5-2022

Qualified Immunity, Sovereign Immunity, and Systemic Reform

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Duke Law Journal

VOLUME 71 MAY 2022 NUMBER 8

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ABSTRACT

Qualified immunity has become a central target of the movement for police reform and racial justice since George Floyd's murder. And rightly so. Qualified immunity, which shields government officials from damages for constitutional violations even in many egregious cases, should have no place in federal law. But in critical respects, qualified immunity has become too much a focus of the conversation about constitutional-enforcement reform. The recent reappraisal offers unique opportunities to explore deeper problems and seek deeper solutions.

This Article argues that the public and policymakers should reconsider other aspects of the constitutional-tort system—especially sovereign immunity and related protections for government entities—too. Qualified immunity arises from and interacts with sovereign

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immunity in doctrinal and functional terms. Both rest on concerns about defense-side expenses and federal-court dockets. Both create harm given the impacts of indemnification and the economics of unconstitutional acts. In important ways, the problem with qualified immunity is actually sovereign immunity.

As one possible strategy, this Article recommends incremental yet systemic reform, contending that Congress should remove qualified immunity and allow entity liability at all levels of government for Fourth Amendment excessive-force claims while paving the way for further-reaching changes. Like qualified immunity, sovereign immunity and related protections for government entities fall hardest on populations that suffer a disproportional share of constitutional harm, including communities of color in the context of police violence. Increasing accountability in this area should help provide equal justice under law while showing that peeling away unwarranted defenses should not wreak havoc on individual or government finances, the judicial system, or substantive rights.

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INTRODUCTION

On May 29, 2020, four days after George Floyd, an unarmed Black man, was murdered under the knee of a white police officer in Minneapolis, the *New York Times* published an editorial demanding that the Supreme Court "rethink 'qualified immunity.'"[1] Qualified immunity is a defense to lawsuits seeking money damages for federal constitutional violations.[2] It says that courts cannot hold government officials liable unless the conduct in question violated "clearly established" rights,[3] which has become a high bar to relief.[4] The doctrine thus protects police officers from civil accountability for excessive-force claims even in many egregious cases.[5]

The *New York Times* piece points out that "[t]he vast majority of police officers are decent, honest men and women who do some of society's most dangerous work."[6] But, the editorial board says, "[w]ith the next George Floyd just a bad cop away," the Court should "ratchet back qualified immunity to circumstances in which it is truly warranted."[7] For "[w]hen bad cops escape justice and trust between the police and the community shatters, it isn't just civilians who suffer the consequences, it's the good cops, too."[8] A *USA Today* op-ed followed the next day.[9] That column focuses on how courts regularly refuse to deny qualified immunity unless the plaintiff finds factually

1. Editorial, *How the Supreme Court Lets Cops Get Away with Murder*, N.Y. TIMES (May 29, 2020), https://www.nytimes.com/2020/05/29/opinion/Minneapolis-police-George-Floyd.html [https://perma.cc/HH7A-JQ4D].

2. Harlow v. Fitzgerald, 457 U.S. 800, 806–07 (1982).

3. *Id.* at 818.

4. *See infra* Part II.A.

5. *See infra* Part I.

6. Editorial, *supra* note 1.

7. *Id.*

8. *Id.*

9. Patrick Jaicomo & Anya Bidwell, Opinion, *Police Act Like Laws Don't Apply to Them Because of 'Qualified Immunity.' They're Right.*, USA TODAY, https://www.usatoday.com/story/opinion/2020/05/30/police-george-floyd-qualified-immunity-supreme-court-column/5283349002 [https://perma.cc/W6EK-N5XG] (last updated June 9, 2020, 2:36 PM) (originally published May 30, 2020).

indistinguishable precedent, an often impossible requirement that can produce outrageous results.[10] These pieces provided just a glimpse of what was to come. The months following Floyd's death saw an explosion of commentary advocating an overhaul of qualified immunity.[11]

Qualified immunity, at least in its current form, should have no place in federal law. But even before the recent spotlight on police violence, calls to rethink qualified immunity had become common among legal and political commentators[12]—including from me.[13] The racial-justice reckoning that has recently swept the nation provides new opportunities to look beyond qualified immunity—to examine other, deeper problems with how constitutional enforcement works and to seek other, deeper solutions to improve it. In particular, the public and policymakers should reconsider the role that *sovereign* immunity has played in producing and perpetuating the inadequate U.S. constitutional-tort scheme.

While qualified immunity protects government officials when the law deems their behavior "reasonable,"[14] sovereign immunity shields certain governments themselves from constitutional-tort damages under any and all conditions.[15] To illustrate the effects of each doctrine, consider the circumstances of *Fortunati v. Campagne*.[16] State police were alerted that an "agitated" man was camping on a dirt road in the Vermont woods.[17] The man's father reached out to the troopers twice, telling them that his son, Joseph, suffered from mental illness, was off

10. *Id.*

11. *See* Hailey Fuchs, *Qualified Immunity Protection for Police Emerges as Flash Point amid Protests*, N.Y. TIMES, https://www.nytimes.com/2020/06/23/us/politics/qualified-immunity.html [https://perma.cc/SXL4-AMNY] (last updated Oct. 18, 2021) (originally published June 23, 2020) (stating that "[a]ctivists have seized on qualified immunity as what they see as one of the biggest problems with policing" and that the doctrine had become "a focal point of the new debate on Capitol Hill").

12. *See infra* Part I.A.

13. *See* Katherine Mims Crocker, *Qualified Immunity and Constitutional Structure*, 117 MICH. L. REV. 1405, 1457–60 (2019) [hereinafter Crocker, *Constitutional Structure*].

14. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

15. *See infra* Part II.A.

16. Fortunati v. Campagne, 681 F. Supp. 2d 528 (D. Vt. 2009), *aff'd sub nom.* Fortunati v. Vermont, 503 F. App'x 78 (2d Cir. 2012). The district court explained that "[b]ecause Plaintiffs rely on the same officer testimony, post-incident reports, and other police records as the Defendants," the facts the court recounted were "effectively undisputed." *Id.* at 532; *see also id.* at 536–39 (further discussing arguments surrounding the evidence).

17. *Id.* at 532.

his medication, and had recently threatened another family member with a handgun at the campsite.[18] The father explained that the family was "available to help with Joseph" and "asked to work with the police in formulating a plan" to detain him.[19]

Soon after, the state-police shift commander "requested activation of the State Police's Tactical Services Unit"—a "specialized, SWAT-type" team.[20] At a pre-deployment briefing, "[n]o particular instruction was given on how to approach Joseph in light of his mental illness."[21] The team laid siege to the campsite, with seven officers moving in while "w[earing] camouflage uniforms with face paint" and "carr[ying] assault rifles, tasers, and shotguns with beanbag ammunition."[22] The officers found Joseph acting peacefully, but when he refused to comply with their instructions, they fired multiple beanbag rounds on him and chased him through the woods and to his car, where he "rummage[d] around the floorboard or center console area" and was then seen pointing a handgun toward the ground.[23] Several officers reported that after some additional movement around the area, Joseph pulled a handgun from his waistband, at which point two troopers shot him dead with assault rifles.[24] A local alternative newspaper reported that "[e]lectrodes from two Taser stun guns were lodged in his back, delivering high-voltage shocks to his lifeless body."[25]

Joseph's family sued nine state troopers in federal court, raising Fourth Amendment excessive-force claims.[26] The district court held that a jury could determine that authorizing the SWAT-style raid when "the police knew Joseph was mentally ill" and when "he was not actively threatening anyone" violated Joseph's constitutional rights.[27] The court likewise held that a jury could determine that firing beanbag rounds when Joseph was not "acting combative" or "threaten[ing] to

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* at 533.

22. *Id.*

23. *Id.* at 533–34.

24. *Id.* at 534, 537.

25. Andy Bromage, *Did Vermont State Troopers Go Too Far When They Shot Paranoid Schizophrenic Joe Fortunati?*, SEVEN DAYS (Sept. 9, 2009), https://www.sevendaysvt.com/vermont/did-vermont-state-troopers-go-too-far-when-they-shot-paranoid-schizophrenic-joe-fortunati/Content?oid=2138263 [https://perma.cc/M7HB-DZ95].

26. *Fortunati*, 681 F. Supp. 2d at 535–44.

