the resulting conformity was looser than that required by the Process Act.[163] The Supreme Court concluded that the "indefiniteness" of the phrase "as near as may be" as used in the Conformity Act indicated a Congressional "purpose" for courts to use "their judgment" to refuse to apply state law when it "would unwisely encumber the administration of the law, or tend to defeat the ends of justice."[164] It later expanded this exception to state laws that "would be inconsistent with the terms, defeat the purpose, or impair the effect, of any legislation of Congress."[165] But federal courts could not use this discretion to refuse to apply state-law rules of decision—contradistinguished from forms and modes of proceeding—because the Rules of Decision Act required federal courts to apply certain state law irrespective of the

159 *See* Nudd v. Burrows, 91 U.S. 426, 441 (1875).

160 *See* Burbank, *supra* note 156, at 1040–42.

161 *See* Chemung Canal Bank v. Lowery, 93 U.S. 72, 75–76 (1876).

162 Note, *Conformity by Federal Courts to State Procedure. Rev. Stat., § 914*, 35 HARV. L. REV. 602, 602–03 (1922) (footnotes omitted); *see also* 1 WALTER MALINS ROSE, A CODE OF FEDERAL PROCEDURE § 900[c], at 835–36 (1907).

163 Aside from the structures of conformity, the Act did not even apply to trials or verdicts, enforcement of judgments, or the court's jurisdiction. *See In re* Chateaugay Ore & Iron Co., 128 U.S. 544, 554–55 (1888); S. Pac. Co. v. Denton, 146 U.S. 202, 209 (1892); Note, *supra* note 161, at 602–05; 1 ROSE, *supra* note 161, § 900[b], [d]–[e], at 834–37. Neither did it affect the separation of law and equity in federal court or the effect of the Seventh Amendment. *See* Slocum v. N.Y. Life Ins. Co., 228 U.S. 364, 376–77 (1913).

164 Indianapolis & St. Louis R.R., Co. v. Horst, 93 U.S. 291, 300–01 (1876); Conformity Act of 1872, ch. 255, § 5, 17 Stat. 196, 197. It is possible that the Supreme Court misinterpreted that phrase, which could be read to mean that state law must apply unless other federal law applies. *See, e.g.*, Note, *supra* note 162, at 603 (explaining that the Conformity Act is subject to that limit without identifying a textual source); Comment, *Ineffectiveness of the Conformity Act*, 36 YALE L.J. 853, 854 (1927) (describing the Supreme Court's interpretation as "seiz[ing]" a phrase to "avoid conformity"); 1 ROSE, *supra* note 162, § 900[g], at 839–40; Myers v. Cunningham, 44 F. 346, 348–49 (C.C.N.D. Ohio 1890) (explaining that section 914's specification of an action on the case, 13 Rev. Stat. § 914 (1874), supplanted the Conformity Act's command).

165 Luxton v. N. River Bridge Co., 147 U.S. 337, 338 (1893). This result led to substantial criticism that, under the Conformity Act, lawyers were worse off than under the Process Acts or under a potential uniform federal act because of the unpredictability under the Conformity Act. *See, e.g.*, Burbank, *supra* note 155, at 1040–42; Comment, *supra* note 164, at 854 ("[T]his purpose has largely failed of accomplishment."); Warren, *supra* note 154, at 564–67; Main, *supra* note 156, at 91; Alfred J. Schweppe, *Survey of the New Federal Rules: The New Practice in the Federal Courts in Civil Cases Cognizable at Law or in Equity*, 13 WASH. L. REV. & STATE BAR J. 162, 169 (1938).

Conformity Act's command.[166] And if state law—either through traditional practice or through code pleading—required conformity to the forms of action, federal courts had to conform as well.[167]

Returning to Thompson's case, if he wanted to bring his action after the Conformity Act, he "would have needed to find a *contemporary* form of proceeding under New York law," in addition to satisfying Section 1983 itself (by establishing a violation of rights secured by the Constitution).[168] "And any non-substantive-right rules of decision"—including any rules of decision that were no longer dictated by the form of proceeding—"would have come from contemporary New York law" (absent applicable federal law) under either the Rules of Decision Act or Section 1988(a).[169] The same would have been true for the Monroes, except by reference to Illinois law. So all that the Conformity Act changed with respect to Section 1983 was to move the referent for form-of-proceeding rules of decision from 1789 state law to contemporary state law.

2. Revised Statutes

"In 1874, Congress approved and made positive law the Revised Statutes of 1874, which reorganized and categorized all statutes that had been enacted before December 1, 1873."[170] The Revised Statutes made several changes to Section 1983, but they were largely minor.[171]

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166 § 34, 1 Stat. at 92; *see also* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 66–67 (1938). To be sure, one could argue that, for state-law rules of decision embedded in and inseparable from the forms and modes of proceeding, the Conformity Act—being the more specific and later in time—would control over the Rules of Decision Act. *Compare* § 5, 17 Stat. 196, *with* § 1652, 62 Stat. 869. But the presumption against implied repeals would likely have counseled an interpretation of the Conformity Act that did not allow federal courts to ignore state-law rules of decision covered by the Rules of Decision Act. And even if the Rules of Decision Act were so limited, it would not justify refusal to apply state-law rules of decision *unrelated* to the forms or modes of proceeding.

167 *See* Hills & Co. v. Hoover, 220 U.S. 329, 335–38 (1911) (discussing whether actions of replevin and assumpsit under the Copyright Act could be maintained under state law and holding that the state form of an action was required but could be slightly modified because the Copyright Act allowed for only one action but explicitly allowed for both remedies); Taylor v. Brigham, 23 F. Cas. 735, 736 (C.C.S.D. Ga. 1876) (applying the rules of an action of trover under Georgia law because "the act of congress" was "binding").

168 Lindley, *supra* note 1, at 948.

169 *Id.*

170 *Id.* at 925; *see also* Act of June 20, 1874, ch. 333, 18 Stat. 113 ("providing for publication of the revised statutes and the laws of the United States").

171 The Revised Statutes changed the target from "any person" to "every person," limited the protections to "citizen[s] of the United States" and those within the state's jurisdiction, excluded state "law" from the list of relevant legal sources under which the defendant must have acted under color, Lindley, *supra* note 1, at 925 & n.226, and made other

Four of those changes are potentially relevant to the legal effect of Section 1983, but none alter it. First, the jurisdictional grant was moved to a centralized location, granting federal jurisdiction for all cases arising under the civil rights provisions enacted during Reconstruction.[172] Second, the reference to the Civil Rights Act of 1866 was removed in favor of a general provision specifying the actions to which it applied, which included Section 1983.[173] Third, the revisor added "and laws" after "the Constitution" such that the rights referenced included federal statutory rights.[174] Fourth, the phrase "any such" state law "notwithstanding" was removed.[175] None of these changes affected the basic operation of Section 1983 litigation as originally understood.

Professor Alexander Reinert has argued that, by removing the clarification that state law cannot justify the unlawful act, the fourth change obfuscates the original legal effect of Section 1983, which was to eliminate state-law obstacles to liability such as official immunities.[176] Elsewhere, I have explained why Reinert's interpretation is unpersuasive.[177] In short, the notwithstanding clause is a duplicative clause that reemphasizes that the same law under color of which the state officer acts cannot justify the action or prevent liability from attaching.[178] Because the notwithstanding clause did not do any independent work, its removal in the Revised Statutes did not affect Section 1983's legal effect going forward.[179]

grammatical changes. *Compare* Ku Klux Klan Act, ch. 22, § 1, 17 Stat. 13, 13 (1871), *with* 24 Rev. Stat. § 1979 (1874).

172 *Compare* § 1, 17 Stat. at 13, *with* 23 Rev. Stat. §§ 563(11)–(12), 629(16).

173 *Compare* § 1, 17 Stat. at 13, *with* 23 Rev. Stat. § 722.

174 *Compare* § 1, 17 Stat. at 13, *with* 24 Rev. Stat. § 1979.

175 *Compare id.*, *with* 24 Rev. Stat. § 1979.

176 *See* Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*, 111 CALIF. L. REV. 201, 234–41 (2023); *see also, e.g.*, Price v. Montgomery County, 144 S. Ct. 2499, 2500 n.2 (2024) (mem.) (Sotomayor, J., statement respecting denial of certiorari); Rogers v. Jarrett, 63 F.4th 971, 980 (5th Cir. 2023) (Willett, J., concurring); Green v. Thomas, 734 F. Supp. 3d 532, 561–62 (S.D. Miss. 2024), *aff'd in part, rev'd in part* 129 F.4th 877 (5th Cir. 2025); Villarreal v. City of Laredo, 94 F.4th 374, 408 n.14 (5th Cir. 2024) (en banc) (Willett, J., dissenting), *vacated sub nom.*, Villareal v. Alaniz 145 S. Ct. 368 (2024) (mem.); Hollamon v. County of Wright, No. 22-cv-2246, 2024 WL 3653092, at *19 n.26 (D. Minn. Aug. 5, 2024); Patrick Jaicomo & Anya Bidwell, *Recalibrating Qualified Immunity: How* Tanzin v. Tanvir*,* Taylor v. Riojas*, and* McCoy v. Alamu *Signal the Supreme Court's Discomfort with the Doctrine of Qualified Immunity*, 112 J. CRIM. L. & CRIMINOLOGY 105, 122 n.118 (2022); Patrick Jaicomo & Anya Bidwell, *Unqualified Immunity and the Betrayal of* Butz v. Economou*: How the Supreme Court Quietly Granted Federal Officials Absolute Immunity for Constitutional Violations*, 126 DICK. L. REV. 719, 735 n.87 (2022).

177 *See* Lindley, *supra* note 1, at 926.

178 *See id.*

179 Patrick Jaicomo and Daniel Nelson have thoughtfully responded to this argument, but their response ultimately supports the conclusion that the notwithstanding clause does no independent work and that the core dispute is about the meaning of the operative

An objector might argue that the reviser's inclusion of the rights secured by "laws" of the United States in addition to those secured by the Constitution rendered Section 1983 an awkward fit with the state-law focused interpretation I have advanced.[180] But that objection makes no ground in light of the legal context of the 1870s. The Process Act of 1792 and the Conformity Act of 1872 both applied with equal force to claims in federal court that arose under federal statute. For example, early federal statutes—such as the Patent and Copyright Acts of 1790[181]—established rights by federal statute, yet plaintiffs were nonetheless required to use state-law forms of action, which made state-law defenses available to defendants.[182] And in the Ku Klux Klan Act of 1871 itself, Congress established a federal right to have bystanders make reasonable efforts to prevent mob violence.[183] But notwithstanding the federal statutory source of the right, victims of mob violence still had to bring a state-law form of action, subject to non-preempted state law.[184] In fact, Congress specifically preempted some state-law rules—primarily to allow survivors of killed victims to maintain the action—because congressmen were worried that state law would not have been conducive to the purposes of that section.[185] Congress, by contrast, provided no special preempting rules for Section 1983, so the default rule (reliance on state law and state-law causes of action) would have applied.

provision of Section 1983. Jaicomo and Nelson concede that the notwithstanding clause does not do anything extra; rather it merely reinforces the preemption of state law under the Supremacy Clause. *See* Patrick Jaicomo & Daniel Nelson, *Section 1983 (Still) Displaces Qualified Immunity*, 49 HARV. J.L. & PUB. POL'Y 151, 188, 216 (2026). That is, the question is whether other aspects of Section 1983 preempt, accommodate, or incorporate state law. And on this front, Jaicomo and Nelson do not even address the Process Act's requirement that federal courts use state-law causes of action, the host of other statutes that uncontroversially adopted the same approach, or Senator Thurman's unrebutted statement in the debates. On the interpretation of the qualifier "such," Jaicomo and Nelson ultimately assert that the inclusion of "such" was likely the result of sloppy draftsmanship. *Id.* at 188 n.195 (quoting § 1, 17 Stat. at 13). That explanation facts grammatical and textual difficulties as "such" does necessary work in the Notwithstanding Clause, § 1, 17 Stat. at 13. In any event, the sloppiness hypothesis is unnecessary because no matter one's interpretation of "such," the evidence is decidedly in favor of the statute having incorporated the Process Act rather than impliedly repealing it, even setting aside the strong presumption against implied repeals.

180 24 Rev. Stat. § 1979.

181 *E.g.*, Patent Act of 1790, ch. 7, 1 Stat. 109; Copyright Act of 1790, ch. 15, 1 Stat. 124.

182 *See* Lindley, *supra* note 1, at 920 & n.187.

183 *See* § 6, 17 Stat. at 15; Lindley, *supra* note 1, at 919–20.

184 *See* Lindley, *supra* note 1, at 919–20.

185 *See id.* at 939–40 (citing the legislative debates).

3. General Federal Question Jurisdiction

One of the biggest accomplishments of Section 1983 was granting federal courts jurisdiction over cases involving misconduct by state officials. Prior to Section 1983, there was no jurisdictional hook for these cases. As an initial matter, under the well-pleaded complaint rule required by the contemporary federal-question-jurisdiction statute,[186] there would have been no federal question. The constitutional question—whether the defendant could, consistent with the Constitution, claim an official-authorization defense—would not have arisen until the defendant raised the defense. But even assuming that problem away, there was no statutory general federal question jurisdiction, which means that even a well-pled federal question was not enough to get into federal court.

Section 1983 removed both obstacles. *First*, it created a federal question. Unlike the Alien Tort Statute, which merely stated that jurisdiction would extend to a subset of cases involving torts against aliens,[187] Section 1983 states that defendants "shall be liable" for depriving individuals of rights secured by the Constitution.[188] Therefore, in every Section 1983 action, a plaintiff must establish that she had her rights deprived as stated in Section 1983 and as secured by the Constitution. This requirement created federal-question jurisdiction in every case arising under Section 1983 because the substantive right underlying whatever cause of action was invoked involved a claim of right under Section 1983 and therefore presented a federal question.[189]

Opponents of Section 1983's enactment in 1871 argued that Section 1983 extended the federal judicial power beyond the jurisdictional limits of Article III.[190] To a modern ear, such a complaint sounds ludicrous: *For one thing, of course there is a federal question—it is a federal cause of action. And second, the whole issue in a Section 1983 case concerns an alleged constitutional violation, which is certainly a federal question.* But it was not so simple in 1871, which might explain why the complaint was made so often.[191] For one, Section 1983 did not create a federal cause of action, or any cause of action at all. Rather, it required plaintiffs to identify a state-law cause of action. For another, "constitutional rights"—the phrase itself creates a misimpression—were not seen as

186 *See* Louisville & Nash. R.R. v. Mottley, 211 U.S. 149, 153–54 (1908); 28 U.S.C. § 1331 (2018); *see also* Bracken v. Matgouranis, 296 F.3d 160, 163–64 (3d Cir. 2002).

187 28 U.S.C. § 1350 (2018).

188 42 U.S.C. § 1983 (2018).

189 *See* Bellia, *supra* note 100, at 800–17.

190 *See, e.g.*, CONG. GLOBE, 42d Cong., 1st Sess. app. at 268 (1871) (statement of Rep. Joseph Humphrey Sloss).

191 I am indebted to John Harrison for helping me develop this point.

imposing affirmative duties on government actors. Instead, they worked as nullification rules, nullifying attempts to justify actions that, if indeed authorized by the government, would run afoul of the relevant constitutional provision.[192] So Section 1983 detractors were correct that something more than a mere jurisdictional transfer was needed to create a federal question sufficient for federal question jurisdiction in federal district court. But they were incorrect that Section 1983 was lacking this something more. Section 1983 codified the rights secured by the Constitution such that when a plaintiff would have brought an action (a writ of trespass, for example), the underlying substantive right alleged to have been violated would have been a federal right.[193]

Second, Section 1983 originally included a jurisdictional provision extending jurisdiction exclusively to Section 1983 proceedings.[194] Three years later that jurisdictional grant was moved to a general provision covering Reconstruction-era rights-protecting statutes.[195] A year after that, and four years after Section 1983's enactment, Congress enacted general federal-question jurisdiction with a $500 amount-in-controversy requirement.[196] But Section 1983, and its jurisdictional grant, was still important. The jurisdictional provision covered cases claiming less than $500.[197] And, of course, Section 1983 itself still supplied the necessary federal question.

4. Centralized Federal Procedure

The biggest relevant legal change since 1871 was Congress's enactment of the Rules Enabling Act in 1934.[198] The Act was "designed to federalize questions of civil procedure in federal court"—including

192 *See* West, *supra* note 85, at 869–72.

193 For this reason, my interpretation is slightly distinct from the one considered, and rejected, by Justice Harlan in concurrence in *Monroe v. Pape*, 365 U.S. 167, 195–97 (1961) (Harlan, J., concurring), *overruled on other grounds by* Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978). Like the position rejected by Justice Harlan, a state-law interpretation would in effect merely transfer jurisdiction from state to federal court, but Justice Harlan did not consider the jurisdiction transfer separate from the dispute in *Monroe* about "color of" state law. *See id.* at 193–98 (associating the jurisdiction-transferring approach with Justice Frankfurter's view, *id.* at 193–94).

194 *See* Ku Klux Klan Act, ch. 22, § 1, 17 Stat. 13, 13 (1871).

195 23 Rev. Stat. § 722 (1874); *see also* Lindley, *supra* note 1, at 925 n.226.

196 Removal of Causes Act, ch. 137, § 1, 18 Stat. 470, 470 (1875).

197 This feature of Section 1983 no longer does work today, after Congress removed the amount-in-controversy requirement in 1980. *See* Federal Question Jurisdictional Amendments Act of 1980, Pub. L. 96–486, § 2(a), 94 Stat. 2369, 2369 (codified at 28 U.S.C. § 1331 (2018)).

198 Rules Enabling Act of 1934, ch. 651, § 1, 48 Stat. 1064, 1064 (codified as amended in 28 U.S.C. § 2072 (2018)).

some questions that were traditionally dictated by the form of proceeding.[199] It gave the Supreme Court the "power to prescribe, by general rules, . . . the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law."[200] That power included the power to "unite" its rules for cases at equity with the new rules "to secure *one form of civil action* and procedure for both."[201] The Supreme Court promulgated new rules under that authority in 1938.[202] Those rules specified that there was only one form of action in federal court—called the civil action.[203] These federal rules answered many of the same questions that otherwise would have been answered by the traditional forms of proceeding.[204] That same year, the Supreme Court decided in *Erie* that in diversity cases, the Rules of Decision Act, the Rules Enabling Act, and Article III of the Constitution all directed federal courts to apply state law in matters of substance (unlike matters of procedure, which were governed by federal law).[205]

But Congress limited the power it gave the Supreme Court by specifying that any new rules could not "abridge, enlarge, [or] modify the substantive rights of any litigant."[206] That prohibition applies to the "substantive rights of *any* litigant," not just litigants in diversity actions.[207] So, under background law and the Rules of Decision Act, federal courts would still have had to apply state rules of decision—whether or not they traditionally were dictated by the forms of action—absent contrary federal law.[208] That is, abolishing the forms of action in federal court did not grant federal courts the power to ignore state substantive law, even when that substantive law was or had been

199 Lindley, *supra* note 1, at 948.

200 § 1, 48 Stat. at 1064.

201 *Id.* § 2, 48 Stat. at 1064 (emphasis added).

202 *See* Schweppe, *supra* note 165, at 163.

203 *See* FED. R. CIV. P. 2.

204 *See* Lindley, *supra* note 1, at 948 n.424. *Compare* FED. R. CIV. P. 17–21, 23 (governing joinder of parties and claims and the proper parties to actions), *with* 1 ROSE, *supra* note 162, § 902[a], at 842–44 (discussing parties to action and joinder of parties were derived from state law under the Conformity Act), *and id.* § 903[a], at 846 (noting that state law governed "what causes of action may be joined in one suit").

205 *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78–80 (1938). A subsequent line of decisions has fleshed out what matters are substantive as opposed to procedural. *See* Vital Pharms., Inc. v. Alfieri, 23 F.4th 1282, 1294–96 (11th Cir. 2022) (Pryor, C.J., concurring) (detailing this history).

206 Rules Enabling Act of 1934, ch. 651, § 1, 48 Stat. 1064, 1064 (codified as amended in 28 U.S.C. § 2072 (2018)).

207 *Id.* (emphasis added).

208 § 34, 1 Stat. at 92; *see also Erie*, 304 U.S. at 66–67.

embedded in the form of action.[209] So, for example, post-Rules Enabling Act, all questions of causation, damages, and survivorship (traditionally form-of-action rules) would have still been governed by state law absent an applicable federal statute.

So, too, did federal courts look to state law for causes of action post-Rules Enabling Act. As Bellia and Clark have explained, pre-1938, federal courts used state causes of action as a default under the Judiciary, Process, or Conformity Acts; post-1938 they "applied such causes of action as substantive law under *Erie* and the Rules of Decision Act."[210] That is,

> [W]hen state courts came to treat substantive rather than procedural law as the source of causes of action in common law cases, federal courts relied on state law to determine the causes of action available for the violation of federal statutes that themselves did not create a cause of action.[211]

So, "[a]bsent contrary federal law" creating a cause of action, "federal courts [have always] looked to state law to define the causes of action they adjudicated, absent more-specific direction from Congress."[212]

Recall, though, that the form of action was part procedural, part substantive. Some procedural form-of-action rules (think joinder of parties and claims) switched from being governed primarily by state law (under the Process Act and later the Conformity Act) to federal law (under the Rules Enabling Act and the Federal Rules of Civil Procedure).[213] But both form-of-action and non-form-of-action substantive rules were and continued to be governed by state law absent federal law.[214]

It is possible that the initial rules committee, *Erie*, and *Erie*'s progeny misinterpreted "substantive rights" and that Congress did not intend to limit the Supreme Court's ability to remove remedial hurdles

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209 *See* G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 9–10 (1980) (explaining that the substance of tort law tracked the requirements of the form of action).

210 Bellia & Clark, *supra* note 107, at 659; *see also* Lindley, *supra* note 1, at 948.

211 Anthony J. Bellia Jr., *Justice Scalia, Implied Rights of Action, and Historical Practice*, 92 NOTRE DAME L. REV. 2077, 2099 (2017).

212 Bellia & Clark, *supra* note 107, at 658–59; *cf.* W.L. Crawford, *Actions*, *in* 1 THE ENCYCLOPEDIA OF PLEADING AND PRACTICE: UNDER THE CODES AND PRACTICE ACTS, AT COMMON LAW, IN EQUITY AND IN CRIMINAL CASES 108, 145 (William M. McKinney ed., Northport, Long Island, N.Y., Edward Thompson Co. 1895) (explaining that the implementation of code pleading, the predecessor of the Rules of Civil Procedure, "create[d] no new causes of action" and that "[w]hatever was a cause of action at law, or a ground for relief in equity, before the Codes, is now remediable in a civil action; and whatever was remediless before is now remediless under the Codes").

213 *See* Bellia & Clark, *supra* note 107, at 658–59.

214 *See id.*

by adopting a broad view of substance.[215] Instead, perhaps, Congress meant to limit the Supreme Court's authority to affect the underlying substantive rights as traditionally understood—separate from the availability of a remedy—which would have advanced the congressional goal of simplifying procedure and pleading standards by forgoing anything that looked like traditional pleading. On this interpretation, the Rules Enabling Act (and Rule 2) would raise serious constitutional questions in allowing the Supreme Court to alter the rights, obligations, and liabilities of private parties, including by abridging congressional statutes.[216] But by 1934 the conception of a cause of action and of rights generally had changed,[217] so there is good reason to think that Congress would have used the newer and broader, rather than older and narrower, sense of "substantive rights."[218] If so, to the extent Congress's goal was to completely abolish the distinction between properly pleading a cause of action and adequately alleging the deprivation of a judicially enforceable right, perhaps Congress failed to achieve its desired end. In all events, the Rules Enabling Act and Federal Rules of Civil Procedure did not supplant the general rule that a plaintiff must have a substantive cause of action. Thus, the question is whether Section 1983 provides one, and as an original matter the answer is no.

Returning now to Thompson's claim against the New York City officers, "the Rules Enabling Act and the Federal Rules of Civil Procedure would not have affected the ultimate source of law for causation, damages, survivorship, or a cause of action: contemporary New York law."[219] And with respect to his cause of action, he would have used those provided by contemporary New York law.[220] Likewise, the Monroes would have looked to contemporary Illinois law for these substantive rules.

The harder question is whether, post-Rules Enabling Act, Section 1983 could have been construed to have created an implied private right of action. On the one hand, it is difficult to imagine that Congress implied a stand-alone federal cause of action when enacting Section 1983 against the backdrop of a federal statute *requiring* courts to look to state law for causes of action. On the other hand, under current implied-cause-of-action doctrine, Section 1983 does appear to create a personal right enforcement of which is not provided for by public

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215 Rules Enabling Act of 1934, ch. 651, § 1, 48 Stat. 1064, 1064 (codified as amended in 28 U.S.C. § 2072 (2018)).

216 *Cf. id.* ("[A]ll laws in conflict [with promulgated rules] shall be of no further force or effect.").

217 *See* Bellia, *supra* note 100, at 797–98.

218 § 1, 48 Stat. at 1064.

219 Lindley, *supra* note 1, at 948–49; *see also infra* Section III.A.

220 *See infra* Section III.A.

or administrative means. I discuss this question in more detail below,[221] but in short: It is doubtful that Section 1983 created an implied cause of action. And even if it did, and post-Rules Enabling Act federal courts could recognize such a cause of action, the source of substantive rules governing that action would not have changed—they would have come from state law absent preemptory federal law.

B. Potential Legitimation

Another potential obstacle to carrying forward Section 1983's original meaning to today's legal world is legitimation. Perhaps the modern, anachronistic approach has been legitimated, which would mean that a return to the original understanding would be unjustified. That legitimation might manifest in one of two ways: First, perhaps congressional action—by amending Section 1983 over the last 150 years but keeping its operative language—implicitly adopted or ratified the modern approach to Section 1983. Second, maybe stare decisis prevents judges from returning to the original meaning. I address each in turn, concluding that neither justify maintaining the current ahistorical path. The original understanding—not its modern misinterpretation—remains the law today.

1. Amendments

Since the amendments to the language of Section 1983 made by the Revised Statutes in 1874, "Congress has amended section 1983 only twice (in 1979 and 1996), neither of which altered the operative text."[222] It first amended Section 1983 and its corresponding jurisdictional provision such that the District of Columbia would be considered a state for those limited purposes.[223] Congress then added what is now the final phrase of Section 1983: "[E]xcept that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable."[224] Neither of these amendments speak to the scope of Section 1983 or the source of the cause of action and substantive rules.

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221 *See infra* Section III.A.

222 Lindley, *supra* note 1, at 949. When *Monroe* was decided in 1961, Justice Frankfurter noted that Section 1983 "ha[d] not been touched by Congress in three quarters of a century" since the Revised Statutes in 1874. Monroe v. Pape, 365 U.S. 167, 220 n.30 (1961) (Frankfurter, J., dissenting), *overruled on other grounds by* Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978).

223 *See* Act of Dec. 29, 1979, Pub. L. No. 96-170, 93 Stat. 1284.

224 Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, § 309(c), 110 Stat. 3847, 3853.

As for legitimation, one could argue that the amendments changed the meaning of Section 1983 (in which case recourse to its 1871 meaning would be misguided altogether); alternatively, one could argue that this evidence of congressional attention to Section 1983 strengthens stare decisis as applied here.[225] I address the stare decisis form of the objection below. With respect to the possible change in statutory meaning, it is unlikely that these minor amendments did so.[226] For one, the traditional "old-soil canon" counsels that when "a word or phrase . . . is 'obviously transplanted from another legal source . . . [it] brings the old soil with it.'"[227] To be sure, the canon does not apply squarely here, as the operative language was not transplanted at all but rather remained untouched. But that difference strengthens the underlying principle. Absent contrary evidence, the original meaning of Section 1983's operative language—under which contemporary state law provides the rules of the game—would carry through these minor amendments.[228] As applied here, this conclusion comports with the intuitive idea that amending one part of a provision does not change the meaning of the parts that were not amended.[229]

An objector might respond, *The old-soil canon, whatever its worth, is at the very least defeasible, and here, the underlying assumption that Congress intends to carry forward the original meaning is implausible.*[230] In particular, Congress's 1996 amendment concerning the propriety of enjoining state judges appears to be based on a modern understanding of what Section 1983 does—create a cause of action against state judicial

225 *See* CALEB NELSON, STATUTORY INTERPRETATION 454 (2011) (addressing this argument as relevant to the precedential force of an earlier interpretation).

226 This situation is not like the traditional reenactment canon in which case a newly enacted statute takes on new meaning because it was enacted in a context that includes the earlier judicial interpretation. *See id.* at 478–80. Congress never reenacted Section 1983 after the Revised Statutes of 1874 which were expressly designed to be a reorganization and not effectuate a change in meaning. In fact, even if Congress had reenacted Section 1983 to make the alterations it made here, it might be more like the scenario that Nelson has discussed, in which Congress wants to merely amend a provision but effectuates that amendment by repealing and reenacting the entire statute with the changes. *Id.* at 480–81. The better analytical framework, in these circumstances, is stare decisis's consideration of congressional acquiescence.

227 CSX Corp. v. United States, 18 F.4th 672, 681 (11th Cir. 2021) (quoting Hall v. Hall, 138 S. Ct. 1118, 1128 (2018)).

228 *See* Lindley, *supra* note 1, at 949.

229 *Cf.* NELSON, *supra* note 225, at 481–82, 481 n.14 (describing the idea that reenactment of a statute represents "the likely intent of members of the reenacting Congress" as "dubious," *id.* at 481, and saying that in some situations it might even be "silly," *id.* at 481 n.14).

230 *See* Lindley, *supra* note 1, at 949.

officers.[231] But the old-soil canon is more about identifying and tracing original meaning rather than ensuring that every Congress that legislated on a conceptually similar issue or on other parts of the same statutory provision shared the same understanding or intent.[232] And, again, the amendments to Section 1983 did not transplant old text into a new location, but rather amended one part of a section while leaving the other parts intact. So the understanding of the 1996 Congress that amended the statute is even less relevant here. Moreover, although the amendment providing for judicial injunctions might make more sense in a world in which courts are broadly authorized to find judges "liable," it nonetheless does meaningful work under a state-law-focused approach because federal courts would otherwise look to general principles of equity for rules concerning injunctions.[233]

Neither does the reenactment canon apply. For one, both amendments simply directed that text be added to the preexisting statute, rather than reenacting the entire provision with the added language.[234] But even reconceptualizing the amendments as reenactments, these amendments did not change Section 1983's meaning. Micah Quigley has recently advanced an objective, textualist version of the reenactment canon: "On this rationale, the existing interpretation must be well-established because only then would an informed reader understand the reenacted text as a ratification of that interpretation."[235] But even on this version of the reenactment canon, it is unlikely that Congress's amendments to Section 1983 changed Section 1983's meaning. An "informed reader" is unlikely to have thought that Congress, by merely adding additional language—limiting injunctions against judicial officers in one instance and including the District of Columbia in another—was ratifying judicial interpretations of Section 1983 as opposed to altering an aspect of Section 1983 litigation without opining

231 Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, § 309(b)–(c), 110 Stat. 3847; *cf.* NELSON, *supra* note 224, at 482–83 (addressing a similar argument in the context of the reenactment canon). *But see* Micah S. Quigley, *What Is Habeas?*, 173 U. PA. L. REV. 453, 530 (2025) ("[T]he statutory text went through bicameralism and presentment and became law; Congress's assumptions did not. Congress could have enacted text to give its assumptions legal force . . . . It was instead silent on the issue, and congressional silence is not legislation.").

232 *Cf.* B&B Hardware, Inc. v. Hargis Indus., Inc., 575 U.S. 138, 148 (2015); *see also* Anita S. Krishnakumar, *The Common Law as Statutory Backdrop*, 136 HARV. L. REV. 608, 615–16 (2022).

233 42 U.S.C. § 1983; *see also* Lindley, *supra* note 1, at 920.

234 *See* Act of Dec. 29, 1979, Pub. L. No. 96-170, 93 Stat., 110 Stat. at 3853; *see also* Quigley, *supra* note 231, at 529 (explaining the requirement that the reenactment "canon applies only when Congress has in fact reenacted the operative text").

235 Quigley, *supra* note 231, at 521.

on every aspect of its modern doctrine.[236] Otherwise, Congress's amendments would have ratified the Court's qualified immunity doctrine as well, for example, and to my knowledge no one has made the argument that these amendments affirmatively imposed the modern version of qualified immunity. Absent any "statute-specific evidence"[237] that Congress gave any special attention to Section 1983 beyond the subject of the narrow amendments, it would be "silly" for a reasonable, educated reader to "presume that the reenacting Congress had the intention of ratifying" then-current judicial interpretation.[238]

In sum, neither congressional amendment (in 1979 and 1996) altered the meaning or legal effect of Section 1983. This conclusion, though, does not mean that the Court would be justified in returning to the original understanding of Section 1983. But absent a doctrine that "shelters a wrong decision from overruling,"[239] judges should return to the original understanding and legal effect of Section 1983.

2. Stare Decisis

One such sheltering doctrine is stare decisis. The doctrine of stare decisis counsels judges to adopt an earlier court decision as if it were law so as not to disrupt those previous decisions. This doctrine is said to promote legal stability, faith in the judicial system, and public reliance on Supreme Court decisions.[240] As might be apparent, *Monroe v. Pape* and the numerous Supreme Court and lower-court decisions applying a modern—and decidedly non-original—understanding of Section 1983 could be just the kind of decisions entitled to deference under stare decisis.

The predominant modern approach to stare decisis broadly considers four factors: how erroneous the precedent is, whether the precedent implements a workable standard, whether the precedent has been undermined by subsequent legal developments, and the reliance interests, if any, the precedent has endangered.[241] None of these four

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236 *Id.* at 528; *see also* NELSON, *supra* note 225, at 481–82 (discussing various critiques of the contrary assumption); *cf.* Quigley, *supra* note 231, at 528–30.

237 NELSON, *supra* note 225, at 483.

238 *Id.* at 481 n.14.

239 Quigley, *supra* note 231, at 521.

240 *See* Randy J. Kozel, *Stare Decisis as Judicial Doctrine*, 67 WASH. & LEE L. REV. 411, 412–413 (2010).

241 *See* Kimble v. Marvel Ent., LLC, 576 U.S. 446, 455–60 (2015) (addressing statutory stare decisis by examining the correctness of the precedent, its workability, whether it had been undermined, and the reliance interests it engendered); *accord* Kisor v. Wilkie, 139 S. Ct. 2400, 2422–23 (2019); *see also* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2270 (2024) (similar but de-prioritizing whether the precedent had been undermined).

factors counsels in favor of retaining *Monroe v. Pape* or any other decision adopting the modern approach to Section 1983.

Even if one disagrees that stare decisis is overcome here, there are reasons to believe that stare decisis might not apply, at least not fully. First, the Court has repeatedly counseled that Section 1983 is to be interpreted according to its original intent[242] (and then, of course, proceeded to repeatedly interpret and apply the statute in a manner inconsistent with its original understanding). This feature of the Court's decisions raises the serious and challenging question whether interpretive methodologies are themselves entitled to stare decisis weight.[243] The answer might depend on the nature of interpretive rules: If such rules are obligatory law, then a court ostensibly could overrule such a rule, or at least recognize that such a rule is no longer a part of the law.[244] Conversely, if interpretive methodologies are merely permissive considerations in arriving at what the judge thinks is the best answer, then it is unlikely that such a permissive rule is of the kind that can be overruled, as opposed to judges merely choosing to de-prioritize it in particular cases.[245] In any event, the Supreme Court has often treated interpretive rules as though they are themselves independently binding, most recently treating the interpretive approach known as the *Chevron* doctrine as precedent (and overruling it) in *Loper Bright*,[246] so it is valuable to examine how one might resolve apparently conflicting lines of precedent.