27. *Id.* at 541.

use his weapon" violated the Fourth Amendment.[28] Nevertheless, the court granted all the defendants qualified immunity on summary judgment, emphasizing that the doctrine was meant "to protect officers from the sometimes 'hazy border between excessive and acceptable force.'"[29] The Second Circuit affirmed in an unpublished opinion, leaving Joseph's family with no viable constitutional claim for his killing.[30]

The effect of qualified immunity in *Fortunati* was regrettable. But it was *sovereign* immunity that forced Joseph's family to proceed to summary judgment against individual officers only when the *state police agency* would have seemed to bear much responsibility for the way events unfolded. It was the state police agency that appears to have controlled the militarized unit that descended on the campsite. Indeed, multiple superior officers considered and approved the shift commander's request to mobilize the team, with the shift commander later pointing up the chain of command to try to avoid liability.[31] It was the state police agency, presumably, that fostered the unit's culture, managed its training, and established its procedures, with Joseph's family arguing throughout the litigation that the unit should have followed a police professional association's recommendations about how to approach mentally ill individuals.[32] It was the state police agency, moreover, that awarded the troopers "medals of commendation."[33] According to the local alternative newspaper, the officers "who fired the fatal shots . . . received the Combat Cross award for demonstrating 'remarkable discipline in a stressful situation while attempting to bring this action to a conclusion.'"[34] And five other officers "each received" an honor called "the Director's Award,"[35] with

28. *Id.* at 540–41, 544.

29. *Id.* at 541–42, 544 (quoting Saucier v. Katz, 533 U.S. 194, 206 (2001)).

30. *See* Fortunati v. Vermont, 503 F. App'x 78, 82 (2d Cir. 2012).

31. *See Fortunati*, 681 F. Supp. 2d at 532, 542 n.12 (noting that the shift commander argued he had no authority to activate the SWAT-style raid).

32. *Id.* at 540 n.7; *Fortunati*, 503 F. App'x at 81. The family also contended that the unit's conduct ran afoul of the state police agency's extant policies. *See Fortunati*, 681 F. Supp. 2d at 540 (stating that the family "note[d] the Vermont State Police's use of force policy, under which a subject generally should be combative or assaulting the police before beanbag shotguns are used"); *see also Fortunati*, 503 F. App'x at 81 (reiterating the family's argument).

33. Bromage, *supra* note 25.

34. *Id.*

35. *Id.* The newspaper also reported that "[f]ollowing Jo[seph]'s death, state police launched a program to give troopers a minimum level of training in dealing with mentally ill suspects,"

another local news source reporting the officers were praised for exhibiting "dedication, training and commitment to keeping other members safe."[36]

Joseph's family originally sued the State of Vermont in addition to the individual officers, claiming the state crossed constitutional lines by "fail[ing], through its agents the State Police, to properly and adequately train and instruct the members of the department . . . in the proper manner of dealing with emotionally disturbed and mentally ill individuals."[37] The district court made short work of this theory at the motion-to-dismiss stage, explaining that because of sovereign immunity, the Supreme Court has held that federal law "does not provide a federal forum for litigants who seek a remedy against a State for alleged deprivations of civil liberties."[38]

Despite rulings like this, qualified rather than sovereign immunity has raised the public's ire when it comes to constitutional-tort litigation. Perhaps one explanation is that qualified immunity leads to judicial opinions parsing plaintiffs' allegations to conclude that conduct like that involved in *Fortunati* falls within "the sometimes 'hazy border between excessive and acceptable force,'"[39] while sovereign immunity more often leads to nothing at all, with plaintiffs declining to file claims that would result in inevitable dismissal. Even municipal-liability doctrine, which says that plaintiffs can sometimes recover damages for federal constitutional violations from local-government entities (specifically, if the violation arose from the entity's policy or custom),[40] has provoked more pushback recently than sovereign immunity has.[41]

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which the president of the Vermont chapter of the National Alliance on Mental Illness said was "a good start, but nowhere near adequate." *Id.*

36. Wilson Ring, *State Police Give Troopers Awards for Actions*, RUTLAND HERALD ONLINE, https://www.rutlandherald.com/news/state-police-give-troopers-awards-for-actions/article_3864a7bf-61ad-56e4-a7f2-34e22c12321c.html [https://perma.cc/8YC3-GUYU] (last updated Oct. 27, 2018).

37. Fortunati v. Campagne, No. 1:07-CV-143, 2008 WL 220713, at *8 (D. Vt. Jan. 25, 2008) (quoting the complaint).

38. *Id.* (quoting Will v. Mich. Dep't of State Police, 491 U.S. 58, 66 (1989)).

39. Fortunati v. Campagne, 681 F. Supp. 2d 528, 542 (D. Vt. 2009), *aff'd sub nom.* Fortunati v. Vermont, 503 F. App'x 78 (2d Cir. 2012) (quoting Saucier v. Katz, 533 U.S. 194, 206 (2001)).

40. *See infra* Part II.A.

41. *See, e.g.*, Orion de Nevers, *A Dubious Legal Doctrine Protects Cities from Lawsuits over Police Brutality*, SLATE (June 2, 2020, 2:16 PM), https://slate.com/news-and-politics/2020/06/monell-supreme-court-qualified-immunity.html [https://perma.cc/5B5P-VFB7] ("[Besides reforming qualified immunity,] Congress must also act to address the less-well-known but equally pernicious rules governing municipal liability. It's time to hold local governments accountable for

A similar explanation for the differential pushback levels (that municipal-liability doctrine, like qualified-immunity doctrine, leads to judicial opinions parsing plaintiffs' allegations) seems possible—as does the fact that local governments simply employ more law-enforcement officers than the federal government and states do.[42]

There are compelling but contested reasons to believe that opening up government entities to monetary liability would do more to improve policing than changes to qualified immunity could.[43] Reforms like improving education on de-escalation strategies, implementing a use-of-force continuum, and establishing comprehensive-reporting requirements demand top-down organizational coordination and resource commitment.[44] If one wants governments to reduce rather than reward alleged constitutional violations, the possibility of subjecting more agencies to more private causes of action—and to more of the public attention that can accompany litigation—warrants close consideration.

Congress has the power to withdraw sovereign-immunity and related protections for government entities in constitutional-tort cases: when it comes to state and federal entities, it just needs to speak more clearly than it has done.[45] This Article makes the case for why

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police violence."); Brett Raffish, *Municipal Liability in Police Misconduct Lawsuits*, LAWFARE (Oct. 19, 2020, 11:43 AM), https://www.lawfareblog.com/municipal-liability-police-misconduct-lawsuits [https://perma.cc/VV5L-UTNZ] ("Like the qualified immunity doctrine, [municipal-liability] doctrine may be due for change.").

42. *See* William J. Stuntz, *The Virtues and Vices of the Exclusionary Rule*, 20 HARV. J.L. & PUB. POL'Y 443, 446 (1997) ("Most police work for local governments . . . .").

43. *See* Paul Stern, *Qualified Immunity and the Plea for Accountability*, LAWFARE (Dec. 21, 2020, 8:01 AM), https://www.lawfareblog.com/qualified-immunity-and-plea-accountability [https://perma.cc/59DE-PQ2E] (stating that "the absence of vicarious liability . . . frustrates the deterrent rationale of constitutional tort law more than qualified immunity" does but that "[t]he empirical evidence is both scant and pessimistic" for whether "monetary damages aimed at any level of government can have a deterrent effect").

44. These proposals come from the marquee "8 Can't Wait" campaign. *See* #8CANTWAIT, https://8cantwait.org [https://perma.cc/AWV7-5MWQ]; William Earl, *Oprah, Ariana Grande and More Champion 8 Can't Wait, Project To Reduce Police Violence*, VARIETY (June 4, 2020, 9:10 AM), https://variety.com/2020/biz/news/8-cant-wait-reduce-police-violence-oprah-ariana-grande-1234625314 [https://perma.cc/8SAW-KM96]; *see also* Matthew Yglesias, *8 Can't Wait, Explained*, VOX (June 5, 2020, 4:00 PM), https://www.vox.com/2020/6/5/21280402/8-cant-wait-explained-policing-reforms [https://perma.cc/4S4M-SCCA] (stating that the empirical effectiveness is murky but that the project's proposals "would respond to the public desire for police to make tough concessions while remaining more politically palatable to cautious politicians faced with the alternative rallying cry of 'defund the police'").

45. As to states, see, for example, *Allen v. Cooper*, 140 S. Ct. 994 (2020), which says that a federal court may "entertain a suit against a nonconsenting State" if Congress "enact[s]

constitutional-enforcement reform should focus not on a pinpoint look at qualified immunity, but on a panoramic view of a system premised in essential ways on sovereign immunity and continually shaped by its effects. To be clear, the purpose is not to make jurisprudential claims about either qualified or sovereign immunity (which I do in several other pieces[46]). Nor do I intend to undermine the basic dignitary and budgetary values underlying sovereign immunity in federal law, given that the arguments advanced here work within the judiciary's existing withdrawal frameworks and give great weight to worries about fiscal impairment. Instead, the purpose is to demonstrate the need for policy improvements, including rethinking how qualified and sovereign immunity and related protections work in this area; to outline what manifesting such improvements might look like; and to contend that pursuing this path should not make the proverbial sky fall.

This Article proceeds in four parts. Part I reflects on why qualified immunity has become such a specific focus of discussions surrounding constitutional enforcement over the past few years. It also examines the Supreme Court's somewhat cryptic response to recent calls for change and contends that reform efforts are better directed toward Congress.