Second, stare decisis might not apply in the same way to open questions of law, even when those questions are related to questions that have been answered and which are entitled to stare decisis weight.

242 *See, e.g.*, Malley v. Briggs, 475 U.S. 335, 342 (1986) ("We reemphasize that our role is to interpret the intent of Congress in enacting § 1983 . . . ."); Burns v. Reed, 500 U.S. 478, 493 (1991) ("[W]e look to the common law and other history for guidance . . . to discern Congress' likely intent in enacting § 1983."); Buckley v. Fitzsimmons, 509 U.S. 259, 268 (1993)).

243 *See* Tara Leigh Grove, *Is Textualism at War with Statutory Precedent?*, 102 TEX. L. REV. 639, 648 n.34 (2024) (discussing the current debate about "methodological precedent"). *See generally* Tara Leigh Grove, *The Power to Impose Method*, 136 YALE L.J. (forthcoming 2026).

244 *See* William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1108–09 (2017).

245 *See* Richard M. Re, *Permissive Interpretation*, 171 U. PA. L. REV. 1651, 1654 (2023).

246 *See Loper Bright*, 144 S. Ct. at 2270–73; *see also id.* at 2306–11 (Kagan, J., dissenting). Of course, *Loper Bright* was formally about whether the Administrative Procedure Act *foreclosed* a methodological approach, as opposed to a decision about methodological approaches in the abstract. *See id.* at 2264–65 (majority opinion). But in *Kisor v. Wilkie*—a decision concerning analogous deference to an agency's interpretation of its own regulations—the Court afforded that interpretive principle stare decisis respect. *See Kisor*, 139 S. Ct. at 2422. For an argument that the Court and lower courts have given interpretive rules precedential weight, see Aaron-Andrew P. Bruhl, *Eager to Follow: Methodological Precedent in Statutory Interpretation*, 99 N.C. L. REV. 101, 126–34 (2020).

On one view, stare decisis would not apply at all, as it is limited to promoting respect for holdings on certain legal questions necessary to resolve cases. Thus, it would make no more sense to say that a particular holding in a Section 1983 case (presumably reached using the modern approach) is binding as to a new and open question than to say that a holding concerning the Seventh Amendment's Jury Trial Clause requires a certain rule under the Free Speech Clause.[247] And even on a broader view, maybe open questions should be governed by the overarching methodological precedent (that Section 1983 is to be interpreted according to its original meaning) even if specific, already-decided questions should not be reopened.

Third, Justice Thomas has argued that stare decisis should not apply—or apply in a relatively weak form—to written law, including statutes.[248] On his theory, a judge's constitutional obligation is to apply the law as it stands. And stare decisis does not change the written law but rather impermissibly directs judges to defer to a previous judge's legal determination.[249] So, Justice Thomas believes, the doctrine cannot be reconciled with the judicial role required by the Constitution.[250] This anti-precedent view has the most purchase when one ties the minimal,

247 Jud Campbell has demonstrated that at the Founding, it was understood that the right to a jury was one of the principal defenses against infringements on the right to free speech. *See* Jud Campbell, *The Invention of First Amendment Federalism*, 97 TEX. L. REV. 517, 531–34 (2019). And the Supreme Court has held that the Seventh Amendment's command is dictated by reference to whether such a case would have been sent to a jury at the Founding. *See* SEC v. Jarkesy, 144 S. Ct. 2117, 2129–30 (2024). But this latter precedent does not imply that stare decisis requires, as a matter of Free Speech Clause doctrine, a certain role for juries in cases implicating free speech, or that the presence of juries might cure potential free speech problems.

248 *See* Allen v. Milligan, 143 S. Ct. 1487, 1521 n.4 (2023) (Thomas, J., dissenting). Justice Gorsuch's position on statutory stare decisis appears to approximate, even if not match, Justice Thomas's. *See Loper Bright*, 144 S. Ct. at 2279–81 (Gorsuch, J., concurring). Although Justice Gorsuch has shown willingness to apply a robust version of stare decisis in some circumstances, *see, e.g.*, Ramos v. Louisiana, 140 S. Ct. 1390, 1404–1408 (2020) (opinion of Gorsuch, J.), his *Loper Bright* concurrence and the *Allen v. Milligan* dissenting opinion he joined suggest heavily that modern stare decisis should not protect a demonstrably erroneous precedent. *See Loper Bright*, 144 S. Ct. at 2279–80 (Gorsuch, J., concurring) (arguing that precedent "provides this Court no authority in future cases to depart from what the Constitution or laws of the United States ordain," and explaining that other stare decisis factors do not warrant adhering to precedent on their own but rather "may suggest a past decision is right in ways not immediately obvious to the individual judge"); *Allen*, 143 S. Ct. at 1521 n.4 (Thomas, J., dissenting) ("I can perceive no conceptual 'basis for applying a heightened version of *stare decisis* to statutory-interpretation decisions'; rather, 'our judicial duty is to apply the law to the facts of the case, regardless of how easy it is for the law to change.'" (quoting Gamble v. United States, 139 S. Ct. 1960, 1987 (2019) (Thomas, J., concurring))).

249 *See* Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23, 27–28 (1994).

250 *See Allen*, 143 S. Ct. at 1521 n.4 (Thomas, J., dissenting).

historical version of stare decisis at the Founding to constitutional interpretation.[251] There, the argument might go, stare decisis is especially unjustified because the Constitution was ratified against a backdrop that neutral arbiters would interpret it without the distorting effect of a robust doctrine of stare decisis.[252] However, there is a larger leap to explain why stare decisis could not apply to statutes, especially if the statute in question was enacted during a time in which judges widely accepted a robust version of stare decisis.[253]

I first examine whether statutory stare decisis applies and how. I then explain why, even it does in full force, it is no barrier to returning to the original understanding of Section 1983.

a. Conflicting Stare Decisis Considerations

Since Section 1983's revitalization in 1961, the Supreme Court has repeatedly counseled that Section 1983 is to be interpreted and applied consistent with the original understanding of the statute in 1871.[254] In justifying qualified immunity, for example, the Court has explained that Section 1983 would not have originally been understood to have abrogated all the common law rules surrounding tort suits like those arising under Section 1983 suits—indeed that it would have been understood to have incorporated those rules.[255] This consistent interpretive approach has led others to criticize the Court's conclusion that the 1871 Congress did in fact intend to leave common law immunities in place,[256] and whether, even if it did, those common law immunities looked anything like the immunities available to Section 1983 defendants today.[257]

251 *Gamble*, 139 S. Ct. at 1983 (Thomas, J., concurring); Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 14–21 (2001); Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 662–66 (1999); Commonwealth v. Posey, 8 Va. (4 Call) 109, 116 (1787) (opinion of Tazewell, J.) ("[A]lthough I venerate precedents, I venerate the written law more.").

252 *See* Stephen E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813, 1865 (2012).

253 Of course, it is unlikely that a robust version of stare decisis existed in 1871. But the point is that the 1871 version of stare decisis, rather than the non-deferential form that might have prevailed at the Founding, would govern.

254 *See* Lindley, *supra* note 1, at 904–05 (collecting sources).

255 *See* Pierson v. Ray, 386 U.S. 547, 554 (1967). The initial statement to this effect was in *Monroe* itself: "Section [1983] should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." Monroe v. Pape, 365 U.S. 167, 187 (1961), *overruled on other grounds by* Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978).

256 *See generally* Reinert, *supra* note 176 (offering a critique and collecting sources).

257 *See, e.g.*, William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 55–61 (2018) [hereinafter Baude, *Is Qualified Immunity*]; Scott A. Keller, *Qualified and Absolute*

But if one is to interpret Section 1983 as it was understood in 1871, it would be a serious mistake to simply assume that it created a federal cause of action and largely supplanted state law. Instead, judges and scholars must immerse themselves in the legal world of 1871,[258] and someone so immersed would recognize that the Process Act dictated that the form of action—from which the cause of action arose—be found in 1789 state law.[259] Similarly, an informed reader would also understand that the mere legislation of a federal right—here, the right to be free from deprivations of the rights, privileges, and immunities secured by the Constitution—would not displace state law or provide a haven of federal law.[260] Instead, "[a]bsent specific federal statutory provisions that preempted state substantive law, that state law would have applied" even in a suit seeking redress for violation of a federal right.[261]

Even assuming the correctness of my arguments to this point, however, it is unclear what courts should do if stare decisis commands judges to keep decided questions decided. Sure, that command might apply to the conclusion that the original understanding of Section 1983 controls,[262] but surely it also applies—perhaps even with more force—to specific questions, such as the existence of qualified immunity and an express federal cause of action.[263]

Given the potential conflict, the Supreme Court[264] could plausibly take three different approaches. *First*, two conflicting precedents cancel each other out, in which case the Court need not give heed to either line of precedent as it is impossible to follow both. The Court

Immunity at Common Law, 73 STAN. L. REV. 1337, 1378 (2021); James E. Pfander, *Zones of Discretion at Common Law*, 116 NW. U. L. REV. ONLINE 148, 163–64 (2021); William Baude, *Is Quasi-Judicial Immunity Qualified Immunity?*, 74 STAN. L. REV. ONLINE 115, 116–18 (2022). Similar arguments have been made against the historical legitimacy of prosecutorial immunity. *See, e.g.*, Wearry v. Foster, 33 F.4th 260, 273 (5th Cir. 2022) (Ho, J., dubitante); Price v. Montgomery County, 144 S. Ct. 2499, 2499–501 (2024) (mem.) (Sotomayor, J., statement respecting denial of certiorari).

258 *Cf.* Bostock v. Clayton County, 140 S. Ct. 1731, 1738 (2020).

259 Process Act of 1792, ch. 36, §§ 1–2, 1 Stat. 275, 275–76; *see also* Lindley, *supra* note 1, at 909–12, 918–19.

260 Ku Klux Klan Act, ch. 22, § 1, 17 Stat. 13, 13 (1871); *see also* Lindley, *supra* note 1, at 920.

261 Lindley, *supra* note 1, at 920.

262 Grove, *supra* note 243, at 648 n.34; Kisor v. Wilkie, 139 S. Ct. 2400, 2425, 2444 (2019) (Gorsuch, J., concurring in judgment) (arguing that stare decisis does not apply to methodological precedent).

263 *See* Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 NOTRE DAME L. REV. 1853, 1856–63 (2018).

264 I focus here on the Supreme Court because it is highly unlikely that any lower court would be justified in sidestepping on-point Supreme Court precedent, even on the "conflicting-precedent" theories offered here. *See infra* note 291. As developed below, however, lower courts might be able to apply the historical understanding to open questions even without the Supreme Court moving first.

could choose to adhere to the original understanding, the case-specific answers as given by precedent, or a different approach that would bring more consistency and harmony, depending on the Court's preferred jurisprudential approach.

Doctrinally, this approach to conflicting lines of precedent might even fit into the "workability" or "undermined by subsequent decisions" prongs of the conventional stare decisis test.[265] The justification for bucking not just one but both lines of precedent would go something like this. Precedent that conflicts with other precedents is unworkable and is undermined by either specific applications on one flank or broader jurisprudential approaches on the other. After these two factors, the remaining factors are merely correctness and reliance interests.[266] Given the recent narrowing of viable reliance interests to traditional contract and property interests,[267] it seems unlikely that Section 1983 would have engendered much in the way of that kind of reliance.[268] So the question would boil down to the correct way to approach Section 1983 cases. As I have argued above, the state-law-focused interpretation I advance here is supported by any interpretive theory that relies on past textual meaning,[269] the original intent of the legislature,[270] or original legal effect.[271] However, a pragmatist, modern-meaning textualist, or advocate for moral readings might disregard the evidence of original understanding, even setting aside stare decisis.[272]

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265 *See supra* note 241 and accompanying text.

266 *See supra* note 241 and accompanying text.

267 *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2276–77 (2022). For more discussion on this narrower approach, see *infra* Section II.B.2.d.

268 One possibility might be indemnification and insurance agreements, which would have presumed a particular approach to liability under Section 1983. But these kinds of secondary reliance interests are easy to manufacture and so are poor candidates for cognizable reliance interests.

269 This would be true for a lay-public-meaning originalist or a legal-meaning originalist. *Compare* Lawrence B. Solum, *Semantic Originalism* (Ill. Pub. L. & Legal Theory Rsch. Papers Series, Paper No. 07-24, 2008), https://ssrn.com/abstract=1120244 [https://perma.cc/HRY4-PCNU], *with* John O. McGinnis & Michael B. Rappaport, *What Is Original Public Meaning?*, 76 ALA. L. REV. 223 (2024).

270 *See generally* Larry Alexander, *Originalism, the Why and the What*, 82 FORDHAM L. REV. 539 (2013).

271 *See generally* Baude & Sachs, *supra* note 244.

272 *E.g.*, STEPHEN BREYER, READING THE CONSTITUTION: WHY I CHOOSE PRAGMATISM, NOT TEXTUALISM (2024); Stephen Breyer, *Choosing Pragmatism Over Textualism*, N.Y. REV. BOOKS (May 23, 2024), https://www.nybooks.com/articles/2024/05/23/choosing-pragmatism-over-textualism-stephen-breyer/ [https://perma.cc/VD79-HANK]; Fred Schauer, *Unoriginal Textualism*, 90 GEO. WASH. L. REV. 825, 838–47 (2022); Ronald Dworkin, *The Moral Reading of the Constitution*, N.Y. REV. BOOKS (Mar. 21, 1996), https://www.nybooks.com/articles/1996/03/21/the-moral-reading-of-the-constitution/ [https://perma.cc/DPR7-ZWLA].

Second, perhaps the higher-level methodological precedent should prevail. Holding the methodology constant, when previously unknown or uncredited historical facts become apparent, a previous decision (even if more specific) based on incomplete or incorrect facts should not be entitled to any stare decisis weight.

This argument has been made with respect to constitutional decisions that are based on historical fact. For example, consider *Gamble v. United States*, a decision that declined to overrule the exception to the double jeopardy bar to second prosecutions, which allows separate sovereigns to prosecute the same person for the same conduct.[273] The majority declined to overturn the exception in part because it discounted consistent pre-ratification reliance on an English double-jeopardy decision.[274] The majority reasoned that, because the original report of the decision could not be found, the purported basis for the decision and the subsequent reliance on it was unreliable.[275] Researchers, however, have since discovered the original report, and that report is consistent with how pre-Founding-era scholars and jurists (and the *Gamble* dissent) characterized the decision.[276] The scholars who found the original report have called for reconsideration of the question presented in *Gamble* in light of their discovery.[277]

Despite this approach's superficial intuitive appeal (if the Court relied on a now-apparent erroneous historical conclusion, why should that decision bind?), the Supreme Court, to my knowledge, has never taken this approach to stare decisis, even when applying historical or objective methodologies such as originalism. To be sure, new arguments and evidence are relevant to the stare decisis weight to which a precedent is entitled through the first prong (correctness) and

273 *See* Gamble v. United States, 139 S. Ct. 1960, 1964 (2019).

274 *See id.* at 1969–74.

275 *See id.* at 1970–71. To be sure, even if the English decision were fabricated and all the pre-ratification lawyers were mistaken about its contents, the majority's rejection of the principle purportedly espoused in the decision would not follow. If an entire generation treats a principle as law based on a mistaken account of a judicial decision, it would likely form part of the common law or public understanding as much as if that principle had actually been espoused in a decision. Indeed, merely being espoused in a decision would be insufficient because such a decision would need to additionally form part of the common law or public understanding. *Cf.* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2153 (2022) (rejecting isolated gun regulations in favor of generally prevailing regulations).

276 *See* Ann Mumford & Peter Allridge, *The History of Double Jeopardy and Criminal Jurisdiction:* US v. Gamble *(2019) and* R. v. Hutchinson *(1677)*, 139 L.Q. REV. 390, 411 (2023); *Gamble*, 139 S. Ct. at 2000–05 (Gorsuch, J., dissenting).

277 *See* Mumford & Allridge, *supra* note 276, at 411; *see also* Jimmy Hoover, *UK Legal Scholars Track Down 17th Century Murder Case, Prove Supreme Court Wrong*, NAT'L L.J. (June 14, 2023, at 18:18 ET), https://www.law.com/nationallawjournal/2023/06/14/uk-legal-scholars-track-down-17th-century-murder-case-prove-supreme-court-wrong/ [permalink].

perhaps even the third (undermined by subsequent developments).[278] But it is far from clear that a new discovery—even a perfectly clear one—forecloses application of stare decisis altogether.

Third, as developed more fully below, the Court has sometimes differentiated between open questions, which are governed by broader methodological questions, and closed questions, which are governed by past concrete applications. One can see this approach, for example, in Fourth Amendment cases. The prevailing methodological approach to the Fourth Amendment is historical, if not originalist.[279] But nevertheless, the Court continues to apply stare decisis to decisions such as *Miranda*,[280] *Mapp*,[281] and *Katz*,[282] which have shaky historical or originalist pedigrees.[283] As applied to Section 1983, perhaps the Court should apply stare decisis to questions like whether Section 1983 creates a cause of action,[284] the existence of official immunities,[285] and the elements of certain species of Section 1983 claims.[286] But it would not need to apply stare decisis to other open questions such as the role of malice in Fourth Amendment malicious-prosecution claims,[287] whether the any-crime rule can reduce damages for a Fourth

278 *See supra* note 241 and accompanying text; *see also, e.g.*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2244 (2022).

279 *See, e.g.*, United States v. Jones, 565 U.S. 400, 404–05 (2012); Florida v. Jardines, 569 U.S. 1, 5 (2013); Illinois v. Gates, 462 U.S. 213, 238 (1983). *See generally* Sherif Girgis, *Living Traditionalism*, 98 N.Y.U. L. REV. 1477 (2023) (describing the difference between a traditionalist approach and originalism).

280 Miranda v. Arizona, 384 U.S. 436 (1966).

281 Mapp v. Ohio, 367 U.S. 643 (1961).

282 Katz v. United States, 389 U.S. 347 (1967).

283 *See, e.g.*, Dickerson v. United States, 530 U.S. 428, 450 (2000) (Scalia, J., dissenting) (discussing *Miranda*, 384 U.S. 436); Carpenter v. United States, 138 S. Ct. 2206, 2264–67 (2018) (Gorsuch, J., dissenting) (discussing *Katz*, 389 U.S. 347); Utah v. Strieff, 579 U.S. 232, 237 (2016); *cf. Mapp*, 367 U.S. at 657 ("[O]ur holding that the exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments . . . makes very good sense.").

284 *See* Monroe v. Pape, 365 U.S. 167, 170–71 (1961), *overruled on other grounds by* Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978).

285 *See* Pierson v. Ray, 386 U.S. 547, 553–54 (1967).

286 *See, e.g.*, Thompson v. Clark, 142 S. Ct. 1332, 1335 (2022) (establishing a favorable-termination requirement for malicious prosecution); Gonzalez v. Trevino, 144 S. Ct. 1663, 1667 (2024) (specifying what kind of evidence is relevant for First Amendment claims); Nieves v. Bartlett, 139 S. Ct. 1715, 1722–23 (2019) (defining the elements of a First Amendment retaliation claim).

287 *See Thompson*, 142 S. Ct. at 1338 n.3 (pretermitting the question).

Amendment violation to zero (or nominal),[288] or the proper measure of damages for a First Amendment retaliation claim.[289]

So even if one credits so-called methodological precedent, that methodological precedent alone is unlikely to justify jettisoning specific holdings. Nonetheless, methodological precedent might offer a compelling reason for the Court to answer open-ended questions in a manner consistent with Section 1983's original understanding, rather than using the modern, anachronistic approach.

b. Does Stare Decisis Apply to Open Questions?

What if one does not credit methodological precedent, in which case there are no conflicting strands of precedent? Perhaps stare decisis simply does not apply to open questions even if related to previously answered questions. If so, the Court could take a similar approach to the one sketched out in the previous paragraph, even without concluding that interpretive methodologies or conclusions are entitled to stare decisis respect.[290] In practice, either approach to open questions would look similar but would be based on very different theoretical justifications.

Unlike the theoretical justification for the approach sketched out in Section II.B.2.a, this approach to open questions could arise in situations implicating either horizontal or vertical stare decisis.[291] With respect to horizontal stare decisis, the Court has rarely considered itself bound by analogous holdings, even if it has treated those holdings as a persuasive reason to reach a result that is congruous with the earlier, analogous holding.[292] The one exception might be when the new, formally unanswered question is a necessary implication of an earlier

288 *See* Chiaverini v. City of Napoleon, 144 S. Ct. 1745, 1751–52 (2024) (determining that the any-crime rule is not a barrier to suit but not addressing its implication for damages).

289 *See Trevino*, 144 S. Ct. at 1667–68 (setting forth the causation standard but not addressing whether, even if a plaintiff can establish causation, what damages flow).

290 To be sure, methodological precedent would be helpful in these cases because, after deciding that stare decisis does not compel a particular answer, a court might look to other lines of precedent that might be relevant. And if precedential methodology provides an answer, that answer is more easily justified than if a court had to justify its own methodology from first principles. But regardless, the absence of methodological precedent merely requires a court to justify its use of a historical interpretive approach.

291 The issue of conflicting methodological and application precedents addressed in Section II.B.2.a is unlikely to arise in vertical precedent, as other than addressing truly open questions, vertical stare decisis likely requires lower courts to adhere to the more specific of the two strands of precedent.

292 *See, e.g.*, Musick, Peeler & Garrett v. Emps. Ins. of Wausau, 508 U.S. 286, 290–92 (1993).

holding.[293] In those cases, whether as a type of anti-circumvention rule or as a necessary means to protect the efficacy of the previous holding, the Court has viewed the earlier holding as binding.[294] But where there is logical and practical separation between the precedent and the new question, coherence between precedents and the present case is merely one consideration among many in how to decide the case—unlike stare decisis, which compels a certain answer when it applies.

As to vertical stare decisis, the issue of open questions is relevant to an ongoing debate about how lower courts should treat Supreme Court precedent.[295] One way for lower courts to address open questions is to predict how the Supreme Court would resolve that question. This approach flows from an underlying theory of vertical stare decisis in which the justification for binding vertical precedent is the Supreme Court's power to reverse lower courts.[296] Such a justification might lead a lower court to conclude that its job or primary goal is to be affirmed (or avoid being overturned) by the Supreme Court, and the best way to do that is to figure out what the Supreme Court would do if it granted certiorari.[297] A lower court operating under this theory might rationally conclude that resolving open questions consistently with how the Court has resolved other questions is the best approximation of what the Supreme Court would do. To be sure, there might be reason to think that the Court will change course—a change in membership, separate writings, dicta questioning the approach used in reaching earlier conclusions, etc.—which would lead a lower court to chart a new path for open questions. The Court, though, has cautioned lower courts to wait until the Supreme Court overrules its own

293 *See, e.g.*, Samia v. United States, 143 S. Ct. 2004, 2025 (2023) (Kagan, J., dissenting) (criticizing the majority for, though not directly overruling precedent, effectively undercutting the precedent); *see also, e.g.*, Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 72 (1989) (White, J., dissenting) ("Though the Court professes not to overrule [an earlier] decision, . . . there is simply no way to reconcile [that] decision . . . with what the Court holds today.").

294 *See, e.g.*, Gray v. Maryland, 523 U.S. 185, 192 (1998) (holding that precedent compelled a conclusion because the facts "so closely resemble[d]" those in the precedent that "the law must require the same result"); *see also Samia*, 143 S. Ct. at 2017 (taking pains to explain why, in the majority's view, there was a viable distinction such that its holding did not effectively overrule the precedent).

295 *See generally, e.g.*, Ryan C. Williams, *Lower Court Originalism*, 45 HARV. J.L. & PUB. POL'Y 257 (2022).

296 *See* John Harrison, *The Power of Congress over the Rules of Precedent*, 50 DUKE L.J. 503, 510–12 (2000) (discussing, but ultimately rejecting, this argument).

297 *Cf.* Lewis v. Beecher Sch. Sys., 324 N.W.2d 779, 782 (Mich. Ct. App. 1982), *vacated*, 368 N.W.2d 220 (Mich. 1985) (reaching its holding because it predicted that a majority of the state supreme court "would now hold" the same).

precedent.[298] Although those cautions usually come when a lower court has predicted that the Supreme Court will overrule one of its previous holdings—as opposed to charting a new course in answering an open but related question[299]—the same counsel could be applied to these instances in which a question is technically open, but related precedent strongly suggests a certain answer.

Another way for lower courts to approach open questions might be to make the most sense of Supreme Court precedent as a whole.[300] Under such a theory, lower courts are trying to put together and make sense of multiple sources of law—at a minimum, the legal text itself and Supreme Court precedent. On this view, it is unlikely that a lower court, even if stare decisis technically did not apply to an open question, would answer an open question in a way that would be radically different from how the Court had answered similar questions. Rather, the most coherent way to approach such a question would be to take the unimpeachable premises—the Supreme Court holdings—and try to figure out the best conclusion in answering the new question.[301]

Finally, some lower courts first try to figure out what the legally correct answer is as a matter of first principles, and then consider whether any Supreme Court precedent requires a contrary result.[302] This approach—to the extent it reflects more than mere drafting

298 *See, e.g.*, Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").

299 *See, e.g.*, Mallory v. Norfolk S. Ry. Co., 143 S. Ct. 2028, 2038 (2023).

300 In a recent article, Charles Capps presents and defends a more sophisticated yet similar approach. *See* Charles F. Capps, *The Holistic Theory of Precedent*, 93 U. CHI. L. REV. 549, 550–62 (2026). He views coherency as a function of the judge's individual views of the law adjusted on Bayesian terms for precedent. *See id.* (manuscript at 3–7).

301 For one possible example of this approach, see *Kadel v. Folwell*, 100 F.4th 122 (4th Cir. 2024), *cert. granted, judgment vacated sub nom.*, Crouch v. Anderson, 145 S. Ct. 2835 (U.S. June 30, 2025) (mem.), *and*, Fowell v. Kadel, 145 S. Ct. 2838 (U.S. June 30, 2025) (mem.), in which Judge Richardson concluded that *Bostock*'s conclusion that discrimination based on gender identity or transgender status is discrimination based on sex should be applied to the Equal Protection Clause in part because of how the two work together, even while acknowledging the potential formalist distinctions one could make. *Id.* at 177–81 (Richardson, J., dissenting) (discussing *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020)). Another might be *United States v. Johnson*, 921 F.3d 991 (11th Cir. 2019), in which the panel majority refused to narrow the Supreme Court's holding in *Terry v. Ohio*, 392 U.S. 1 (1968), in part because lower courts should "apply Supreme Court precedent neither narrowly nor liberally—only faithfully." *Johnson*, 921 F.3d at 1001.

302 *See, e.g.*, Asinor v. District of Columbia, 111 F.4th 1249, 1252–56 (D.C. Cir. 2024) (concluding as a matter of first principles that the Fourth Amendment requires seizures of property to be reasonable throughout their duration and then reporting that "[m]odern caselaw . . . confirm[ed]" that conclusion).

practice—appears to be justified by reference to the judicial oath. Judges take an oath to faithfully apply the law, and unless precedent requires them to do something other than the judge's best view of what the law requires,[303] adherence to the oath compels judges to follow their best understanding of the law.[304] Under this approach, open questions would be answered by reference to the original understanding of Section 1983,[305] as by definition no Supreme Court precedent compels a contrary conclusion.

Thus, open questions relating to Section 1983 should be answered by the original understanding of Section 1983 outlined here, at least to the extent that using such historical-focused methodologies are independently justified. That conclusion alone provides ample real-world effect to the rediscovery of the original understanding.

c. Contingent Statutory Stare Decisis

Another key question is how stare decisis—at least in the most common formulation that requires substantial deference to precedent—applies to statutes. On the one end, stare decisis applies with full (indeed, heightened) force to questions of statutory interpretation, as the majority of the Court appears to have concluded.[306] On the

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303 It is unclear how this qualification for precedent fits in with the larger oath-based theory, which appears to provide an inflexible command to apply the "law" irrespective of precedent. Michael Stokes Paulsen, *Accusing Justice: Some Variations on the Themes of Robert M. Cover's* Justice Accused, 7 J.L. & RELIGION 33, 85 (1990) (taking the position that the oath might be more obligatory than the obligation to follow vertical precedent). One straightforward resolution would be that stare decisis (at least its vertical component) is part of our law, so it is the best view of the law to respect higher-court precedent. *See* Sachs, *supra* note 252, at 1863–66 (discussing what kind of law stare decisis might be). Another resolution might be that lower-court judges are required to respect superior-court precedent, so a deviation from the law is warranted and the oath bakes in a corresponding obligation to comply with superior-court precedent. *See* Steven G. Calabresi & Gary Lawson, *Equity and Hierarchy: Reflections on the Harris Execution*, 102 YALE L.J. 255, 276 n.106 (1992) (sketching this view). This latter justification, though, would be less compelling to a judge who believes he has an independent, non-oath-based obligation to follow the law.

304 It might even justify "underruling," or refusal to follow Supreme Court precedent because that precedent is incorrect, Paulsen, *supra* note 302, at 85, but I put aside that possibility here.

305 Assuming, of course, that a historical approach could be justified, either by adhering to methodological precedent or as a matter of first principles.

306 *See* Allen v. Milligan, 143 S. Ct. 1487, 1515 (2023) ("[Congress] can change [the Court's construction] if it likes. But until and unless it does, statutory *stare decisis* counsels our staying the course."); *id.* at 1517–18 (Kavanaugh, J., concurring) ("Although statutory *stare decisis* is not absolute, 'the Court has ordinarily left the updating or correction of erroneous statutory precedents to the legislative process.'" (quoting Ramos v. Louisiana, 140 S. Ct. 1390, 1413 (2020) (Kavanaugh, J., concurring in part)); *id.* at 1521 n.4 (Thomas, J., dissenting) (criticizing Justice Kavanaugh's "supposedly enhanced *stare decisis* force of statutory-interpretation precedents").

other end, Justice Thomas has argued that it does not, or at least that it applies in a relatively weak form.[307] However, this Section explores a middle ground in which statutory stare decisis is contingent on historical facts.

One approach to a contingent[308] stare decisis would be to apply the stare decisis rules that would have applied at the time of the statute's enactment.[309] On this theory, judges should apply the original meaning of the written text, together with other relevant written and unwritten rules of law that would have applied at the time of enactment, to promote whatever democratic or legal values require maintaining fidelity to the original enactment. For Section 1983, that would mean determining the stare decisis rules for statutes in 1871 and then applying those rules. That historical question is beyond the scope of this project, but the 1871 version to stare decisis is likely less deferential to precedent than the one the Court currently applies.[310] So if the current stare decisis test is satisfied (meaning the Court should overrule its precedent), then the 1871 test would also be satisfied.

A different approach might point to the stare decisis test that current unwritten law requires.[311] A judge's job is not to interpret legal texts in the abstract, but rather to determine and apply the law governing cases. And if the current governing law privileges previous court decisions over the original understanding of the text (or any understanding of the text), then the court's job would be to apply the previous court decisions in deciding the case. On this view, stare decisis is an unwritten legal principle that is subject to contestation and change, but whatever form it takes at the moment a judge decides a case is the law and is obligatory much the same way any unwritten legal principle

307 *See id.* at 1521 n.4 (Thomas, J., dissenting).

308 By contingent, I mean an approach that does not require a particular form of stare decisis—whether under Article III or a more abstract theory of the judicial role. *See* U.S. CONST. art. III.

309 This approach, for example, might yield Justice Thomas's stare decisis approach for the Constitution, even if Article III does not categorically forbid application of stare decisis, at least insofar as one accepts Caleb Nelson's description of stare decisis at the Founding. *See* Nelson, *supra* note 251, at 53. For an argument that the state of play was more complicated, see Christian R. Burset, *The Origins of Stare Decisis*, 126 COLUM. L. REV. (forthcoming 2026).

310 *See* Branton J. Nestor, Reliance Interests and Stare Decisis 21–40 (unpublished manuscript) (on file with author) (collecting sources from the eighteenth and nineteenth centuries applying a slightly less deferential form of stare decisis); *see also* THOMAS W. POWELL, THE LAW OF APPELLATE PROCEEDINGS, IN RELATION TO REVIEW, ERROR, APPEAL, AND OTHER RELIEFS UPON FINAL JUDGMENTS 27–28 (Philadelphia, T. & J.W. Johnson & Co. 1872).

311 *Cf.* Baude & Sachs, *supra* note 244, at 1138–40 (arguing that judges might be able to establish interpretive rules, however judges approach common law, and that "a statutory rule of interpretation is at most a default rule that can be changed by Congress at any time").

is. So unless a higher order of law prohibits reliance on stare decisis,[312] the court would not just be permitted but be obligated to follow the earlier, potentially erroneous decision (unless stare decisis is otherwise overcome).

d. Is Stare Decisis Overcome Here?

In the end, however, even if the strongest formulation of statutory stare decisis applies to the Section 1983 question, stare decisis is overcome here. Under the current test, the Court should apply the original understanding (as modified by subsequent legal changes) and overturn contrary precedent.[313]

First, the precedent is egregiously wrong.[314] It erroneously presumes that Congress created new law via a new cause of action, locked in common law immunities, and at a minimum gave the courts wide latitude to determine how Section 1983 suits would be litigated. But in reality, Congress legislated against a well-established backdrop that state law provides the cause of action and that state law provides the rules of decision unless Congress said otherwise. The Court's current approach also arrogates power away from states and Congress and to federal courts.[315] Once one understands the historical backdrop, the precedent becomes indefensible as an original matter.[316] Exactly how

312 For example, perhaps Article III or the Supremacy Clause do in fact forbid reliance on erroneous precedents interpreting the Constitution or statutes. *See* U.S. CONST. art. III; *id.* art. VI, cl. 2. In theory, a congressional statute could also do so, at least for non-constitutional matters. *See* Harrison, *supra* note 296, at 538.

313 *See infra* Part III (detailing what returning to the original understanding of Section 1983 would look like today).

314 By using this term, I do not intend to imply that *Monroe* and its progeny were morally wrong. *Cf.* Nina Varsava, *The Nature of a Precedent's Error*, JURISPRUDENCE (Feb. 2026) (defining egregious with a moral dimension). Rather, I mean that the legal question is not particularly close as an original matter once one takes into account the historical context and that the precedent arrogates power to the federal judiciary.

315 *Cf.* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2271–73 (2024) (concluding that overturning precedent is more likely to be warranted when it upsets the separation of powers); *id.* at 2272–73 ("*Chevron* was a judicial invention that required judges to disregard their statutory duties. And the only way to 'ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion,' is for us to leave *Chevron* behind." (citation omitted) (quoting Vasquez v. Hillery, 474 U.S. 254, 265 (1986))); Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2265 (2022) (counting against precedent the fact that the initial decision wielded "raw judicial power" (quoting Doe v. Bolton, 410 U.S. 179, 222 (1973) (White, J., dissenting)) and "short-circuited the democratic process").