Part II considers how sovereign immunity has contributed to qualified immunity's development from a doctrinal, and simultaneously conceptual, perspective. This Part focuses on how the goals of decreasing defense-side expenses and constricting federal-court dockets interacted with background sovereign-immunity principles to prompt the Court to establish and expand qualified immunity and related doctrines. This Part also sets the stage for considering how qualified and sovereign immunity connect with the

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'unequivocal statutory language' abrogating the States' immunity from the suit" and if "some constitutional provision . . . allow[s] Congress to have thus encroached on the States' sovereignty," plus noting that Section 5 of the Fourteenth Amendment can qualify. *Id.* at 1000–01, 1003 (quoting Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 56 (1996)). As to the federal government, see, for example, *Block v. North Dakota ex rel. Board of University & School Lands*, 461 U.S. 273 (1983), which states that "all . . . entities . . . are barred by federal sovereign immunity from suing the United States in the absence of an express waiver of this immunity by Congress." *Id.* at 280.

46. *See generally* Crocker, *Constitutional Structure*, *supra* note 13 (exploring possible qualified-immunity origins and justifications); Katherine Mims Crocker, *Reconsidering Section 1983's Nonabrogation of Sovereign Immunity*, 73 FLA. L. REV. 523 (2021) [hereinafter Crocker, *Reconsidering*] (examining the interpretation preserving state sovereign immunity under § 1983); Katherine Mims Crocker, Essay, *The Supreme Court's Reticent Qualified Immunity Retreat*, 71 DUKE L.J. ONLINE 1 (2021) [hereinafter Crocker, *Retreat*] (assessing doctrinal implications of recent qualified-immunity cases).

larger legal landscape through the lens known as remedial equilibration.

Part III critiques the ways in which sovereign immunity and related protections for government entities work in the constitutional-tort context today. By concentrating on the doctrines' functional significance for on-the-ground cases, this Part first examines the impacts of indemnification, arguing that legal and administrative practices surrounding agencies' apparent near-universal coverage of employees' constitutional-tort costs distort the administration of justice and preclude political accountability. This Part then turns to the economics of unconstitutional acts, exploring how sovereign immunity and related protections for government entities bear on the externality and incentive effects running throughout the system. The upshot is that while these kinds of concerns have recently motivated arguments against qualified immunity, they militate against the application of sovereign immunity and similar protections in this area to at least the same degree.

Part IV provides a reformative sketch for one set of ways that Congress could work to improve this sphere of constitutional enforcement. This Part first addresses doctrinal modification, building on previous work of mine introducing the possibility of expanding entity liability in Fourth Amendment excessive-force claims as a first step toward a better model of government accountability.[47] Specifically, this Part argues that starting with excessive-force claims and moving to other governmental misconduct, Congress should respectively waive and abrogate sovereign immunity from constitutional-tort suits for the federal government and states, remove a major limitation on municipal liability for constitutional wrongs, and extend individual accountability by codifying the common-law cause of action against federal officials and by rejecting qualified immunity. This Part then returns to remedial equilibration, contending there is little reason to fear that gradually making these changes will produce a parade of horribles.

The ultimate argument is that systemic reform along the lines marked here should promote important equality goals without causing unduly detrimental effects on individual or government finances, the federal-court system, or substantive constitutional law. This project pursues pluralistic accountability goals, including compensation,

47. *See* Crocker, *Reconsidering*, *supra* note 46, at 585–88.

deterrence, the expressive value of recognizing rights violations, and victim transparency and autonomy in constitutional litigation.

I. A SPECIFIC FOCUS

This Part sketches how qualified immunity came to dominate the conversation about constitutional-enforcement reform. Start by considering the parallels between the deaths of George Floyd and Eric Garner, another unarmed Black man killed in an encounter with police. The commonalities are uncanny but sadly unsurprising, given the apparent frequency of similar events.[48] "I can't breathe," said each, lying on the ground after being restrained across the neck by a white police officer.[49] "I can't breathe," said each, before slipping into unconsciousness and subsequently being pronounced dead at a nearby hospital.[50] "I can't breathe," said each, accused of committing only a relatively minor, nonviolent crime before law-enforcement officers arrived on the scene.[51]

Police officers have avoided penal culpability for killing an ever-lengthening list of people[52]—even after trial in some of the highest-

48. *See, e.g.*, Leslie Perrot, *After Millions Demand Justice, Colorado Governor's Office Appoints State Attorney General To Examine the Case of a Black Man Who Died in Police Custody*, CNN (June 26, 2020, 9:23 AM), https://edition.cnn.com/2020/06/25/us/colorado-investigation-elijah-mcclain-died-in-custody/index.html [https://perma.cc/D2UG-JG57] (regarding Elijah McClain's death).

49. *See* Wesley Lowery, *'I Can't Breathe': Five Years After Eric Garner Died in Struggle with New York Police, Resolution Still Elusive*, WASH. POST (June 13, 2019, 8:03 PM), https://www.washingtonpost.com/national/i-cant-breathe-five-years-after-eric-garner-died-in-struggle-with-new-york-police-resolution-still-elusive/2019/06/13/23d7fad8-78f5-11e9-bd25-c989555e7766_story.html [https://perma.cc/J7G4-LPDW] (describing Garner's death); Brendan O'Brien, *New Charges Against Minneapolis Policemen as Protests Continue*, REUTERS (June 3, 2020, 6:19 AM), https://reut.rs/301lymC [https://perma.cc/ZQ6C-NZRQ] (describing Floyd's death).

50. *See* Lowery, *supra* note 49; O'Brien, *supra* note 49; Eric Levenson, *Former Officer Knelt on George Floyd for 9 Minutes and 29 Seconds—Not the Infamous 8:46*, CNN (Mar. 30, 2021, 6:27 AM), https://www.cnn.com/2021/03/29/us/george-floyd-timing-929-846/index.html [https://perma.cc/KJE9-VJJV].

51. *See* Lowery, *supra* note 49; O'Brien, *supra* note 49.

52. *See* Janell Ross, *Police Officers Convicted for Fatal Shootings Are the Exception, Not the Rule*, NBC NEWS, https://www.nbcnews.com/news/nbcblk/police-officers-convicted-fatal-shootings-are-exception-not-rule-n982741 [https://perma.cc/697F-TS4T] (last updated Mar. 14, 2019, 7:56 AM) (stating that "[s]ince 2005, 98 nonfederal law enforcement officers have been arrested in connection with fatal, on-duty shootings"; that "[t]o date, only 35 of these officers have been convicted of a crime, often a lesser offense such as manslaughter or negligent homicide, rather than murder"; that "[o]nly three officers have been convicted of murder during this period and seen their convictions stand"; and that "[c]riminal cases are pending against 21 officers involved in fatal shootings").

profile cases, like those of Freddie Gray, Philando Castile, and Terence Crutcher.[53] Indeed, no charges were filed in Garner's case. Garner was killed in New York City on July 17, 2014.[54] Following intense public scrutiny, a local grand jury announced in December of that year that there was "no reasonable cause" to charge the officer who took him to the ground with any crime.[55] And on July 16, 2019, one day before the limitations period expired, the U.S. Attorney for the Eastern District of New York announced that there would be no federal charges either.[56] In Floyd's case, of course, former police officer Derek Chauvin was convicted of murder in a state trial, and he subsequently pleaded guilty to federal civil-rights charges.[57] The other officers involved in the underlying events have also been convicted of federal crimes and still face state charges.[58] But given the infrequency of convictions, one would be justified in doubting whether real reforms will take root on the criminal side even after all the publicity surrounding Floyd's death.[59]

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53. *See* Madison Park, *Police Shootings: Trials, Convictions Are Rare for Officers*, CNN, https://www.cnn.com/2017/05/18/us/police-involved-shooting-cases/index.html [https://perma.cc/9LF8-7J4T] (last updated Oct. 3, 2018, 4:41 PM).

54. *See* Melanie Eversley & Mike James, *No Charges in NYC Chokehold Death; Federal Inquiry Launched*, USA TODAY, https://www.usatoday.com/story/news/nation/2014/12/03/chokehold-grand-jury/19804577 [https://perma.cc/JB34-XZC8] (last updated Dec. 4, 2014, 11:14 AM).

55. *Id.*

56. Katie Benner, *Eric Garner's Death Will Not Lead to Federal Charges for N.Y.P.D. Officer*, N.Y. TIMES (July 16, 2019), https://www.nytimes.com/2019/07/16/nyregion/eric-garner-case-death-daniel-pantaleo.html [https://perma.cc/84W4-EZLC].

57. Rochelle Olson & Andy Mannix, *Ex-Minneapolis Officers Guilty on All Civil Rights Charges Related to George Floyd's Death*, STAR TRIB. (Feb. 24, 2022, 7:38 PM), https://www.startribune.com/ex-minneapolis-officers-guilty-on-all-civil-rights-charges-related-to-george-floyds-death/600150079 [https://perma.cc/JL4X-KWGA].