316 To be sure, my view that current precedent is egregiously wrong depends on an approach to statutory interpretation that privileges the understanding at "the time of the statute's adoption." Bostock v. Clayton County, 140 S. Ct. 1731, 1738 (2020). But all current Justices have signed off on an original-public-meaning-predominant approach to statutory interpretation. *See id.*; Wisc. Cent. Ltd. v. United States, 138 S. Ct. 2067, 2074 (2018). Of

the original understanding applies today is subject to reasonable debate, but there is no way to ignore the Process Act's command in evaluating Section 1983's original understanding.[317]

To the extent that the precedent's quality of reasoning—apart from whether the resulting decision was erroneous—is relevant,[318] the precedent supporting the modern interpretation of Section 1983 has never been justified or defended by sound reasoning. Although the Court has presumed that Section 1983 creates a cause of action since at least *Monroe v. Pape*,[319] "neither it nor any case of [the Supreme Court] applying it grappled with" the historical context.[320] Moreover, the modern approach cannot be said to have been "ground[ed] . . . in text, history, or precedent," but rather by judicial assumption and say-so.[321] Indeed, like the *Dobbs* Court's characterization of the *Roe* decision before overturning it, the Court's Section 1983 precedent "relie[s] on an erroneous historical narrative," has "concocted an elaborate set of rules," and has drawn criticism even from those who support a robust, federalized version of Section 1983.[322]

Second, the Court's current approach to Section 1983 is unworkable. Courts following the modern approach attempt to apply old common law principles to new constitutional torts. But the problem is that constitutional torts were not yet conceived of in 1871,[323] so common law principles are poor matches.[324] Trying to figure out how a common law tort would have been litigated if it were unhinged from the traditional forms of action, were based on a new constitutionally rooted duty, and were brought against a government official makes as much sense as trying to figure out how an airplane would have flown if it were

course, if one takes an approach to statutory interpretation that does not tie legal effect to the time of enactment, the analysis looks much different.

317 Process Act of 1792, ch. 36, §§ 1–2, 1 Stat. 275, 275–76.

318 *See Dobbs,* 142 S. Ct. at 2265–66.

319 Monroe v. Pape, 365 U.S. 167, 187 (1961), *overruled on other grounds by* Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978).

320 *Cf. Loper Bright,* 144 S. Ct. at 2270.

321 *Cf. Dobbs,* 142 S. Ct. at 2266.

322 *Cf. id.* For a sampling of such criticism, see Reinert, *supra* note 176; Teressa Ravenell, *Unincorporating Qualified Immunity,* 53 LOY. U. CHI. L.J. 371 (2022).

323 *See* West, *supra* note 85, at 928.

324 *Cf.* Andrew S. Oldham, Adam I. Steene & John W. Tienken, *The* Ex Parte Young *Cause of Action: A Riddle, Wrapped in a Mystery, Inside an Enigma,* 120 NW. L. REV. 1697, 1709–11 (2026) (describing how causes of action depended heavily on the defendant, with different rules when officials were defendants); Mathew Tokson, *Trespass and Fourth Amendment Originalism* (Univ. of Utah Coll. of L. Rsch. Paper, Paper No. 615, 2024), https://ssrn.com/abstract=5007433 [https://perma.cc/2Q89-664D] (arguing that looking to trespass rules to provide Fourth Amendment doctrine is anachronistic because trespass rules were carefully calibrated as part of a form of action rather than a standalone constitutional standard).

instead a hippopotamus jumping into a lake.[325] To make the inquiry match better, lower courts have admirably prioritized the Constitution and its rules over the common law.[326] But that analytical move would mean that the only role for the common law is to supply process-based rules—for example, when the statute of limitations runs or when a claim accrues.[327] And it is unclear why the general common law of 1871 controls those kinds of questions as opposed to modern state law under the more textually explicit Section 1988(a), which the Court has said applies to determining the *length* of the statute of limitations.[328] Or, for that matter, why the length of the statute of limitations is not defined by reference to federal common law that federal judges purportedly have the authority to craft on their own.[329]

Third, the current approach to Section 1983 litigation has been undermined by later developments in other doctrines. The Supreme Court adopted its current approach during a time when the Court was less committed to the statute's text[330] and more willing to find—indeed, even create—federal causes of action.[331] Today, even through disagreement on the particulars, the Court has remained focused on

325 Professor Garrett West has detailed this confusion and how courts jump back and forth almost unwittingly between different conceptions of constitutional rights. *See* West, *supra* note 85, at 879–911. He recommends abandoning the traditional view of constitutional rights and adopting a constitutional-duty approach, using Section 1983 as a mere conduit for expanding constitutional litigation. *See id.* at 912–20. But the presence of such persistent disagreement and the creative solutions required to solve it are more evidence that current doctrine sends judges on a fool's errand.

326 *See* Lindley, *supra* note 1, at 905 nn.60–61.

327 *See* Thompson v. Clark, 142 S. Ct. 1332, 1335 (2022) (exemplifying when a claim accrues); Manuel v. City of Joliet, 580 U.S. 357, 369–73 (2017) (directing the lower courts to use the same approach to determine when the statute of limitations ran).

328 42 U.S.C. § 1988(a) (2018); *see also* Bd. of Regents v. Tomanio, 446 U.S. 478, 483–85 (1980).

329 *See* United States v. Kimbell Foods, Inc., 440 U.S. 715, 726–29 (1979).

330 *See* Jonathan R. Siegel, *Textualism and Contextualism in Administrative Law*, 78 B.U. L. REV. 1023, 1057 (1998) ("The days when lawyers could 'routinely . . . make no distinction between words in the text of a statute and words in its legislative history' are surely over." (alteration in original) (footnote omitted) (quoting Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 31 (Amy Gutmann ed., 1997))); *see also* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2291 n.6 (2024) (Gorsuch, J., dissenting); Anita S. Krishnakumar, *Backdoor Purposivism*, 69 DUKE L.J. 1275, 1277–78 nn.4–6 (2020) (collecting sources).

331 *See, e.g.*, *Ex parte* Young, 209 U.S. 123, 155–56 (1908); Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 392 (1971).

statutory text, and it has developed a skepticism of assuming that a legal text creates a private right of action.[332]

Fourth, there are no significant reliance interests that would counsel against overruling the Court's precedent. The kind of reliance interests stare decisis directs the Court to consider are property and contract interests—in short, investment-backed interests.[333] Potential official defendants do not (or at least should not) plan on a certain type of liability regime in the same way that a business entering into long-term contracts does.[334] And subsidiary contracts—such as insurance and indemnification agreements for police officers and departments—should not be considered relevant because otherwise parties could always enter derivative contracts to manufacture reliance interests. These are not the reliance interests that the law should recognize. The same holds true for plaintiffs: Private citizens take no concrete action in reliance on a particular tort regime for violations of rights secured by the Constitution.[335]

In any event, even if the Court were to credit reliance interests on either or both the plaintiffs' or defendants' side, it is unclear which way returning to the original meaning would cut. As developed more below, the ultimate effect would depend on how states today and in the future choose to treat official liability. And that might vary both temporally and geographically. Even isolating the effect it would have today (based on current state law), several states have less restrictive qualified immunity regimes, favoring plaintiffs, but other states have administrative requirements plaintiffs might have to fulfill, favoring defendants. So it is unclear whether returning to the original meaning would upend any general reliance interests.

* * *

The Court has frequently stated that stare decisis carries "enhanced force" when it involves statutory interpretation,[336] and I take that burden seriously. My arguments that stare decisis is overcome are not simply "variants" of my claims about the proper interpretation of

332 *See, e.g.*, Armstrong v. Exceptional Child Ctr., Inc., 575 U.S. 320, 327–29 (2015); Egbert v. Boule, 142 S. Ct. 1793, 1806–09 (2022); *id.* at 1817–18 (Sotomayor, J., concurring in judgment in part and dissenting in part).

333 *See* Payne v. Tennessee, 501 U.S. 808, 828 (1991); Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2276 (2022) (quoting *Payne*, 501 U.S. at 828).

334 *See Dobbs*, 142 S. Ct. at 2276 ("Traditional reliance interests arise 'where advance planning of great precision is most obviously a necessity.'" (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 856 (1992), *overruled by Dobbs*, 142 S. Ct. 2228).

335 Like the Court said of abortion, suing state officials is "generally [an] 'unplanned activity.'" *Id.* at 2276 (quoting *Casey*, 505 U.S. at 856).

336 Kimble v. Marvel Ent., LLC, 576 U.S. 446, 456 (2015).

Section 1983.[337] But neither is statutory stare decisis, even for old statutory precedents, insurmountable.[338] To be sure, "*stare decisis* carries enhanced force when . . . . Congress can correct any mistake it sees," but the Court has merely required a "'special justification' . . . over and above the belief 'that the precedent was wrongly decided.'"[339] Here, Section 1983 litigation is "unworkable," which is a sufficient "special justification" that warrants overturning "statutory precedent[]."[340] As I have detailed here and elsewhere,[341] *Monroe v. Pape* and subsequent decisions assuming Section 1983 creates a cause of action governed exclusively by federal law are unworkable.[342] There is no objective way to analogize from private torts to suits against state officials, and current precedent gives courts no way out of that hopeless analogy.

III. RECONSTRUCTING SECTION 1983 TODAY

A. The Law Today

Because the original legal effect of Section 1983 is defined primarily by these background features of 1871 law—and not locked in Section 1983 itself—a change in these features means that Section 1983's *current* legal effect might be different from its *original* legal effect.[343] But Section 1983 itself did not originally provide the cause of action or the substantive rules that would govern litigation arising out of it. So it cannot be understood to do so now—at least not without a legal basis to retroactively give Section 1983 more content than it had at the time of enactment (perhaps the doctrine of implied causes of action, for example). So any attempt to translate the original to the modern[344]

337 Kisor v. Wilkie, 588 U.S. 558, 588 (2015).

338 *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2270 (2024).

339 *Kimble*, 576 U.S. at 456 (quoting Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258, 266 (2014)).

340 Patterson v. McLean Credit Union, 491 U.S. 164, 173 (1989); *see also, e.g.*, *Kisor*, 139 S. Ct. at 2422–23. Another sufficient justification is whether the "conceptual underpinnings" of the precedent have been "weakened" by the "growth of judicial doctrine." *Patterson*, 491 U.S. at 173. This consideration independently justifies overturning *Monroe v. Pape*, 364 U.S. 259 (1961), and its progeny.

341 *See* Lindley, *supra* note 1, at 903–08.

342 *Cf. Kisor*, 139 S. Ct. at 2423. Statutory stare decisis might also be strengthened if one views Congress's inaction as a form of "acquiescence." NELSON, *supra* note 225, at 452, 448–54. Reliance on acquiescence, however, has been sharply criticized, *see* Quigley, *supra* note 231, at 530 & n.477 (collecting sources), and recently has been discounted, *see Loper Bright*, 144 S. Ct. at 2272–73. In any event, even a supercharged statutory stare decisis is overcome here.

343 For example, although Section 1983 originally required use of 1792 state-law causes of action, it now requires modern state-law causes of action. *See supra* Section II.A.

344 *See* Ryan C. Williams, *Historical Fact*, 99 NOTRE DAME L. REV. 1585, 1595–97 (2024).

would not result in a "thick[er]"[345] Section 1983 than the relatively thin state-law-dependent original understanding.

This Section describes what crediting the original legal effect of Section 1983 would look like if stare decisis does not apply or is overcome. Plaintiffs would likely need to identify and use a modern state-law cause of action. Although an implied federal cause of action might theoretically be available post-Rules Enabling Act, it is unlikely that one would be recognized. And non-preempted state substantive law would govern these cases, leading to a more federalist and democratic approach to questions of damages and official immunities.

1. The Source of the Cause of Action

Potentially the most upending change would be to require a Section 1983 plaintiff to use a state-law cause of action in actions at law. That is, a plaintiff must identify the applicable modern state-law cause of action and satisfy the non-substantive-right (as traditionally understood) rules of that cause of action as prerequisite to bringing a Section 1983 action at law.[346] Section 1983 originally would have required a state-law cause of action and relied on cause-of-action-specific procedural rules from state law.[347] The Rules Enabling Act altered that principle only as to the procedural rules provided by nineteenth-century forms of action; by its own terms, it left substantive rules alone. And requiring adherence to state-law causes of action would not violate the "shall be liable" language because there would simply be no applicable action at law to bring.[348]

But requiring the existence of a state-law cause of action—the cause of action that one would bring in state court—does not mean that all its elements would necessarily apply. Compare what courts do under the current approach with what they would do under the

345 JACK BALKIN, MEMORY AND AUTHORITY: THE USES OF HISTORY IN CONSTITUTIONAL INTERPRETATION 106–11 (2024).

346 The Supreme Court has already held that traditional equity rules apply in Section 1983 litigation. *See* Mitchum v. Foster, 407 U.S. 225, 243 (1972). And whether those rules are imposed as a matter of federal courts' equity jurisdiction, *see* Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 318–19 (1999), or the original understanding of Section 1983 under the Process Act of 1792 and section 14 of the Judiciary Act of 1789, *see* Lindley, *supra* note 1, at 920, the limits are analogous to those grounded in state law here.

347 Even when federal courts adopted code pleading in some states—either discretionary updating under the Process Act of 1792 or mandatory dynamic conformity under the Conformity Act of 1872—they located the (traditionally defined) cause of action in state law.

348 42 U.S.C. § 1983; *see also* Lindley, *supra* note 1, at 924; CONG. GLOBE, 42d Cong., 1st Sess. 807 (1871) (statement of Rep. James A. Garfield) (explaining that Section 1983 allows a plaintiff to "bring his action for redress" in federal court instead of state court).

historically correct approach. Courts today look to elements of analogous tort causes of action to define the "contours" of supposed Section 1983 claims.[349] But courts apply those tort-law elements only to the extent that they give content to the constitutional right at issue; they are ignored if inconsistent with the constitutional right and maybe even if they add any requirements beyond the elements of a constitutional violation.[350] To be sure, when federal courts do look to the common law, they mistakenly look to the general-law elements of torts circa 1871. But, adjusting the referent to modern state law, the original understanding of Section 1983 can tell us how to treat these tort-law elements.

Under the original understanding of Section 1983, elements of a state-law cause of action can be set aside if they purport to speak to whether a constitutional right has been violated because the scope of that right is governed by federal law, which preempts state law. So, counterfactually, if New York or Illinois law states that, in a malicious-prosecution case, someone can be lawfully seized as a result of a malicious prosecution so long as the defendant has reasonable suspicion, federal law (which requires probable cause) displaces that rule. In this sense, tort-law elements are displaced only when they purport to legalize something that the Constitution prohibits.[351]

But where a state-law element merely adds a prerequisite to *recovery*, a plaintiff would have to satisfy both the constitutional (to establish a constitutional violation) and the state-tort element (to satisfy the cause of action necessary to remedy the constitutional violation).[352] For example, under the original meaning, Thompson would have to establish the non-substantive-right element under New York law that "the circumstances surrounding the termination" of his prosecution were "not inconsistent with [his] innocence,"[353] and that "the proceeding was brought out of actual malice."[354] The Monroes, in contrast, would

349 Manuel v. City of Joliet, 580 U.S. 357, 370, 369–71 (2017).

350 *See* Lindley, *supra* note 1, at 905.

351 This preemption rule would mirror the approach in the state-court litigation that Section 1983 transferred to federal court. Only when the state law was inconsistent with federal law in the strict sense would the state law have been preempted or "nullified" by the Constitution. *See* West, *supra* note 85, at 864, 863–64.

352 *Cf.* Bellia, *supra* note 211, at 2100 ("A state law cause of action might . . . be subject to limitations to which a federal cause of action would not.").

353 Cantalino v. Danner, 754 N.E.2d 164, 167 (N.Y. 2001); *see also* Thompson v. Clark, 142 S. Ct. 1332, 1335–41 (2022) (concluding the same under the current approach).

354 *Cantalino*, 754 N.E.2d at 166; *see also Thompson*, 142 S. Ct. at 1338–39 (pretermitting whether malice is required). Most states other than New York now allow for malice to "be inferred from a lack of probable cause" in some circumstances. 8 AM. L. TORTS § 28:12 & n.5, Westlaw (database updated Feb. 2026).

have had to prove merely an unlawful act that caused them harm.[355] Another example might be state-law notice requirements, which courts do not require for Section 1983 claims,[356] but that presumably would apply under the original meaning.

The lack of an express federal cause of action—and the possibility that a plaintiff might be able to use a state-law cause of action in federal court—does not end the matter, though. The propriety of mandating (as opposed to allowing) a state-law cause of action might depend on whether federal courts can recognize implied private rights of action. If a cause of action can be implied from Section 1983, then the repeal of the Conformity Act arguably would have allowed courts to recognize such a cause of action. Bellia, however, has argued that we should rethink the propriety of recognizing implied rights of action at all because the historical basis for the doctrine is questionable.[357] If implying private rights of action is not permissible, then the conclusions in this Section are unaffected.

Of course, even assuming that courts can find implied private rights of action, Section 1983 might not contain one. As an initial matter, Congress likely would not have understood courts to have that power in 1871,[358] but whether that congressional [mis?]understanding should control is less obvious. The doctrine of implied causes of action relies on an underlying assumption about congressional intent with respect to private suits.[359] It is unclear whether this objective congressional-intent test is defeasible by evidence of *actual* contrary congressional intent or public understanding. But on the whole, it appears unwarranted to recognize an implied cause of action in Section 1983: Implied rights of action are disfavored, and there are many reasons not to recognize one here, the primary reason being that it would create the same unworkability and muddiness that erroneously identifying an express cause of action has created. Further, implied causes of action were not recognized historically, so it is unlikely that the 1871 Congress intended federal courts to recognize one, especially when the then-in-force statute would have required use of state-law causes of action.

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355 *See* Bucher v. Krause, 200 F.2d 576, 580–82 (7th Cir. 1952); Shanley v. Wells, 71 Ill. 78, 79–81 (1873).