58. *Id.*

59. Garner's and Floyd's families accepted multimillion-dollar civil settlements with the cities of New York and Minneapolis, respectively. *See* Kevin Conlon & Ray Sanchez, *Eric Garner's Family Reacts to $5.9 Million Settlement*, CNN (July 14, 2015, 1:20 PM), https://www.cnn.com/2015/07/14/us/garner-nyc-settlement/index.html [https://perma.cc/CJ8M-MAND]; Nicholas Bogel-Burroughs & John Eligon, *George Floyd's Family Settles Suit Against Minneapolis for $27 Million*, N.Y. TIMES, https://www.nytimes.com/2021/03/12/us/george-floyd-minneapolis-settlement.html [https://perma.cc/99UZ-6P33] (last updated Mar. 30, 2021). Settlements are not unusual in notorious cases, but scholars debate their frequency in police-misconduct actions more generally. *Compare* Eleanor Lumsden, *How Much Is Police Brutality Costing America?*, 40 U. HAW. L. REV. 141, 175 (2017) ("[S]ettlements are exceedingly rare. Most families who do sue are unable to state a [constitutional-tort claim] and actually receive nothing for the loss of a loved one."), *with* Marc L. Miller & Ronald F. Wright, Essay, *Secret Police and the Mysterious Case of the Missing Tort Claims*, 52 BUFF. L. REV. 757, 775 (2004) ("[M]any civil

Qualified immunity does not frustrate attempts to hold police officers culpable under criminal provisions.[60] The federal doctrine applies only to certain civil damages claims, most prominently those for constitutional violations under 42 U.S.C. § 1983 against state and local officers or under the regime flowing from the Supreme Court's 1971 decision in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*[61] against federal officers.[62] But many critics believe that qualified immunity—which the Court has repeatedly said "protects all but the plainly incompetent or those who knowingly violate the law"[63]—contributes to a broad feedback loop between legal unaccountability and police brutality.[64]

This Part outlines the rise of the recent movement against qualified immunity, especially from within the legal academy and with respect to the judicial system. The discussion first traces how and to what extent the tide has turned against the doctrine over the last few

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claims against police are resolved either before a case is filed, or through secret settlements and judgments sealed by courts.").

60. To be sure, the Supreme Court has suggested that the standard for holding defendants criminally culpable for willful deprivations of federal rights under 18 U.S.C. § 242 is the same as the standard for overcoming qualified immunity in the civil context. *See* United States v. Lanier, 520 U.S. 259, 264, 270–71 (1997). But the Court has made clear this is because the same concerns arise independently in each situation. *See id.*

61. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

62. *See* Camreta v. Greene, 563 U.S. 692, 705 (2011). Section 1983 was enacted during Reconstruction as part of the Civil Rights Act of 1871, which is also known as the Ku Klux Klan Act because it was aimed in important part at combatting Klan violence. *See* Crocker, *Reconsidering*, *supra* note 46, at 526–27. As relevant, the statute provides a cause of action for "an action at law, suit in equity, or other proper proceeding for redress" against any person acting "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia" who "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." 42 U.S.C. § 1983. *Bivens* and its progeny provide a damages cause of action against federal officers for a limited range of federal constitutional violations. *See infra* notes 169–83 and accompanying text (discussing this regime in more detail). For purposes of the arguments presented here advocating express congressional changes to qualified and sovereign immunity, technical distinctions between § 1983 and *Bivens* claims are largely irrelevant.

63. *E.g.*, Kisela v. Hughes, 138 S. Ct. 1148, 1152 (2018) (per curiam) (quoting White v. Pauly, 137 S. Ct. 548, 551 (2017) (per curiam)).

64. *See, e.g.*, Julian A. Cook III, *The Wrong Decision at the Wrong Time:* Utah v. Strieff *in the Era of Aggressive Policing*, 70 S.M.U. L. REV. 293, 318 & n.230 (2017) (referencing qualified immunity among other factors in arguing that "[w]ith little to fear in terms of criminal or civil sanctions, internal discipline, or suppression of evidence, the aggressive policing that has been so prevalent of late will only continue" (footnotes omitted)).

years and then addresses the Court's somewhat ambivalent actions over the same timeframe.

A. The Turning Tide

Rewind to 2015. In the Supreme Court case *Mullenix v. Luna*,[65] a state trooper tried to disable the car of Israel Leija, Jr., who drove off when an officer tried to arrest him, by shooting from a highway overpass, a tactic in which the trooper had no training.[66] When the trooper contacted his supervisor to ask if the maneuver was "worth doing," the trooper allegedly heard his supervisor respond that he should "stand by" and see whether tire spikes other officers had set up would "work first."[67] The trooper did not follow these instructions, instead firing at the car six times, killing Leija, and then commenting, "[h]ow's that for proactive?"[68] The lower courts denied the trooper's bid for qualified immunity.[69] But the Justices held him entitled to the doctrine's protection in a per curiam opinion without merits briefing or oral argument—a procedure known as a summary reversal.[70]

Justice Sonia Sotomayor broke from what had become a tradition of the Court granting officials qualified immunity with little objection.[71] She accused the majority of "render[ing] the protections of the Fourth Amendment hollow."[72] The decision, she said, supported a "culture" of "'shoot first, think later' . . . policing."[73] Qualified immunity's "basic tenets" had gone "largely unchallenged by leading scholars and Justices for decades,"[74] with the Court holding that alleged constitutional wrongs transgressed clearly established law only twice

65. Mullenix v. Luna, 577 U.S. 7 (2015) (per curiam).

66. *Id.* at 8–9.

67. *Id.* at 9 (quoting Luna v. Mullenix, 773 F.3d 712, 716–17 (5th Cir. 2014), *rev'd*, 577 U.S. 7 (2015) (per curiam)).

68. *Id.*; *id.* at 25 (Sotomayor, J., dissenting).

69. *Id.* at 10–11 (majority opinion).

70. *Id.* at 19; *id.* at 20 (Sotomayor, J., dissenting); *see infra* note 130.

71. *See* Karen M. Blum, *Qualified Immunity: Time To Change the Message*, 93 NOTRE DAME L. REV. 1887, 1887–88 (2018) ("If messages sent by the Supreme Court to the lower federal courts were in the form of tweets, there would be a slew of them under #welovequalifiedimmunity.").

72. *Mullenix*, 577 U.S. at 26 (Sotomayor, J., dissenting).

73. *Id.*

74. Fred O. Smith, Jr., *Formalism, Ferguson, and the Future of Qualified Immunity*, 93 NOTRE DAME L. REV. 2093, 2094 (2018).

since articulating the doctrine's current version in 1982.[75] But Sotomayor's *Mullenix* dissent suggested the tide was beginning to turn.

And it was. Michael Brown was gunned down by a police officer in Ferguson, Missouri, on August 9, 2014, less than a month after Eric Garner's death.[76] With the protests that followed, the Black Lives Matter movement came into widespread public view.[77] In an opinion piece published two weeks after Brown's killing, then-Professor (now-Dean) Erwin Chemerinsky linked qualified immunity to the low chances of holding the officer who killed Brown accountable in court.[78] And more commentators joined the chorus over the next few years.[79]

In 2018, Professor Will Baude published an article titled "Is Qualified Immunity Unlawful?"[80] Other scholars had argued that policy rationales on which the doctrine rested—including allowing courts to cull feeble cases early on—were, or over time had become,

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75. *See* William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 82 (2018) [hereinafter Baude, *Is Qualified Immunity Unlawful?*]. These two cases are *Groh v. Ramirez*, 540 U.S. 551 (2004), and *Hope v. Pelzer*, 536 U.S. 730 (2002). In *Groh*, the Court denied qualified immunity where the defendant law-enforcement officer conducted a search pursuant to a warrant he had drafted that entirely failed to describe the items the investigation was meant to uncover. *See Groh*, 540 U.S. at 563 ("Given that the particularity requirement is set forth in the text of the [Fourth Amendment], no reasonable officer could believe that a warrant that plainly did not comply with that requirement was valid."); *see also id.* at 554–55 (describing the facts of the case). In *Hope*, the Court denied qualified immunity where the defendant prison guards allegedly "hitched [the plaintiff] to a post for an extended period of time in a position that was painful, and under circumstances that were both degrading and dangerous." *Hope*, 536 U.S. at 745; *see id.* at 741 ("The use of the hitching post as alleged by [the plaintiff] 'unnecessar[ily] and wanton[ly] inflicted pain,' and thus was a clear violation of the Eighth Amendment." (quoting Whitley v. Albers, 475 U.S. 312, 319 (1986))); *see also id.* at 733–35 (describing the facts of the case).

76. *See* Leah Thorsen & Steve Giegerich, *Ferguson Day One Wrapup: Officer Kills Ferguson Teen*, ST. LOUIS POST-DISPATCH (Aug. 10, 2014), https://www.stltoday.com/news/local/crime-and-courts/ferguson-day-one-wrapup-officer-kills-ferguson-teen/article_04e3885b-4131-5e49-b784-33cd3acbe7f1.html [https://perma.cc/U9B8-9KUL]; Lowery, *supra* note 49 (noting that Garner died on July 17, 2014).

77. *See Herstory*, BLACK LIVES MATTER, https://blacklivesmatter.com/herstory [https://perma.cc/C8HP-RQ6Z].

78. Erwin Chemerinsky, Opinion, *How the Supreme Court Protects Bad Cops*, N.Y. TIMES (Aug. 26, 2014), https://www.nytimes.com/2014/08/27/opinion/how-the-supreme-court-protects-bad-cops.html [https://perma.cc/L23Z-A54U].

79. *See, e.g.*, Stephen R. Reinhardt, Essay, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 MICH. L. REV. 1219, 1244–50 (2015) (arguing that "the Court has made a series of decisions not compelled by statute or precedent that has had the harmful, practical effect of limiting the ability of all persons to receive the protections of the Constitution").

80. Baude, *Is Qualified Immunity Unlawful?*, *supra* note 75, at 45.

baseless.[81] Baude's article argues that the Court's positive-law rationales—including that "qualified immunity derives from a putative common-law rule that existed when Section 1983 was adopted" in 1871—collapse on examination too.[82] Justice Clarence Thomas cited a pre-publication version of Baude's article in the 2017 case *Ziglar v. Abbasi*[83] to say that "[i]n an appropriate case," the Court "should reconsider [its] qualified immunity jurisprudence."[84] And although Thomas's historical skepticism differed from Sotomayor's consequentialist critique, the combination showed that cutting back on qualified immunity had become a broad-based rallying cry. In 2018, the libertarian Cato Institute mounted a campaign to take qualified immunity down, eventually joining with the ACLU, the NAACP Legal Defense and Education Fund, and other "cross-ideological" organizations in amicus filings challenging the doctrine.[85]

Qualified immunity came to generate an enormous amount of attention in lower courts, academic journals, political discourse, and media outlets. For just a few prominent examples from these respective categories, in 2018, Judge Don Willett of the Fifth Circuit filed a concurrence to express "disquiet over the kudzu-like creep" of the doctrine.[86] "[I]mmunity," he said, "ought not be immune from thoughtful reappraisal."[87] The *Yale Law Journal* featured an article titled "How Qualified Immunity Fails" in October 2017.[88] And when the *Notre Dame Law Review* devoted its annual Federal Courts,

81. *See, e.g.*, Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 8–12 (2017) [hereinafter Schwartz, *How Qualified Immunity Fails*].

82. Baude, *Is Qualified Immunity Unlawful?*, *supra* note 75, at 51; *see also supra* note 62 (introducing § 1983).

83. Ziglar v. Abbasi, 137 S. Ct. 1843 (2017).

84. *Id.* at 1871–72 (Thomas, J., concurring in part and concurring in the judgment) (noting that "some evidence supports the conclusion that common-law immunity as it existed in 1871 looked quite different from our current doctrine").

85. *See* Clark Neily, *Why Cato Took On Qualified Immunity*, CATO AT LIBERTY (May 5, 2020, 8:47 AM), https://www.cato.org/blog/why-qualified-immunity [https://perma.cc/DW9K-RMAH]. *See generally, e.g.*, Brief of Cross-Ideological Groups Dedicated to Ensuring Official Accountability, Restoring the Public's Trust in Law Enforcement, and Promoting the Rule of Law as *Amici Curiae* in Support of Petitioner, Corbitt v. Vickers, No. 19-679 (U.S. Dec. 20, 2019) (challenging qualified immunity).

86. Zadeh v. Robinson, 902 F.3d 483, 498 (5th Cir. 2018) (Willett, J., concurring dubitante), *withdrawn on reh'g*, 928 F.3d 457 (5th Cir. 2019).

87. *Id.* On rehearing, Willett wrote that "deeper study" had "reaffirmed" this position. *Zadeh*, 928 F.3d at 474 (Willett, J., concurring in part and dissenting in part).

88. *See* Schwartz, *How Qualified Immunity Fails*, *supra* note 81, at 2.

Practice & Procedure issue to the doctrine in 2018, just one piece came out in favor of the doctrine.[89] Candidates Pete Buttigieg, Julian Castro, Beto O'Rourke, Bernie Sanders, and Elizabeth Warren all castigated qualified immunity in 2019 while campaigning for the Democratic Party presidential nomination.[90] And in early 2020, Reuters published a Pulitzer Prize-winning investigation into the doctrine's effects in federal cases, concluding that "under the careful stewardship of the Supreme Court," qualified immunity "mak[es] it easier for officers to kill or injure civilians with impunity."[91] The list could go on and on.

On May 13, 2020, with the Court considering whether to grant certiorari in roughly a dozen qualified-immunity cases, conservative political commentator George Will dedicated his *Washington Post* column to attacking the doctrine.[92] Exhorting the Court to rethink qualified immunity from the ground up, Will said the defense "has essentially nullified accountability for law enforcement and other government officers even in cases where violations of constitutional rights are indisputable."[93] Its casualties, he said, "include not just those whose civil rights have been violated, but the overwhelming majority of law-abiding law enforcement officers and other public officials who are tainted by the unpunished unconstitutional behavior of a few."[94] The outcry against qualified immunity seemed to have reached a crescendo. But that was about two weeks before George Floyd's death,

89. *See* Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 NOTRE DAME L. REV. 1853, 1854 (2018).

90. Emma Ockerman, *It's Nearly Impossible To Sue a Cop for Shooting Someone. These Democratic Candidates Are Trying To Change That.*, VICE NEWS (Oct. 31, 2019, 12:25 PM), https://www.vice.com/en_us/article/7x5jj9/its-nearly-impossible-to-sue-a-cop-for-shooting-someone-these-democratic-candidates-are-trying-to-change-that [https://perma.cc/KA28-K8GP].

91. Andrew Chung, Lawrence Hurley, Jackie Botts, Andrea Januta & Guillermo Gomez, *For Cops Who Kill, Special Supreme Court Protection*, REUTERS INVESTIGATES (May 8, 2020, 12:00 PM), https://www.reuters.com/investigates/special-report/usa-police-immunity-scotus [https://perma.cc/489F-XDDK]; Jonathan Allen & Gabriella Borter, *Reuters, New York Times Win Pulitzers for Coverage of Racial Injustice, COVID-19*, REUTERS (June 11, 2021), https://www.reuters.com/world/us/reuters-star-tribune-win-pulitzer-prizes-reporting-us-policing-2021-06-11 [https://perma.cc/5PLT-U49N].

92. *See* George F. Will, Opinion, *This Doctrine Has Nullified Accountability for Police. The Supreme Court Can Rethink It.*, WASH. POST (May 13, 2020), https://www.washingtonpost.com/opinions/will-the-supreme-court-rectify-its-qualified-immunity-mistake/2020/05/12/05659d0e-9478-11ea-9f5e-56d8239bf9ad_story.html [https://perma.cc/Y56R-LARX].

93. *Id.*

94. *Id.*

which turned what had been a growing tide of opposition into a tsunami.

B. The Cryptic Court

Since George Floyd's death, qualified immunity has emerged as the central target of public calls to reform the constitutional-tort system. And understandably so. As far as legal doctrines go, qualified immunity is low-hanging fruit. It "excuses conduct that seems inexcusable,"[95] has little if any basis in constitutional or statutory law,[96] and has nevertheless received "pride of place on the [Supreme] Court's docket" for years.[97] What is more, policing and prejudice problems seem so intractable that advocating a potential, if partial, solution as straightforward as reconsidering qualified immunity may feel especially productive.

But in important ways, qualified immunity has become too central a target of the conversation about constitutional-enforcement reform. Wrapped up in this assessment is the impression that, especially toward the start of the movement, a disproportional share of the energy seeking change was directed toward the Court.[98] To be fair, the Court

95. Crocker, *Constitutional Structure*, *supra* note 13, at 1407.

96. Baude, *Is Qualified Immunity Unlawful?*, *supra* note 75, at 51–77. In a recent article, attorney Scott Keller argues (contrary to "the prevailing view among modern commentators") that "the common law around 1871 did recognize a freestanding qualified immunity protecting all government officers' discretionary duties—like qualified immunity today." Scott Keller, *Qualified and Absolute Immunity at Common Law*, 73 STAN. L. REV. 1337, 1344 (2021). Keller argues that this bears on "the legitimacy of state-officer immunities" from constitutional-tort suits, which "depends on 'the common law as it existed when Congress passed § 1983 in 1871.'" *Id.* at 1341 (quoting Filarsky v. Delia, 566 U.S. 377, 384 (2012)). Professors Baude and Jim Pfander have drafted compelling responses arguing that the historical evidence provides qualified immunity less support than Keller suggests. *See* William Baude, *Is Quasi-Judicial Immunity Qualified Immunity?*, 73 STAN. L. REV. ONLINE (forthcoming 2022) (manuscript at 1), https://ssrn.com/abstract_id=3746068 [https://perma.cc/K7W3-Q7DC] (arguing that "the common law did not recognize the doctrine of qualified immunity" but did "recognize[] a doctrine of quasi-judicial immunity, which shielded certain acts from liability for good faith mistakes," and that while "Keller does acknowledge that this nineteenth century doctrine has important differences from today's doctrine," the contrasts "run deeper than you would know from Keller's account"); James E. Pfander, *Zones of Discretion at Common Law*, 116 NW. U. L. REV. ONLINE 148, 150–51 (2021) (arguing that "Keller has identified not a body of immunity law that shields official actors from liability when they transgress constitutional boundaries," but "a body of law best characterized today as administrative discretion" and that "[c]ontrary to Keller's suggestion, there was no common law immunity—qualified or otherwise—when executive officials violated the law").