356 *See* 1B MARTIN A. SCHWARTZ, SECTION 1983 LITIGATION: CLAIMS AND DEFENSES § 12.08[B], at 12-122 to -126 (4th ed. 2011); *see also, e.g.*, Felder v. Casey, 487 U.S. 131, 141–50 (1988) (concluding that a Wisconsin notice-of-claim statute was preempted); UTAH CODE ANN. § 63G-7-401(2)–(3) (LexisNexis 2025) (requiring a notice of claim to be served before suing government officials for actions committing in the scope of their job duties).

357 *See* Bellia, *supra* note 100, at 858–61; *see also* Alexander v. Sandoval, 532 U.S. 275, 287 (2001) ("Having sworn off the habit of venturing beyond Congress's intent, we will not accept [the] invitation to have one last drink.").

358 *See* Bellia, *supra* note 100, at 838–46; Lindley, *supra* note 1, at 918–20, 919 n.175.

359 *See Sandoval*, 532 U.S. at 286–92.

2. The Source of Substantive Rules of Decision

Regardless of the source of the cause of action—but especially if that source is state law—courts in Section 1983 cases should apply modern state law absent clearly applicable federal law in actions at law.[360] Originally and into the twentieth century, the Rules of Decision Act was understood to have required federal courts to apply modern state-law rules of decision (absent applicable federal law) even when the claim of right and authorization to sue were grounded in federal law.[361] However, some rules of decision were not freestanding but were dictated by the requirements of the forms and modes of proceeding.[362] For these rules, the Process Act directed federal courts to apply these rules of decision as they existed in 1789 by conforming to these forms and modes of proceeding then in effect;[363] the Conformity Act altered that directive and required conformity to contemporary state modes and forms of proceeding.[364] So, post-Conformity Act, whether the state rule of decision was a part of the form of proceeding was immaterial.[365]

The Rules Enabling Act then changed the source of procedural rules in federal court, but it did not change (and perhaps could not have changed) any substantive law.[366] So, although federal law no longer required federal courts to apply state rules of decision solely because they were embedded in the forms of action, the Rules of Decision Act required application of those same state rules of decision.[367] Any state rule of decision—traditionally applicable to the form of action or not—would have applied absent a conflicting federal statute.[368] Some rules of decision that would have applied to Section 1983 cases are statutes of limitations, causation, damages, survivorship, and official immunities.[369]

In practice today, courts apply the modern "general or residual statute for personal injury actions" no matter the nature of the claim

360 *See* Lindley, *supra* note 1, at 950–51.

361 *See id.* at 912–14.

362 *See id.* at 944.

363 *See* Process Act of 1792, ch. 36, §§ 1–2, 1 Stat. 275, 275–76; *see also* Lindley, *supra* note 1, at 914–15.

364 *See* Conformity Act of 1872, ch. 255, 17 Stat. 196; *see also supra* Section II.A.1.

365 Either the state rule of decision was bound up in the form of proceeding such that the Conformity Act required application of the contemporary rule, or it was not and the Rules of Decision Act required application of the contemporary rule.

366 *See also supra* Section II.A.3.

367 *See supra* notes 205–08 and accompanying text.

368 *See* Lindley, *supra* note 1, at 908–09. And even if § 1988(a) rather than the Rules of Decision Act applied in § 1983 cases, that provision would also direct courts to contemporary state law. *See id.* at 928–30.

369 *See* Lindley, *supra* note 1, at 950–52.

under Section 1988(a).[370] That is, Thompson needed to comply with the New York limitations period for general personal injury (three years).[371] Under the original understanding, however, the Rules of Decision Act would direct Thompson to look to the statute of limitations for the relevant state cause of action—here, one year for malicious prosecution.[372] Although using Section 1988(a) rather than the Rules of Decision Act might sometimes point to different limitation periods, both current doctrine and the original understanding turn to current state law.

Likewise, courts today come close to the original meaning in deciding questions of survivorship but depart from it in significant ways. Although the Supreme Court has held that survivorship rules of the most analogous state-law claim generally apply,[373] lower federal courts do not apply—pursuant to Section 1988(a)'s clause excluding from application state law that is "inconsistent" with federal law[374]—state rules barring survivorship when the state official caused the death or state rules restricting the damages available in an otherwise survived action.[375]

But originally, survivorship would have been governed by the forms of action, which were provided by state law.[376] Although Congress could have preempted state survivorship rules for Section 1983 claims—as it did in section 6 of the Ku Klux Klan Act—it did not.[377]

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370 Owens v. Okure, 488 U.S. 235, 250, 249–50 (1989); *see also* 1B SCHWARTZ, *supra* note 355, § 12.02[B], at 12-15 to -16.

371 *See* N.Y. C.P.L.R. § 214(5) (MCKINNEY 2021).

372 *See id.* § 215(3); *see also* Campbell v. City of Haverhill, 155 U.S. 610, 614–16 (1895) (applying contemporary statute of limitations for the analogous state-law claim to a federal claim of right). Likewise, the Monroes' statute of limitations would have been the residual of general statute of limitations for personal injury, but the original understanding of § 1983 would have resulted in the limitations period for trespass and false arrest.

373 *See* Robertson v. Wegmann, 436 U.S. 584, 588–93 (1978).

374 42 U.S.C. § 1988(a) (2018). Section 1988(a) provides:

> The jurisdiction . . . [under § 1983] . . . shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction . . . so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause . . . .

375 *See* 1B SCHWARTZ*, supra* note 356, § 13.02[B], at 13-6 to -8.1.

376 *See* Lindley, *supra* note 1, at 944–45.

377 Ku Klux Klan Act, ch. 22, § 6, 17 Stat. 13, 15 (1871). In another example, Congress preempted state law and narrowed the Process Act by providing that, notwithstanding state law to the contrary, "property taken or detained . . . under authority of any revenue law of

And as survivorship rules were bound up with the form of action, they would not have originally been subject to the "inconsistent" limitation on state law in Section 1988(a) (assuming Section 1988(a) applied like a miniature rules of decision act).[378] That state rules of survivorship would have applied to civil actions arising under the Ku Klux Klan Act—even if those rules "generally [are] inhospitable to survival"[379]—appears to have been understood by the bill's sponsor.[380] So, the "inconsistent" clause offers no basis to refuse to apply modern state survivorship rules.[381]

With respect to standards of causation and damages, courts today do not look to state law of any kind. Instead, they apply the purported general law of 1871—that is, the well-settled rules governing the most analogous torts—updated only in extreme circumstances.[382] So, to measure the damages owed to Thompson by the New York police officers, courts today would look to the general law of damages (presumably circa 1871). And that law might limit Thompson's recovery to the damages related to the *seizure* and not the *prosecution*.[383]

Although this result departs from the original understanding, the motivating theory is more defensible than meets the eye. There is no federal statute that governs causation and damages in Section 1983 cases, so courts are correct to look for some other body of law. But it is inconsistent with the original understanding to look to 1871 general law: both because localized tort law and forms of action (that is, causes of action) were likely matters of local, not general law,[384] and because

the United States" was not subject to the writ of replevin. Act of Mar. 2, 1833, ch. 57, § 2, 4 Stat. 632, 633; *see also* 1 ROSE, *supra* note 162, § 908.

378 42 U.S.C. § 1988(a) (2018); *see also* Lindley, *supra* note 1, at 929–30.

379 Robertson v. Wegmann, 436 U.S. 584, 594 (1978).

380 *See* Lindley, *supra* note 1, at 939–40 (detailing an exchange in which Rep. Shellabarger explained that the Ku Klux Klan Act, 17 Stat. 13, needed additional language because the action authorized by section 6 would not survive if the plaintiff died).

381 42 U.S.C. § 1988(a).

382 *See, e.g.*, Williams v. Aguirre, 965 F.3d 1147, 1167–68 (11th Cir. 2020); *see also* Smith v. Wade, 461 U.S. 30, 34 n.2 (1983); Monroe v. Pape, 365 U.S. 167, 187 (1961) (adopting the "background of tort liability" for causation in Section 1983 actions), *overruled on other grounds by* Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978); Kalina v. Fletcher, 522 U.S. 118, 123 (1997) (discussing "elements of the cause of action and the defenses available to state actors"); Nieves v. Bartlett, 139 S. Ct. 1715, 1726–27 (2019).

383 *See Williams*, 965 F.3d at 1161.

384 *See* Bellia & Clark, *supra* note 115, at 672–77; Bellia & Clark, *supra* note 107, at 630; Reinert, *supra* note 175, at 242–43; 1 ROSE, *supra* note 162, § 10[ee]–[f], at 80–81 (explaining that local law is determined by state law and collecting decisions of federal courts deferring to state law (including unwritten law) for torts and personal injury); *see also* Bucher v. Cheshire R.R. Co., 125 U.S. 555, 584 (1888) ("It may be said generally that wherever the decisions of the state courts relate to some law of a local character, which may have become established by those courts, or has always been a part of the law of the State, that the decisions upon the subject are usually conclusive, and always entitled to the highest respect of

Section 1983 did not originally fix such rules in 1871 (if anything, the rules would have been fixed in *1789*). Instead, current state law provides these rules. So the original understanding would use New York's law for damage in malicious prosecution actions, which includes "attorney's fees"[385] and all other damages from the first legal process "until the conclusion of the criminal prosecution."[386]

Finally, official immunities under current state law would apply in Section 1983 cases. Today, the Court has its own doctrine of official immunities, purportedly rooted in the general law of 1871,[387] and that law offered the New York City police officers immunity from Thompson's suit.[388] The historical accuracy of the Court's qualified immunity doctrine is debatable,[389] but the enterprise itself is misguided. Official immunities do not purport to define the underlying substantive rights or duties of the parties; instead, they put conditions on recovery, a separate question.[390] As I have previously explained, there was no unanimous view about whether these immunities were embedded as substantive requirements of the form of proceeding or were non-substantive-right rules of decision.[391] But either way, in the light of the Conformity Act and the Rules of Decision Act, immunities would be borrowed from modern state law.[392] So the New York City police officers, rather than being protected by a "judicially invented immunity,"[393] would be

the Federal courts. . . . Where such local law or custom has been established by repeated decisions of the highest courts of a State it becomes also the law governing the courts of the United States sitting in that State."). *But see* Kreimer, *supra* note 36, at 622–28.

385 Broughton v. State, 335 N.E.2d 310, 316 (N.Y. 1975).

386 Oakley v. City of Rochester, 421 N.Y.S.2d 472, 474 (N.Y. App. Div. 1979). Notably, in a false-imprisonment claim, the officers' "motives are immaterial to . . . liability," but "proof of good faith . . . may result in nominal damages only." *Broughton*, 335 N.E.2d at 315.

387 *See* Ziglar v. Abbasi, 582 U.S. 120, 157–58 (2017) (Thomas, J., concurring in part and concurring in judgment).

388 *See* Thompson v. Clark, 673 F. Supp. 3d 261, 269–72 (E.D.N.Y. 2023), *vacated and remanded*, No. 23-900-cv, 2024 WL 2720230 (2d Cir. May 28, 2024).

389 *See, e.g.*, *Ziglar*, 582 U.S. at 158–60 (Thomas, J., concurring in part and concurring in judgment).

390 *See* Lindley, *supra* note 1, at 945–47; *cf.* 1 ROSE, *supra* note 162, § 10[l]–[m], at 87–89 (explaining that conditions on recovery exist somewhere between "procedure" and the underlying "substantive rights," *id.* § 10[l], at 87); *id.* § 10[m], at 90–91 (explaining that federal courts are not required to follow state statutes of limitation in equity because "[s]uch statutes can scarcely be said to create substantive rights which the Federal court must respect, but to be concerned rather with the mode of their enforcement," *id.* § 10[m], at 90).

391 *See* Lindley, *supra* note 1, at 945–47.

392 *Compare supra* text accompanying note 367–71 (discussing a statute of limitations, a non-substantive-right, and a non-form-of-action rule of decision), *with supra* text accompanying notes 382–86 (discussing causation, damages, and survivorship form-of-action rules of decision).

393 Baude, *Is Qualified Immunity*, *supra* note 257, at 63.

entitled only to the protection that New York law offers them: today, immunity "unless 'there is bad faith *or* the action taken is without a reasonable basis'";[394] tomorrow, perhaps neither.[395] So, too, Illinois officers would be dependent on the protection Illinois law offers them, which is now a form of qualified immunity[396] but in the future might be no immunity.[397]

Applying contemporary immunity rules in Section 1983 cases would represent a truer form of federalism—one that was understood to have applied in 1871. If this form of Section 1983 federalism was accepted today, Colorado's choice to offer its police officers no immunity[398] would govern Section 1983 actions for damages against its officers. On the other hand, Illinois's choice to give its officers a somewhat robust immunity[399] would also be acceptable.[400] As Professors Aaron Nielson and Christopher Walker have explained, the current approach operates as a form of immunity federalism because states can always lower protection under state law.[401] But the ever-present and available federal standard places a heavy thumb on the scale and curbs the states' ability to choose how and when to expose their own officers to liability.

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394 Triolo v. Nassau County, 24 F.4th 98, 108–09 (2d Cir. 2022) (emphasis added) (quoting Arteaga v. State, 527 N.E.2d 1194, 1196 (N.Y. 1988)). It appears that in the malicious-prosecution context, proving malice would necessarily overcome the official's qualified immunity.

395 *See* S. 182, 2023–2024 S., Reg. Sess. § 1 (N.Y. 2023) (proposing the repeal of qualified immunity for state-law claims).

396 *See* 745 ILL. COMP. STAT. 10/2-202 (2025) ("A public employee is not liable for his act or omission in the execution or enforcement of any law unless such act or omission constitutes willful and wanton conduct."); Andrade v. City of Kankakee, 238 N.E.3d 381, 389–90 (Ill. App. Ct. 2023).

397 *See* Alyssa Patrick, *Illinois Considers Removing Qualified Immunity for Police*, WAND NEWS (Apr. 1, 2022), https://www.wandtv.com/news/illinois-considers-removing-qualified-immunity-for-police/article_d6a9a554-b22b-11ec-9a24-4b22b92ecdb0.html [https://perma.cc/FEW4-TA2T] (reporting on a recent bill proposing to end qualified immunity under Illinois state law).

398 *See* COLO. REV. STAT. § 13-21-131(2)(b) (2025); *see also* N.M. STAT. ANN. § 41-4A-4 (2025).

399 *See* 745 ILL. COMP. STAT. 10/1-210 (2025) (granting public employees executing the law immunity unless the act "shows an actual or deliberate intention to cause harm or . . . shows an utter indifference to or conscious disregard for the safety of others or their property"); *id.* 10/2-202. Many states offer a lesser form of qualified immunity that requires subjective good faith. *See, e.g.*, GA. CONST., art. I, § 2, para. IX(d).

400 Both decisions are subject to some limitations, *see infra* Section III.B.4, but as a general matter borrowing these state rules would be entirely consistent with the original understanding of Section 1983.

401 *See* Aaron L. Nielson & Christopher J. Walker, *Qualified Immunity and Federalism*, 109 GEO L.J. 229, 294–95 (2020).

Additionally, adopting the original meaning of Section 1983 would promote the democratization of immunity doctrines. Presently, federal judges decide the most important immunity standards through convoluted historical forays or engaging in judicial policymaking without input from Congress or state decisionmakers. And even when plaintiffs do prevail, officers are indemnified, so deterrence objectives courts point to are frustrated.[402] By turning the immunity question back to Congress and state governments, the people will be able to decide how to allocate the relative costs between victims, officers, governmental entities, and the citizenry at large. Perhaps the best rule is to have strong immunities but disallow indemnification; perhaps states would choose to weaken or eliminate immunities if they could ensure that officers would be indemnified; or maybe a hybrid, always-liable regime combining personal liability for bad-faith violators and indemnification for good-faith violators would best promote civil rights and law enforcement. If states fail to adequately protect civil rights, Congress can always step in. But until it does, the only democratically justified standards come from the states. Unfortunately, the Supreme Court has effectively foreclosed state action by imposing a universal, minimum-level immunity.

B. *Refocusing Reform Efforts*

The Court's misinterpretation and misapplication of Section 1983 has incentivized scholars, judges, and litigants to play a judicial game: convince the Supreme Court that its interpretation is legally wrong, bad policy, and causing harm.[403] Nothing here is meant to discount the harm that plaintiffs endure when they are victims of official mistreatment, or the possibility that the Court is making such harm worse by refusing to grant relief where Congress authorized or mandated it. But another unfortunate byproduct of putting the focus on the Court—on its view of history, on its view of policy, on its view of stare decisis—is that the original understanding of Section 1983 by design left plenty of room for vigorous debate and democratic participation outside the judiciary. This Section discusses how returning to the original understanding of Section 1983 could direct efforts to more fruitful areas.

402 *See* Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 938–43 (2014); *see also, e.g.*, Owen v. City of Independence, 445 U.S. 622, 651, 656 (1980).

403 *See, e.g.*, Petition for Writ of Certiorari at 17–33, Felkner v. Nazarian, 144 S. Ct. 999 (2024) (No. 23-274) (mem.).

1. Finding Policy Solutions in Section 1983

Much of the current debate about Section 1983 and qualified immunity centers on the wisdom of the Court's current approach as a matter of law and economics or fairness or political theory. Although the pleas have not completely fallen on deaf ears, they have not yet persuaded the majority of the Supreme Court.[404] In the aftermath of the death of George Floyd and resulting civil unrest, momentum in Congress to modify, if not eliminate, qualified immunity in Section 1983 suits increased.[405] Ultimately, however, the reform effort stalled.[406]

Around the same time, the Supreme Court issued a summary reversal of a lower-court decision granting state officials qualified immunity; in another petition from a grant of qualified immunity, the Court granted certiorari, summarily vacated the lower court decision, and remanded for further proceedings.[407] It surely communicated to some that the Court was hearing public outcry and that it was willing to reconsider its qualified-immunity doctrine.[408] But the Court has not

404 *See, e.g.*, Baxter v. Bracey, 140 S. Ct. 1862, 1864 (2020) (mem.) (Thomas, J., dissenting from denial of certiorari); Price v. Montgomery County, 144 S. Ct. 2499, 2500 n.2 (2024) (mem.) (Sotomayor, J., statement respecting denial of certiorari).

405 *See, e.g.*, George Floyd Justice in Policing Act of 2021, H.R. 1280, 117th Cong. § 102.

406 *See* Brigid Kennedy, *George Floyd Police Reform Bill Stalls in Senate over Qualified Immunity*, THE WK. (May 25, 2021), https://theweek.com/speedreads/984260/george-floyd-police-reform-bill-stalls-senate-over-qualified-immunity [https://perma.cc/7F8G-J4V7]; *see also* Lawrence Hurley, *Five Years After George Floyd's Death, Calls to Reform Qualified Immunity Mostly Fall Silent*, NBC NEWS (May 20, 2025, at 11:52 ET), https://www.nbcnews.com/news/amp/rcna205338 [https://perma.cc/6FZK-VY3W].

407 *See* Taylor v. Riojas, 141 S. Ct. 52, 54 (2020) (per curiam); McCoy v. Alamu, 141 S. Ct. 1364 (2021) (mem.).

408 For a sample of the optimistic and less-optimistic discussion among qualified immunity skeptics, see Ed Yohnka, Julia Decker, Emma Andersson & Aamra Ahmad, *Ending Qualified Immunity Once and for All Is the Next Step in Holding Police Accountable*, ACLU (Mar. 23, 2021), https://www.aclu.org/news/criminal-law-reform/ending-qualified-immunity-once-and-for-all-is-the-next-step-in-holding-police-accountable [https://perma.cc/K9UX-WA7C]; Joanna Schwartz, *The Supreme Court Is Giving Lower Courts a Subtle Hint to Rein in Police Misconduct*, THE ATL. (Mar. 4, 2021), https://www.theatlantic.com/ideas/archive/2021/03/the-supreme-courts-message-on-police-misconduct-is-changing/618193/ [https://perma.cc/67QU-5BC8]; Jay Schweikert, *The Supreme Court Won't Save Us from Qualified Immunity*, CATO INST. BLOG (Mar. 3, 2021, at 16:58 ET), https://www.cato.org/blog/supreme-court-wont-save-us-qualified-immunity [https://perma.cc/M6PX-UJRF]; Anya Bidwell & Patrick Jaicomo, *Lower Courts Take Notice: The Supreme Court Is Rethinking Qualified Immunity*, USA TODAY (Mar. 2, 2021, at 08:59 ET), https://www.usatoday.com/story/opinion/2021/03/02/supreme-court-might-rethinking-qualified-immunity-column/4576549001/ [https://perma.cc/4RR6-3FQP].

ruled in favor of a Section 1983 plaintiff on a qualified-immunity question since.[409]

To be sure, the efforts by opponents of qualified immunity have led to state-level reform in some jurisdictions.[410] But that reform has been limited, and it can only be effectuated in the shadow of the Supreme Court-imposed federal baseline.[411] If, instead, the Supreme Court deferred to state law on the issue, as Section 1983 originally did, then reform efforts could be more creative. State legislatures, unlike the federal courts, can fashion creative compromises and utilize indemnification and insurance to reform official liability. Rather than trying to convince courts in legalistic terms—constrained by the textually plausible interpretations of Section 1983 and historically plausible accounts of the 1871 common law—advocates and legislatures could more freely create regimes that align with their policy goals.

2. Returning to Constitutional Principles

Returning power to states and state law does not mean, however, that states would be free to enact any law—either extremely protective of their officials or extremely generous to plaintiffs. But the source of those constraints would no longer be 1871 common law or the purported federal interests behind Section 1983. Instead, attention would turn to constitutional limits and requirements.

a. Equality

The first limitation comes from the Equal Protection Clause.[412] In enacting Section 1983, Congress was motivated by the unequal application of otherwise neutral state law in state courts.[413] So, of course, a state law that is not *itself* equal is inapplicable.[414] Even if New York can grant its officers immunity, it cannot do so only in "suits by female

409 *See, e.g.*, Rivas-Villegas v. Cortesluna, 142 S. Ct. 4, 7 (2021) (per curiam); City of Tahlequah v. Bond, 142 S. Ct. 9, 11–12 (2021) (per curiam); Zorn v. Linton, 146 S. Ct. 926, 930–31 (2026) (per curium).

410 *See* Alexander Reinert, Joanna C. Schwartz & James E. Pfander, *New Federalism and Civil Rights Enforcement*, 116 NW. U. L. REV. 737, 740–42 (2021).

411 *See* Ilya Somin, *Assessing the State of the Struggle to Reform Qualified Immunity*, VOLOKH CONSPIRACY (Feb. 2, 2022, at 16:49 ET), https://reason.com/volokh/2022/02/11/assessing-the-state-of-the-struggle-to-reform-qualified-immunity/ [https://perma.cc/86Y3-JR86].

412 *See* U.S. CONST. amend. XIV, § 1.

413 *See* Lindley, *supra* note 1, at 934–35.

414 *Cf.* CONG. GLOBE, 42d Cong., 1st Sess. app. at 115–16 (1871) (statements of Rep. John Franklin Farnsworth and Rep. Samuel Shellabarger) (stating that Section 1983 applies to Black and white persons alike).

plaintiffs," for instance.[415] The original meaning of the Equal Protection Clause[416] required states to extend the protection of the state—through criminal and civil remedies—to all persons on an equal basis.[417] It is squarely within the scope of that Clause to require equal legal remedies.[418]

b. Remedial Floor

The Due Process Clauses offer another limitation.[419] Post-deprivation tort remedies form a part of procedural due process.[420] So removing those remedies without offering any additional process in return, and depriving persons of their life, property, or liberty, might become a due-process violation.[421] For example, statutes of limitations that do not give a reasonable opportunity to bring claims might deprive those victims of due process.[422] And if official immunities are extended too far, similar due process problems might arise.[423]

Alternatively, the Privileges or Immunities Clause might provide substantive protection from the removal of tort suits by states.[424] That Clause protects the privileges and immunities of federal citizenship.[425] Perhaps some of those privileges or immunities include remedies for their violation (or alternatively, perhaps some tort remedies are

415 Lindley, *supra* note 1, at 952.

416 It is unclear whether any equal-protection limitation was understood to apply to the federal government. *See* United States v. Vaello Madero, 142 S. Ct. 1539, 1544–47 (2022) (Thomas, J., concurring). But it makes no difference whether the state law is unconstitutional and therefore inapplicable under the terms of the federal statute or whether the federal statute is itself unconstitutional because it attempts to embrace a rule it cannot constitutionally embrace.

417 *See* Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Pre-Enactment History*, 19 GEO. MASON U. C.R.L.J. 1, 44–45 (2008); John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1390 (1992).

418 Drawing lines on state boundaries does not implicate the Equal Protection Clause or Article III. *Contra* Taylor Kordsiemon, *Challenging the Constitutionality of Qualified Immunity*, 25 U. PA. J. CONST. L. 576, 594–609 (2023). As has been shown, Congress has borrowed remedial rules from states since the First Congress, and American courts have been applying various forms of immunities for over two centuries.

419 *See* U.S. CONST. amend. V; *id.* amend. XIV, § 1.

420 *See, e.g.*, Ingraham v. Wright, 430 U.S. 651, 678–79 (1977); Hudson v. Palmer, 468 U.S. 517, 530–33 (1984).

421 *See* U.S. CONST. amends. V, XIV, § 1.

422 *Cf.* Campbell v. City of Haverhill, 155 U.S. 610, 614–16 (1895). Neither *Campbell* nor the cases on which it relies are clear about the constitutional basis for this limitation. But the best account appears to be the Due Process Clauses.

423 *Cf.* Carlos M. Vázquez & Stephen I. Vladeck, *State Law, the Westfall Act, and the Nature of the* Bivens *Question*, 161 U. PA. L. REV. 509, 573–76 (2013).

424 U.S. CONST. amend. XIV, § 1.

425 *See id.*

themselves privileges or immunities). Or perhaps, as a kind of anti-circumvention rule or as an "ancillary right[],"[426] states cannot remove all private remedies while nominally recognizing a citizen's "rights."[427]

c. Non-Discrimination

The state rules cannot discriminate against federal claims, by offering a different rule for Section 1983 claims than normal state-tort claims, for example. The Supreme Court has recognized this limitation on the applicability of statutes of limitations, though on a different basis.[428] As applied to Section 1983, it is unlikely that this limitation is an exercise of statutory interpretation, as none of the potentially applicable statutes can be read to incorporate such a limitation. But as *McCulloch* recognized, when Congress exercises its constitutionally authorized power, states cannot purposefully interfere.[429]

Further, both Section 1988(a) and the Rules of Decision Act clarify that applicable federal law preempts conflicting state law.[430] So, if Congress chooses to impose survivorship rules or statutes of limitations—as it did for actions arising under section 6 of the Ku Klux Klan Act[431]—those rules would supplant state law. Similarly, nothing prevents Congress from providing a uniform immunity rule for cases arising under Section 1983.[432] And it has already provided for attorney's fees to be awarded to the prevailing party, supplanting the normal rules for fee shifting.[433] If state rules operate in a way that threatens the supposed purpose of Section 1983, Congress has plenty of power to intervene.

426 Jacob D. Charles, *Ancillary Rights*, 173 U. PA. L. REV. 1269, 1299 (2025). Professor Charles separates ancillary rights into different kinds; this right would be a "necessary" right—that is, in order to have a right, there has to be a way to exercise that right. *Id.* So actions that are necessary in this way are themselves rights.

427 *Id.* For an articulation of this argument in the context of the Takings Clause, see Tyler B. Lindley & E. Garrett West, *The Takings Clause Cause of Action*, 79 STAN. L. REV. (forthcoming 2027).

428 *See, e.g.*, *Campbell*, 155 U.S. at 614–15. *Campbell* appeared to suggest that the basis for the limitation is in the inherent power for courts to effectuate or promote the purposes of federal statutes. *See id.* But it is more likely that the limitation is a negative inference from Congress's Article I powers.

429 *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 391–93 (1819). Although *McCulloch*'s reasoning and holding about the propriety of *non-discriminatory* treatment is unsatisfying, its application to *discriminatory* treatment is much more persuasive.

430 42 U.S.C. § 1988(a) (2018); Act of June 25, 1948, ch. 646, § 1652, 62 Stat. 869, 944 (codified at 28 U.S.C. § 1652 (2018)).

431 Ku Klux Klan Act, ch. 22, § 6, 17 Stat. 13, 15 (1871).

432 *See, e.g.*, George Floyd Justice in Policing Act of 2021, H.R. 1280, 117th Cong., § 102.

433 *See* 42 U.S.C. § 1988(b) (2018).

d. Notice

Finally, there might be a limit on how freely a state can impose personal liability on misbehaving officers. Professor Nathan Chapman has argued for a limited form of qualified immunity on the basis of fair notice.[434] Perhaps a state immunity that would impose liability even without some fundamentally required notice would violate the Constitution,[435] whether under the Due Process Clause or the original meaning of the Ex Post Facto Clause.[436]

C. Understanding Section 1983's Federalism

Recapturing the original understanding of Section 1983 as a state-law-focused enforcement statute also changes the resulting federalism for civil-rights litigation against state officials. Under current doctrine, state courts must generally hear Section 1983 suits and follow Supreme Court precedent applying that federal law. But if Section 1983 were instead to bring state law and state-law causes of action to federal court, perhaps federal courts would then have to follow state courts on questions of state law. Moreover, current doctrine provides that municipalities may be subject to Section 1983 claims, but states are not. This potentially counterintuitive distinction makes more sense if one understands Section 1983 to have deferred—subject to the constitutional limitations discussed above—to states' decisions about whether to subject themselves or their municipalities to liability.

1. Imposition on State Courts

The original understanding of Section 1983 reveals a different attitude toward state courts.[437] Consider the difference in the imposition on state courts effectuated by Section 1983 depending on the interpretation one adopts. Today, under the current interpretation of Section 1983, the Supreme Court has held that state courts are generally required to hear Section 1983 suits and to follow Supreme Court precedent in doing so.[438] Four Justices vigorously dissented from the former

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434 *See* Nathan S. Chapman, *Fair Notice, The Rule of Law, and Reforming Qualified Immunity*, 75 FLA. L. REV. 1, 29–31 (2023).

435 *See id.* at 27–31.

436 U.S. CONST. amend. XIV, § 1; *id.* art. I, § 9.

437 I am again indebted to John Harrison for raising this implication.

438 *See* Haywood v. Drown, 556 U.S. 729, 734–35 (2009). The Court allowed an exception for truly jurisdictional and nondiscriminatory state laws, but it interprets that exception narrowly. *See id.* at 735–36; *see also, e.g.*, Williams v. Reed, 145 S. Ct. 465, 471–72 (2025).

holding,[439] but no Justice has questioned that state courts are obligated to follow Supreme Court holdings if the state has voluntarily chosen to allow its courts to hear Section 1983 claims.[440]

But the entire dynamic inverts when one sees Section 1983 as an avenue to bring state-law causes of action—subject largely to state-law rules of decision—in federal court. Nothing in this interpretive shift affects state courts' obligation to hear Section 1983 cases,[441] but it does undermine and even reverse the presumption that state courts must follow the Supreme Court. Of course, on questions concerning the scope of the underlying (constitutional or federal) right and any federal statute that applies to Section 1983 litigation, the Supreme Court would have final say, and state courts would be obligated to follow its decisions. But on questions of state law—concerning the state-law cause of action at issue or any applicable state-law substantive rules—the presumption would not merely disappear, it would flip: The Supreme Court would generally be obligated to follow state courts on decisions of state law. That is, so long as the state law does not run afoul of the Constitution,[442] state courts would get final say on what state law is, even though the question arose in Section 1983 litigation. In fact, federal courts would presumably apply *Erie* on these questions of state law and could certify questions to the state supreme courts as needed.[443]

This analysis paints a far different picture of the relationship between state and federal courts than one sees today. Indeed, rather than imposing federal law on state courts, Section 1983 would have marshalled federal courts to interpret state law (absent a preemptory federal statute).

439 *See Haywood*, 556 U.S. at 742 (Thomas, J., joined by Roberts, C.J., & Scalia & Alito, JJ., dissenting); *see also Williams*, 145 S. Ct. at 473 (Thomas, J., joined by Alito, Gorsuch & Barrett, JJ., dissenting).

440 Across substantive areas of law, it is well accepted that state courts must follow the Supreme Court on issues of federal law. *See, e.g.*, Michigan v. Long, 463 U.S. 1032 (1983).

441 Neither would the issue be very consequential. Because Section 1983 originally required a state-law cause of action, the only significant difference between bringing a claim based on Section 1983 in state court and bringing the state-law cause of action directly in state court (without Section 1983) would be the application of certain congressionally provided rules such as attorney's fees. *See* 42 U.S.C. § 1988(b) (2018).

442 *See supra* Section III.B. Jonathan Mitchell has also argued that the Supreme Court has the power to contradict state courts on their conclusions of state law where their conclusions raise constitutional issues. *See* Jonathan F. Mitchell, *Reconsidering* Murdock*: State-Law Reversals as Constitutional Avoidance*, 77 U. CHI. L. REV. 1335 (2010).

443 Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

2. State & Local Sovereign Immunity

Under current doctrine, states cannot be found liable under Section 1983 because they are not considered "person[s]" under the statute.[444] And lower levels of state governments (such as counties and municipalities) are liable only when they cause a deprivation under Section 1983.[445] For these governmental entities, the Court rejected respondeat superior for counties and municipalities on the basis that the common law in 1871 generally did not impose respondeat superior liability for torts.[446] On the other hand, the Court completely rejected state-level liability on the basis that "person" generally does not include states, and that such an inclusion would implicate a radical alteration of federal-state balance that should not be presumed without a clear statement from Congress.[447]

Professor Katherine Mims Crocker has offered a thoughtful critique of the Court's conclusion that states are not subject to Section 1983.[448] She marshals evidence that the federalism clear statement rule the Court applied would have been unknown to both Congress and an informed reader in 1871.[449] She also uncovers evidence that in 1871, the Dictionary Act[450]—which supplied a presumption for defining certain words in federal statutes—suggested that states were generally included in the term "person."[451] Only in 1874 was it amended to provide prima facie evidence that states were excluded.[452] And under the current approach to Section 1983, her arguments warrant significant consideration.

On a state-law-focused understanding of Section 1983, however, the question whether "person" includes states is less practically

444 Will v. Mich. Dep't of State Police, 491 U.S. 58, 64 (1989).

445 *See* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 694 (1978).

446 *See id.* at 693–95. Early on, the Court held that Section 1983 did not cover counties or municipalities at all, *see* Monroe v. Pape, 365 U.S. 167, 191–92 (1961), but it reversed its decision in *Monell*, 436 U.S. at 701. Interestingly, substantially the same reasons *Monroe* pointed to as evidence against extending Section 1983 to counties and municipalities can explain why Section 1983 was understood to rely on state law for these questions. *See Monroe*, 365 U.S. at 187–92 (discussing and drawing a negative inference from a separate section of the Ku Klux Klan Act that had tried to make municipalities liable but provoked significant outcry among legislators and was amended).

447 *See Will*, 491 U.S. at 64–65.

448 *See* Katherine Mims Crocker, *Reconsidering Section 1983's Nonabrogation of Sovereign Immunity*, 73 FLA. L. REV. 523 (2021).

449 *See id.* at 535–37.

450 Act of Feb. 25, 1871, ch. 71, § 2, 16 Stat. 431, 431 (codified as amended at 1 U.S.C. § 1).

451 *See* Crocker, *supra* note 448, at 558–64.