97. Baude, *Is Qualified Immunity Unlawful?*, *supra* note 75, at 48.

98. *See supra* Part I.A.

came up with qualified immunity, cultivated it for decades, and should logically bear responsibility for reining it in.[99] As an institution, though, the Court has lagged far behind the public's increasingly negative perception of the doctrine—an appropriate point of concern given modern qualified immunity's acknowledged provenance in policy preferences[100]—and cannot efficiently make the kinds of cross-doctrinal shifts that a legislature can.[101]

Since *Mullenix*, Justice Sotomayor (joined by Justice Ruth Bader Ginsburg) has twice taken the majority to task for using the summary-reversal procedure asymmetrically to condemn decisions when lower courts erroneously deny qualified immunity but not when they erroneously grant it.[102] Perhaps somewhat in response, the Court reversed a grant of qualified immunity in the 2018 case *Sause v. Bauer*,[103] remanding for further factual development.[104] But *Sause* seems to have signified little about the broader arc of qualified-immunity jurisprudence. For one thing, the question presented—whether officials "violate a person's right to the free exercise of religion if they interfere, without any legitimate law enforcement justification, when a person is at prayer"[105]—was far removed from the street-level circumstances that underlie many of the most troubling qualified-immunity cases. For another, the Court's subsequent conduct leaves only a dim hope that a substantial shift is forthcoming from One First Street.

The Court denied cert in the cases that prompted George Will and others to sound alarms even before George Floyd's death heaped more attention on qualified immunity.[106] The Court's failure to take up any

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99. *See infra* Part II.A.

100. *See* Crawford-El v. Britton, 523 U.S. 574, 594 n.15 (1998) (stating that "our opinion in *Harlow* [*v. Fitzgerald*, 457 U.S. 800 (1982),] was forthright in revising the immunity defense for policy reasons"); Wyatt v. Cole, 504 U.S. 158, 171 (1992) (Kennedy, J., concurring) (stating that *Harlow* "depart[ed] from history in the name of public policy, reshaping immunity doctrines in light of those policy considerations").

101. *See* Crocker, *Retreat*, *supra* note 46, at 13–14.

102. *See* Kisela v. Hughes, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting); Salazar-Limon v. Houston, 137 S. Ct. 1277, 1282–83 (2017) (Sotomayor, J., dissenting from denial of cert.).

103. Sause v. Bauer, 138 S. Ct. 2561 (2018) (per curiam).

104. *See id.* at 2562–63.

105. *Id.* at 2562.

106. *See* Jay Schweikert, *The Supreme Court's Dereliction of Duty on Qualified Immunity*, CATO AT LIBERTY (June 15, 2020, 11:27 AM), https://www.cato.org/blog/supreme-courts-dereliction-duty-qualified-immunity [https://perma.cc/CET3-5T6S] (stating that "[t]his morning,

of these petitions seemed to endorse the doctrine's continued entrenchment. For if the Court had been inclined to reconsider qualified immunity in any meaningful way, these cases would have provided plenty of opportunity to do so.[107]

Take *Kelsay v. Ernst*,[108] where a woman who was "neither fleeing, nor resisting arrest, nor posing a safety risk to anyone" was allegedly knocked unconscious, resulting in a broken collarbone, when a police officer "ran up behind [her]," "seized [her] in a bear hug," "lifted her completely off the ground," and "slammed [her] down."[109] Or take *Jessop v. City of Fresno*,[110] where police officers allegedly stole over $275,000 in currency and coins they had seized from the plaintiffs' property while executing a search warrant.[111] Both cert petitions were filed by accomplished appellate litigators; both had substantial amicus support; and both were denied on May 18, 2020.[112] Consider *Baxter v. Bracey*[113] as well. There, the first question presented was whether "binding authority holding that a police officer violates the Fourth Amendment when he uses a police dog to apprehend a suspect who has surrendered by *lying down on the ground*" could overcome qualified

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the Supreme Court denied all of the major cert petitions raising the question of whether qualified immunity should be reconsidered"); *supra* note 92 and accompanying text.

107. Some might argue that the Court's failure to take up any of these petitions could have stemmed more from a reluctance to enter such a politically charged area. *See* Schweikert, *supra* note 106 (stating that the Justices may have been "looking closely at developments in Congress—where members of both the House and the Senate have introduced bills that would abolish qualified immunity—and decided to duck the question, hoping to pressure Congress to fix the Court's mess"). But the 2021 summary reversals of qualified-immunity denials to police officers undermine this alternative explanation. *See* Rivas-Villegas v. Cortesluna, 142 S. Ct. 4, 9 (2021) (per curiam); City of Tahlequah v. Bond, 142 S. Ct. 9, 12 (2021) (per curiam). These cases are discussed *infra* notes 132–33, 138–39 and accompanying text .

108. Kelsay v. Ernst, 140 S. Ct. 2760 (2020) (mem.), *denying cert. to* 933 F.3d 975 (8th Cir. 2019) (en banc).

109. Petition for Writ of Certiorari at 3–4, 18, *Kelsay*, 140 S. Ct. 2760 (No. 19-682).

110. Jessop v. City of Fresno, 140 S. Ct. 2793 (2020) (mem.), *denying cert. to* 936 F.3d 937 (9th Cir. 2019).

111. Petition for Writ of Certiorari at 5–7, *Jessop*, 140 S. Ct. 2793 (No. 19-1021).

112. For *Kelsay*, see Petition for Writ of Certiorari, *supra* note 109, at 25 (listing attorneys); Docket Search for No. 19-682, SUP. CT., https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/19-682.html [https://perma.cc/R4B4-UJA4] (showing amicus support and denial date). For *Jessop*, see Petition for Writ of Certiorari, *supra* note 111, at 37 (listing attorneys); Docket Search for No. 19-1021, SUP. CT., https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/19-1021.html [https://perma.cc/C4HV-8UT3] (showing amicus support and denial date).

113. Baxter v. Bracey, 140 S. Ct. 1862 (2020) (mem.), *denying cert. to* 751 F. App'x 869 (6th Cir. 2018).

immunity by "'clearly establish[ing]' that it is likewise unconstitutional to use a police dog on a suspect who has surrendered by *sitting on the ground with his hands up*."[114] Again, the petition was filed by accomplished appellate litigators, had substantial amicus support, and was denied—this time, on June 15, 2020.[115]

Baxter stands out because Justice Thomas dissented from the cert denial.[116] Again questioning qualified immunity's lawfulness, Thomas pointed out that "[t]here likely is no basis for the objective inquiry into clearly established law that [the Court's] modern cases prescribe."[117] But Thomas's comments should come as cold comfort to anyone who favors wider-ranging recovery. For Thomas went out of his way to say he "express[ed] no opinion" on qualified immunity in the federal-officer, as opposed to the state- and local-officer, context.[118] And he suggested in a footnote that if the Court reconsiders qualified immunity, it should reconsider *Monroe v. Pape*[119] as well.[120] *Monroe* held that § 1983 extends to unconstitutional conduct that violates state law, as most unconstitutional conduct probably does.[121] So to overrule *Monroe* could render constitutional-tort relief against state and local officers a virtual nullity.

The Court's post-*Baxter* actions have been more equivocal. Most significant was the surprise summary reversal in *Taylor v. Riojas*,[122] which overturned a grant of qualified immunity to prison officials

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114. Petition for Writ of Certiorari at i, *Baxter*, 140 S. Ct. 1862 (No. 18-1287) (emphases added).

115. *See id.* at 36 (listing attorneys); Docket Search for No. 18-1287, SUP. CT., https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/18-1287.html [https://perma.cc/ELY9-LGCZ] (showing amicus support and denial date).

116. *See Baxter*, 140 S. Ct. at 1862 (Thomas, J., dissenting from denial of cert.).

117. *Id.* at 1864. Thomas expressed doubts about qualified immunity yet again a year later. *See* Hoggard v. Rhodes, 141 S. Ct. 2421, 2422 (2021) (arguing that "in an appropriate case, we should reconsider either our one-size-fits-all test or the judicial doctrine of qualified immunity more generally").

118. *Id.* at 1863 n.1. For a discussion about whether it makes sense to treat the doctrine differently in these areas, see Crocker, *Constitutional Structure*, *supra* note 13, at 1458–59 (arguing that "an adequate justification remains elusive" across the board but noting that it "should be more difficult to justify" qualified immunity "for state officials than federal officials, at least insofar as the statutory setting of § 1983 constrains the range of available defenses more than the federal-common-law milieu of *Bivens* does").

119. Monroe v. Pape, 365 U.S. 167 (1961).

120. *Baxter*, 140 S. Ct. at 1864 n.2 (Thomas, J., dissenting from denial of cert.).

121. *Monroe*, 365 U.S. at 183; *see also supra* note 62 (introducing § 1983).

122. Taylor v. Riojas, 141 S. Ct. 52 (2020) (per curiam).

whom the plaintiff alleged confined him in "deplorably unsanitary conditions" for six days.[123] The plaintiff asserted the officials held him first in a cell "covered, nearly floor to ceiling, in '"massive amounts" of feces': all over the floor, the ceiling, the window, the walls, and even '"packed inside the water faucet."'"[124] And he alleged he was then put in "a second, frigidly cold cell, which was equipped with only a clogged drain in the floor to dispose of bodily wastes."[125]

As I argue elsewhere, *Taylor* is an ambiguous case.[126] On one hand, it represents the first time since 2004 that the Court has rejected a defendant's assertion of qualified immunity on the core issue of whether the conduct at issue violated clearly established law.[127] And after years of implying that only factually on-point precedent could overcome the defense, the Court reinvigorated the important proposition that "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question."[128] On the other hand, *Taylor* emphasized that the facts of the case were "particularly egregious," making it seem likely that more usual governmental misconduct would continue to go unpunished.[129] And the unsigned, shadow-docket decision was only a few paragraphs long, raising more questions than it answered.[130]

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123. *Id.* at 53.

124. *Id.* (quoting Taylor v. Stevens, 946 F.3d 211, 218 (5th Cir. 2019), *cert. granted, judgment vacated sub nom.* Taylor v. Riojas, 141 S. Ct. 52 (2020) (per curiam)).

125. *Id.*

126. *See* Crocker, *Retreat*, *supra* note 46, at 7–13. That piece also discusses the follow-on matter *McCoy v. Alamu*, 141 S. Ct. 1364 (2021) (mem.), where the Court without opinion vacated another grant of qualified immunity and remanded the case to the Fifth Circuit for reconsideration in light of *Taylor*. *See id.* at 1364.

127. *See supra* notes 74–75 and accompanying text.

128. *Taylor*, 141 S. Ct. at 53–54 (quoting Hope v. Pelzer, 536 U.S. 730, 741 (2002)).

129. *Id.* at 54.

130. *See id.* at 53–54. In a 2015 publication, Professor Baude devised the name "shadow docket" for "a range of orders and summary decisions that defy [the Court's] normal procedural regularity." William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1, 1 (2015). The docket—and the designation—have become quite controversial since then. *See* Steve Vladeck, *"Shadow Dockets" Are Normal. The Way SCOTUS Is Using Them Is the Problem.*, SLATE (Apr. 12, 2021, 6:09 PM), https://slate.com/news-and-politics/2021/04/scotus-shadow-docket-use-problem.html [https://perma.cc/Q7KV-ZZQU]. Most of the recent discussion both supporting and opposing the Court's reliance on extraordinary decision-making techniques has centered around so-called emergency motions seeking quick action on cases that have not yet completed the normal litigation course in lower courts. *See id.* Summary reversals represent a different kind of shadow-docket disposition in which the Court, generally without notice to the parties, renders a merits-level decision at the certiorari stage. *See* Baude, *supra*, at 18–19. This

If anyone thought *Taylor* signaled that the Court might be more circumspect about expanding the reach of qualified immunity than the Justices had been before, *Tanzin v. Tanvir*,[131] decided just a month later, implies otherwise. And both *Rivas-Villegas v. Cortesluna*[132] and *City of Tahlequah v. Bond*,[133] decided the following year, reinforce the Court's pre-*Taylor* approach to qualified immunity. The question in *Tanzin* was whether the Religious Freedom Restoration Act of 1993 ("RFRA") provided a damages remedy against federal officers.[134] The Court said yes but made clear that qualified immunity would apply, suggesting in an opinion by Justice Thomas that the doctrine was part of the landscape of constitutional-tort liability for First Amendment free-exercise claims that RFRA, after an upheaval in case law, was enacted to reinstate.[135] Never mind that at the time there *was* no constitutional-tort liability for free-exercise claims against federal officers, the target of *Tanzin*, at least insofar as Supreme Court decisions were concerned.[136] In any event, the Court said that the parties agreed qualified immunity should be available in RFRA suits against individual officers, with the plaintiffs even "emphasiz[ing]" that the doctrine "'was created for precisely these circumstances.'"[137]

Cortesluna and *Bond* are more conventional qualified-immunity cases. In both § 1983 actions, the lower courts denied police officers qualified immunity from excessive-force claims.[138] And in both, the Justices summarily reversed with no noted dissents, emphasizing that the "specificity" of the qualified-immunity inquiry into preexisting cases is "especially important in the Fourth Amendment context" because it is "sometimes difficult for an officer to determine how the

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"usually reflects the feeling of a majority of the Court that the lower court result is so clearly erroneous . . . that full briefing and argument would be a waste of time." STEPHEN M. SHAPIRO, KENNETH S. GELLER, TIMOTHY S. BISHOP, EDWARD A. HARTNETT & DAN HIMMELFARB, SUPREME COURT PRACTICE 5–36 (11th ed. 2019).

131. Tanzin v. Tanvir, 141 S. Ct. 486 (2020).

132. Rivas-Villegas v. Cortesluna, 142 S. Ct. 4 (2021) (per curiam).

133. City of Tahlequah v. Bond, 142 S. Ct. 9 (2021) (per curiam).

134. *Tanzin*, 141 S. Ct. at 489.

135. *See id.* at 492.

136. *See infra* notes 169–83 (tracing the *Bivens* doctrine's development).

137. *Tanzin*, 141 S. Ct. at 492 n.* (quoting Brief for Respondents at 22, *Tanzin*, 141 S. Ct. 486 (No. 19-71)).

138. Rivas-Villegas v. Cortesluna, 142 S. Ct. 4, 7 (2021) (per curiam); *Bond*, 142 S. Ct. at 11.

relevant legal doctrine . . . will apply to the factual situation the officer confronts."[139]

Given this state of affairs, the Court seems unlikely to make major alterations to qualified immunity anytime soon. Instead, the most promising course for moving forward runs through Congress.[140] Importantly, though, much of the case for cutting back on qualified immunity demonstrates why policymakers should dig deeper into the constitutional-tort system. With more of the U.S. population focused on improving constitutional enforcement recently than at perhaps any previous point in the nation's history, and with the ability to make more sweeping changes than the Court realistically can or will in a relatively short time span, Congress should look beyond qualified immunity. As it turns out, and as the ensuing discussion explores, qualified immunity came about in part as a byproduct of the Court's commitment to *sovereign* immunity, which shields certain governments themselves from suit. Reconsidering qualified immunity should thus encourage reconsidering sovereign immunity and related protections for government entities in the constitutional-tort context too.

II. A DOCTRINAL ACCOUNT

This Part has two purposes. First, Professor John Jeffries has observed that "[t]he law limiting damage remedies against states and the law allowing damage remedies against state officers obviously have much to do with each other, yet analyses of one have tended to ignore the other."[141] What "we need," he says, is "to bring the Eleventh Amendment and Section 1983 into the same field of vision."[142] This Part aims to do that by explaining various ways in which the current form of qualified immunity came about as a consequence of the Supreme Court's dedication to sovereign immunity, which (for states) finds a constitutional hook in the Eleventh Amendment. Second, this Part outlines some of the primary concerns underlying the development of constitutional-tort law, which provides a useful foundation for considering the potential effects of future

139. *Cortesluna*, 142 S. Ct. at 8 (alteration omitted) (quoting Mullenix v. Luna, 577 U.S. 7, 12 (2015) (per curiam)); *Bond*, 142 S. Ct. at 11–12 (quoting *Mullenix*, 577 U.S. at 12).

140. *See infra* Part IV.

141. John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 81 (1998) [hereinafter Jeffries, *Eleventh Amendment*].

142. *Id.*

adjustments.[143] In short, one needs to wade into the doctrinal weeds now to reach the practical roots of the system's shortcomings later.

As a means to both ends, the discussion begins by examining how rulings surrounding qualified and sovereign immunity interconnect in light of the Court's goals for decreasing defense-side expenses. It then turns to how rulings surrounding these immunities relate to the Court's goals for constricting federal-court dockets. Finally, to anticipate some counterpoints and introduce the concept of remedial equilibration, the discussion elaborates on the larger legal landscape.