452 *See id.* at 568–74. The definition in the Dictionary Act was altered in 1874 by the Revised Statutes without comment. *See id.*

important.[453] Under the Court's current approach, that question is decisive as to whether Section 1983 imposed monetary liability on states. But under the original understanding of Section 1983, including states in the term "person" would merely refer the question of liability to state law. So, if "person" does not include states, Section 1983 would not cover a suit against a state, consistent with Supreme Court precedent. But if "person" does include states, the question whether states are subject to Section 1983 liability would shift to whether state law recognizes a cause of action against the state itself. In other words, the question would instead be whether the state had waived its own sovereign immunity for the state-law claim brought through Section 1983.[454]

From this perspective, the Court's holding that states are not included in Section 1983 might be seen as a corrective mechanism or "second best" judgment. For many people, something seems wrong about categorically subjecting states to Section 1983 suits. And the legislative record does not contain any discussion indicating that states were to be made liable. In fact, when an amendment to the Ku Klux Klan Act was proposed that made municipalities directly liable for damages under another section, the objections were so strong that it was removed from the bill.[455] The Supreme Court might have been wrong to conclude that states were not "person[s]" under Section 1983,[456] but it was correct that Congress did not make states liable for damages over their objection.

In fact, a return to the original approach to Section 1983 would call into question the Court's conclusion that Congress subjected municipalities and counties to monetary damages irrespective of how state law treats those entities. To be sure, state law might very well refuse to extend sovereign immunity to such entities and make them amenable to suit, but Congress did not remove any immunity they might otherwise enjoy under state law. If a state protects municipalities and counties under state law, Section 1983 does not provide a basis for overriding that decision.

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453 42 U.S.C. § 1983.

454 Because the availability of a cause of action against the sovereign (separate from whether the sovereign enjoys immunity) has long depended on the sovereign's consent, *see* WILLIAM BAUDE, JACK GOLDSMITH, JOHN F. MANNING, JAMES E. PFANDER & AMANDA L. TYLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 486–87 (8th ed. 2025), it is unlikely that a state's failure to make a cause of action available against itself would violate the constitutional provisions discussed above.

455 *See* CONG. GLOBE, 42d Cong., 1st Sess. 749, 804 (1871) (conference committee reports to the House).

456 42 U.S.C. § 1983.

IV. Reconstruction Federalism

A. *Substance or Enforcement*

Recasting Section 1983 as a Reconstruction-era statute focused on enforcement of state law (both procedural and substantive) rather than as a creation of a new federal regime of official liability speaks more broadly to how one views Reconstruction-era federalism. From a narrow view, it recasts the dominant understanding of how Section 1983 operated in our federalist system. But more broadly, Section 1983's original understanding sheds light on how the Reconstruction Congress saw its role in enforcing the Reconstruction Amendments and the value of federalism. Not even Section 1983—generally viewed today as a hallmark of federal power over states—was a wholesale rejection of state law but instead sought to enforce and vindicate state law. This discovery challenges our prevailing ideas and justifications for the federalism we have today. And if a state-law-focused statute such as Section 1983 remains relatively state-law focused today despite vast legal change, then perhaps we ought to rethink our view of the current state of federalism.

This finding is consistent with other recent scholarship on the Reconstruction Amendments. That scholarship argues that the Reconstruction Amendments did not make new federal law. Rather, they gave Congress and federal courts the power to enforce preexisting law, whether it came from state law or general, unwritten law. For example, Professor Stephen E. Sachs has argued that the Due Process Clause made enforceable the general law of jurisdiction, such that a judgment entered without jurisdiction could not be enforced against any person.[457] Professors Christopher Green and John Harrison have separately argued that the Equal Protection Clause made enforceable the preexisting obligation for governments to provide equal protection, or remedies, from violence, as opposed to a new general principle of equality.[458] And Professor Ilan Wurman has argued that the Privileges or Immunities Clause was merely a preexisting antidiscrimination principle that states had been flouting before and during the Civil War.[459]

Professors William Baude, Stephen E. Sachs, and Jud Campbell take a broader stance than Wurman on the scope of the Privileges or Immunities Clause but also maintain that the Fourteenth Amendment

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457 *See* Stephen E. Sachs, Pennoyer *Was Right*, 95 TEX. L. REV. 1249, 1290–91 (2017).

458 *See* Green, *supra* note 417, at 44–45; Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Subsequent Interpretation and Application*, 19 GEO. MASON U. C.R.L.J. 219, 251–52 (2009); Harrison, *supra* note 417, at 1436–37.

459 *See* Ilan Wurman, *Reversing Incorporation*, 99 NOTRE DAME L. REV. 265, 270–72 (2023).

did not create federal law, at least not in the sense that we currently understand it.[460] On their account, the Privileges or Immunities Clause (the only Clause examined in their article) referenced general-law rights; that is, rights derived from sources other than sovereign declarations and applicable in all jurisdictions.[461] So, when the Fourteenth Amendment states that no state "shall abridge the privileges or immunities" of United States citizens,[462] it was not creating or nationalizing those rights; nor was it granting Congress the power to create those rights.[463] Rather, it was giving the federal government the power to *enforce* rights that were *already* binding under the general law (and perhaps the constitutions and laws of the states as well).[464] It was harkening on an established—even if contested on the margins—framework for identifying and protecting rights that "all free governments" had to respect.[465]

Immediately after the ratification of the Fourteenth Amendment, all those rights were enforceable by the Supreme Court on writ of error under the Judiciary Act of 1789.[466] But that avenue required plaintiffs to first go to state court, where the courts in Southern states were (at best) overrun by the power of the Klan and other mobs, or (at worst) part of the Klan conspiracy themselves.[467] And traversing through state courts did more harm than merely delay justice. It created its own wrongs—witnesses and plaintiffs assaulted, mob violence against state courts, and more. Moreover, detouring through state courts made it *more* difficult to get Supreme Court review because irrespective of the law and the facts, "juries would weigh the evidence and decide all doubts, and make doubts in favor of the defendants."[468] And of course, if a plaintiff loses on the merits at trial, obtaining Supreme Court review of a federal question is unlikely, if not impossible.[469]

All of this context points to a Reconstruction-era legal movement focused on enforcing preexisting law; law that states had flouted under the evil of slavery and abhorrent racial animosity. The problem was

460 *See* William Baude, Jud Campbell & Stephen E. Sachs, *General Law and the Fourteenth Amendment*, 76 STAN. L. REV. 1185, 1206–10 (2024).

461 *See id.*

462 U.S. CONST. amend. XIV, § 1.

463 *See* Baude et al., *supra* note 460, at 1206–10.

464 *See id.* at 1206–10.

465 *Id.* at 1223 (quoting Corfield v. Coryell, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823) (No. 3230) (Washington, J.)).

466 *See id.* at 1208; Lindley, *supra* note 1, at 931.

467 *See* Lindley, *supra* note 1, at 931, 934–35.

468 *Cf. id.* at 934 (quoting CONG. GLOBE, 42d Cong., 1st Sess. 760 (1871) (statement of Sen. Sherman)).

469 *See* Baude, *Is Qualified Immunity*, *supra* note 257, at 67, 68 n.132.

not, one might say, the content of the then-existing law, but rather the fact that so many states contravened it.

In enacting Section 1983, Congress responded to this enforcement deficiency by transplanting those state-law actions from state courts—where as a practical matter they would have been dead on arrival—to federal courts. Congress did not necessarily view the *substance* of state law in the South as deficient or abhorrent; rather, it viewed the *enforcement* of that law as deficient and unequal and sought to rectify such enforcement failures.[470] In the congressional debates surrounding the Ku Klux Klan Act, one legislator remarked that nothing in Section 1 of the Fourteenth Amendment was not already law applicable to the states and did not already bind states.[471] Rather, the Fourteenth Amendment merely allowed the federal government to enforce those restrictions on governments.[472] Although the Supreme Court could immediately enforce those provisions in the normal course under its appellate jurisdiction over state courts,[473] there was no similar path to the lower federal courts. Section 1983 resolved that asymmetry by giving federal courts the power to enforce state law in original actions and ensure that officials were not—de jure or de facto[474]—escaping liability or resisting enforcement of the Reconstruction Amendments.

Other Reconstruction statutes appear to have taken a similar state-law-focused tact. Some Reconstruction statutes were exactly like Section 1983, declaring that it shall be unlawful to deprive individuals of certain rights but leaving enforcement of that declaration to "appropriate suit[s] or proceeding[s]."[475] Other statutes specifically referred

470 *See* Monroe v. Pape, 365 U.S. 167, 173–77 (1961), *overruled on other grounds by* Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978); Lindley, *supra* note 1, at 933–35 ("The debates [surrounding Section 1983] did not reveal any concern with the substance of state law, which was largely considered adequate at the time. Rather, legislators were concerned with the enforcement (or lack thereof) of that law.").

471 *See* Baude et al., *supra* note 460, at 1230 & n.268 (collecting statements from congressional debates reflecting this "declaratory" view of the Fourteenth Amendment).

472 *See id.* at 1191; *see also* Sachs, *supra* note 457, at 1306.

473 *See* CONG. GLOBE, 42d Cong., 1st Sess. 661 (1871) (statement of Sen. George Vickers).

474 CONG. GLOBE, 42d Cong., 1st Sess. 334 (1871) (statement of Rep. George Frisbie Hoar).

475 *E.g.*, Enforcement Act of 1870, ch. 114, § 23, 16 Stat. 140, 146; *see also, e.g.*, Habeas Corpus Act of 1867, ch. 28, § 1, 14 Stat. 385, 385–86 (extending federal jurisdiction over state prisoners for habeas corpus proceedings but leaving the scope of habeas corpus to general law already applicable to the states). Another act seeking to "promote the Reconstruction of the State of Georgia" declared that "exclusion" of candidates or candidates-elect for public office "upon the ground of race, color, or previous condition of servitude, would be illegal, and revolutionary, and is hereby prohibited" but did not offer a cause of action or clear enforcement mechanism other than the "employ[ment of] . . . military or naval forces of the United States." Act of Dec. 22, 1869, ch. 3, §§ 6–7, 16 Stat. 59, 60.

to state-law forms of action for enforcement,[476] or merely provided federal jurisdiction over pending actions in state court.[477] And still other statutes simply ensured that the existing state-level civil rights be enjoyed by all regardless of race or color.[478] These equality-forcing statutes similarly ensured the equal application and enforcement of state law rather than dictating the substantive content of that law. In fact, of all the public acts enacted by Congress from the end of the Civil War until the end of the Grant administration,[479] only a handful could plausibly be understood to have displaced state law respecting civil rights.[480]

My point is not that Congress cannot displace state law with federal law. The scope of that power hinges on the correct interpretation of the Reconstruction Amendments, particularly their grant of enforcement authority to Congress.[481] But a state-law-focused interpretation of Section 1983, paired with other statutes that took the same "adequate enforcement of preexisting substantive law" approach, is powerful evidence of how Reconstruction Congress understood its own role.

B. Rethinking Pragmatic Federalism

Finally, simple appeals to the Reconstruction era would no longer justify a weak form of federalism, which would need to be defended on pragmatic, not historical, grounds. It might be true that, as a matter of constitutional law, the Reconstruction Amendments greatly limited states' sovereign power and that Congress's power to enforce those Amendments removes any serious Constitution-based federalism

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476 *See, e.g.*, § 3, 16 Stat. at 140–41 (action on the case); Ku Klux Klan Act, ch. 22, § 6, 17 Stat. 13, 15 (1871) (action on the case); Civil Rights Act of 1875, ch. 114, §§ 2–3, 18 Stat. 335, 336 (action of debt for actions under both sections).

477 *See, e.g.*, Act of Feb. 28, 1871, ch. 99, § 16, 16 Stat. 433, 438–39.

478 *See, e.g.*, Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27 (civil rights generally); Act of July 16, 1866, ch. 200, § 14, 14 Stat. 173, 176–77 (similar but for states under presidential control because of the war's disruptive effects on state court systems).

479 By my count, there are 1,610, from December 18, 1865, *see* Act of Dec. 18, 1865, ch. 1, 14 Stat. 1, to March 3, 1877, *see* Act for the Relief of Thomas E. Maley, ch. 134, 19 Stat. 408 (1877). An initial research team marked all statutes potentially relevant, and I reviewed those statutes.

480 *See, e.g.*, Act of May 21, 1866, ch. 86, §§ 1–2, 14 Stat. 50, 50 (imposing a criminal prohibition and penalties on kidnapping and transporting of kidnapped persons); § 1, 18 Stat. at 335–36 (displacing state law concerning racial discrimination in public accommodations to the extent that the Supreme Court was correct in concluding that the Reconstruction Amendments did not prohibit such discrimination, *see* The Civil Rights Cases, 109 U.S. 3, 9–14 (1883)). Another statute criminalized and penalized the importation and selling of persons "inveigled or forcibly kidnapped in any other country," which could be construed as concerning civil rights or foreign relations. Act of June 23, 1874, ch. 464, § 1, 18 Stat. 251, 251.

481 U.S. CONST. amend. XIII, § 2; *id.* amend. XIV, § 5; *id.* amend. XV, § 2.

check on congressional power. But even assuming that much is true, it does not establish that Congress should do so now or has done so in the past. Proponents of aggressive congressional action often point to the Reconstruction Congress to justify broad exercises of congressional power. But once that historical justification is unavailable, a more pragmatic justification is necessary to establish why Congress should take such action now, when even the Reconstruction Congress often (even if not always) deferred to state law and endeavored to ensure equal enforcement.[482]

None of this is to say that it is impossible to make exactly that case. During Reconstruction, "Americans recognized 'a *common set* of rights, applicable against the state and federal governments alike.'"[483] Restricting those rights across the board would have hurt those who were in power as much as it would have hurt those who were out of favor. The biggest threat to liberty was not so much in formal enactments concerning rights generally but rather unequal enactments or, more likely (and harder to detect), unequal enforcement. A mandate of equality and promise of federal enforcement, in turn, was seen as the panacea. Although state courts were distrusted, the federal government still sought to ensure that state law was enforced.

Today, by contrast, Americans do not so much hold in their minds a common set of rights applicable to all citizens and held against all governments—at least not a very robust set of rights. So, when a state makes performing an abortion a crime and enforces it equally, one state might view that as a just (and perhaps required) exercise of sovereignty; another might view it as a gross deprivation of rights and affront to basic human dignity and autonomy. One state might regulate speech in a way that accords with its view of free speech; others might argue that such an enactment is inconsistent with the idea of a free state. Additional examples abound.

At the same time, state courts are increasingly considered trustworthy. Federal courts grant them presumptions of regularity that, at least on some accounts, track the low empirical likelihood that state courts will misbehave.[484] And all along the political and ideological spectrum one can see calls to move litigation to state court, which

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482 Many statements made during Reconstruction presume that mandating equal laws and ensuring equal enforcement would in fact ensure that the substance of the law would remain satisfactory. *See* Wurman, *supra* note 458, at 323–32. But that does not necessarily mean that the *only* thing the Reconstruction Amendments did was mandate equal formal treatment and equal enforcement, as Wurman himself recognizes. *See id.* at 347–48.

483 *Id.* at 278 (quote corrected) (quoting Jud Campbell, *Constitutional Rights Before Realism*, 2020 U. ILL. L. REV. 1433, 1441).

484 *See, e.g.*, Parke v. Raley, 506 U.S. 20, 29–30 (1992); United States *ex rel.* Sampson v. Brewer, 593 F.2d 798, 799 (7th Cir. 1979).

might be more friendly to rights claims, more democratic, and more responsive to the populace.[485]

Perhaps this shift in the factual circumstances is enough to justify more aggressive congressional action today with respect to the content of state law, but the case must be made on the facts. It is not enough to dubiously point to Reconstruction as a time in which Congress ran roughshod over state law for justification. And further, in interpreting Reconstruction-era enactments, it would be a mistake to assume that Congress necessarily intended to displace state law in favor of federal law. Congress might have simply sought to ensure enforcement of a shared set of legal norms.[486]

CONCLUSION

Section 1983 is rightly hailed as a landmark advancement in enforcement of the rights secured by the Constitution, but the way in which it did so has been deeply misunderstood. Consistent with the general misunderstanding that the Reconstruction Congress always displaced state substantive law and imposed federal law, many have assumed that Section 1983 must have created a federal cause of action controlled entirely by federal law. That assumption is inconsistent with the historical evidence. Instead, Section 1983 would have been understood as a way for individuals to bring their state-law causes of action against misbehaving state officials in federal court. What's more, nothing since Section 1983's enactment in 1871 has changed that original legal effect. Putting aside stare decisis, Section 1983 still mandates that plaintiffs use a state-law cause of action governed by state law (except where otherwise provided for by federal statute). And even assuming stare decisis applies in full force here, each of the four factors suggests that the Court should jettison the modern approach in favor of adherence to Section 1983's original meaning.

This conclusion also suggests a broader reconsideration of the story of Reconstruction federalism. Even if Congress has the constitutional power to regulate the content of state law in enforcing the Reconstruction Amendments, Reconstruction Congress notably sought to ensure equal enforcement of state law rather than change its content in many instances. Arguments that Congress should regulate and preempt state substantive law now must be justified on pragmatic

485 *See* Tyler B. Lindley, *Remedial Limits, Constitutional Adjudications, and the Balance of Powers*, 58 WAKE FOREST L. REV. 655, 703–05 (2023) (collecting sources and offering its own call to shift litigation to state courts).

486 *Contra, e.g.*, Kreimer, *supra* note 36, at 616 (arguing that it is "an incongruous historical vision to picture the Reconstruction Congress establishing the local law of the recently-rebelling states as the linchpin of an avowedly nationalist enforcement program").

grounds rather than by reference to the dubious story of a Reconstruction Congress that purportedly took radically aggressive steps to create and impose new federal law.