A. Defense-Side Expenses

Constitutional-tort law began from the baseline that some amount of litigation serves the important purpose of providing compensation for victims of rights violations. In allowing a damages claim against federal officers in *Bivens*,[144] for instance, the Supreme Court stated that "where federally protected rights have been invaded, . . . courts will be alert to adjust their remedies so as to grant the necessary relief."[145] As Justice John Marshall Harlan II famously put it, "[f]or people in Bivens' shoes, it is damages or nothing."[146] So the Court held the plaintiff entitled to a monetary recovery to the extent he could prove his Fourth Amendment claim.[147]

Sovereign immunity quickly came into the picture, though, with the Court holding that neither states nor the federal government would have to expend public resources to fulfill damages awards or other retrospective judgments in constitutional-tort suits.[148] This left

143. It bears emphasizing that the Justices—like all people and especially all *groups* of people—do things for an infinite and irreducible variety of reasons, some of which one could view more cynically than one should view others. *See* Katherine Mims Crocker, *A Scapegoat Theory of* Bivens, 96 NOTRE DAME L. REV. 1943, 1963 (2021) [hereinafter Crocker, *Scapegoat*]; Crocker, *Constitutional Structure*, *supra* note 13, at 1439; Crocker, *Reconsidering*, *supra* note 46, at 552.

144. *See supra* note 62 (introducing the *Bivens* regime); *infra* notes 169–83 and accompanying text (discussing the *Bivens* regime in more detail).

145. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 392 (1971) (quoting Bell v. Hood, 327 U.S. 678, 684 (1946)).

146. *Id.* at 410 (Harlan, J., concurring in the judgment).

147. *Id.* at 397 (majority opinion).

148. In chronological order in the § 1983 context, see *Edelman v. Jordan*, 415 U.S. 651, 674–77 (1974) (declaring that § 1983 does not allow retrospective relief against states); *Quern v. Jordan*, 440 U.S. 332, 338–49 (1979) (holding that § 1983 does not abrogate state sovereign immunity); and *Will v. Michigan Department of State Police*, 491 U.S. 58, 64 (1989) (relying on similar reasoning to hold that states are not suable "person[s]" within § 1983's text). *See also* Crocker, *Reconsidering*, *supra* note 46, at 528–29, 544–46, 552–54 (discussing and critiquing these

individual officers in their personal capacities and local governments (to which the Court has long refused to extend sovereign immunity in a formal sense[149]) holding the bag for whatever damages might be available for unconstitutional conduct.[150] The problem was that constitutional-tort suits could be expensive to defend and constitutional-tort judgments could be expensive to discharge, both financially and in time and attention terms. For then as now, individual officers and local governments were on the whole less able than state and federal entities to bear substantial litigation costs, including damages awards.

It should come as little surprise, therefore, that (as the following narrative demonstrates) the Court worried that the system it had set up—with sovereign immunity at the center—would cause a flood of costs to devastate constitutional-tort defendants.[151] And the Court worried, in turn, that a host of negative consequences could follow, from encouraging hesitancy on the individual-officer side to draining funds from important programs on the municipality side.[152] So the Court resolved to prevent defense-side cost accumulation in a large swath of cases. And it did so through qualified immunity for federal,

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cases in detail). In *Bivens* itself, Justice Harlan noted that "[h]owever desirable a direct remedy against the Government might be as a substitute for individual official liability, the sovereign still remains immune to suit." *Bivens*, 403 U.S. at 410 (Harlan, J., concurring in the judgment). And Chief Justice Warren Burger called on Congress to withdraw sovereign immunity from the field (as long as it also jettisoned the exclusionary rule). *Id.* at 421–23, 423 n.7 (Burger, C.J., dissenting). By the time the Court officially declared that courts could not subject federal entities to damages for constitutional violations, FDIC v. Meyer, 510 U.S. 471, 475 (1994), it "treated the issue as a foregone conclusion not worthy of reasoned discussion." Cornelia T.L. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability Under* Bivens, 88 GEO. L.J. 65, 101 (1999).

149. *See* Lincoln Cnty. v. Luning, 133 U.S. 529, 530 (1890).

150. *Monroe* and *Bivens* allowed § 1983 liability against individual defendants. *See* Monroe v. Pape, 365 U.S. 167, 192 (1961); *Bivens*, 403 U.S. at 389; *supra* notes 121, 144–47 and accompanying text. *Monell v. Department of Social Services of New York* held that local governments were also suable under § 1983. Monell v. Dep't of Soc. Servs. of N.Y., 436 U.S. 658, 690, 700–01 (1978); *see infra* notes 160–61. Under *Ex parte Young* and related principles, plaintiffs could still in effect seek prospective injunctive relief against state and federal entities by suing individual officers in their official capacity. *See* Ex parte Young, 209 U.S. 123, 149, 155–56 (1908); EEOC v. Peabody W. Coal Co., 610 F.3d 1070, 1085–86 (9th Cir. 2010) (discussing early applications of principles associated with *Young* to suits challenging federal-government conduct and the later relevance of the Administrative Procedure Act to allowing injunctions in this context).

151. *See infra* notes 161–62, 167–68, 183, 187 and accompanying text.

152. *See infra* notes 161–62, 167–68, 183, 187 and accompanying text; *see also infra* note 242 and accompanying text.

state, and local officers and through doctrines targeting the scope of both municipal liability and the *Bivens* regime.

With every significant expansion of constitutional-tort liability, the Court laid the groundwork for qualified immunity or similar protections to follow. In 1961, *Monroe* said that § 1983 "should be read against the background of tort liability."[153] Not long after that, *Pierson v. Ray*[154] held that because "the defense of good faith and probable cause" was "[p]art of the background of tort liability" for "police officers making an arrest," the defense was also available in § 1983 false-arrest suits.[155] *Pierson* touched off a series of decisions extending the scope of this doctrine, which soon became known as qualified immunity. In the 1974 case *Scheuer v. Rhodes*,[156] the Court expanded its coverage from arrests to actions by state and local executive officers at large.[157] And having hinted that some form of official immunity might apply in *Bivens* itself,[158] the Court expressly expanded the defense to suits against federal officers in the 1978 case *Butz v. Economou*.[159]

Municipal liability followed a similar course. In *Monell v. Department of Social Services of New York*,[160] also decided in 1978, the Court overturned a subsidiary holding from *Monroe* that § 1983 plaintiffs could not sue local governments—but expressly left open the possibility that some form of official immunity might apply.[161] The Court later rejected that possibility over a biting dissent, with Justice Lewis Powell accusing the majority of exposing local governments to "ruinous judgments" that could cause a "severe limitation on their

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

154. Pierson v. Ray, 386 U.S. 547 (1967).

155. *Id.* at 556–58.

156. Scheuer v. Rhodes, 416 U.S. 232 (1974).

157. *Id.* at 245–48.

158. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397–98 (1971) (leaving official immunity for remand because the issue had not been decided below); *id.* at 411 (Harlan, J., concurring in the judgment) (purporting to "express no view on the immunity defense offered in the instant case" but stating that "interests in efficient law enforcement of course argue for a protective zone with respect to many types of Fourth Amendment violations").

159. Butz v. Economou, 438 U.S. 478, 507 (1978).

160. Monell v. Dep't of Soc. Servs. of N.Y., 436 U.S. 658 (1978).

161. *Id.* at 690, 701 ("[W]e express no views on the scope of any municipal immunity beyond holding that municipal bodies sued under § 1983 cannot be entitled to an absolute immunity, lest our decision that such bodies are subject to suit under § 1983 'be drained of meaning.'" (quoting *Scheuer*, 416 U.S. at 248)).

ability to serve the public."[162] But a different seed planted in *Monell* soon grew up to take qualified immunity's place.

Monell concluded that "a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents."[163] Rather, the Court said, "the government as an entity is responsible" only "when execution of a government's policy or custom . . . inflicts the injury."[164] This so-called custom-or-policy requirement has matured since *Monell* into an obstacle regarded as so formidable that it seems "almost always" to "preclude ultimate recoveries of damages,"[165] which, as Professor Fred Smith explains, can be seen as according sovereign immunity to municipalities in a functional sense.[166] And the same apprehension that Powell expressed when the Court declined to extend qualified immunity to municipalities has helped drive this doctrine's development. As Justice Sandra Day O'Connor said in one custom-or-policy case, "the resources of local government are not inexhaustible," and "other city services will necessarily suffer" in response to constitutional-tort judgments.[167] The Court also relied on similar reasoning to prohibit the award of punitive damages against municipalities in § 1983 suits in the 1981 case *City of Newport v. Fact Concerts, Inc.*[168]

An analogous pattern emerged around another doctrine designed to restrict the volume of constitutional-tort litigation—the framework

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162. Owen v. City of Independence, 445 U.S. 622, 670 (1980) (Powell, J., dissenting).

163. *Monell*, 436 U.S. at 694.

164. *Id.*

165. Richard H. Fallon, Jr., *Bidding Farewell to Constitutional Torts*, 107 CALIF. L. REV. 933, 995–96 (2019).

166. *See* Fred Smith, *Local Sovereign Immunity*, 116 COLUM. L. REV. 409, 412–13 (2016) (stating that "[t]he doctrine that has emanated from the Eleventh Amendment purports to reaffirm the idea that local governments do not receive sovereign immunity" but arguing that "[i]t is difficult to reconcile these pronouncements with the broad protections local governmental defendants receive from constitutional suit," including because "[t]hese protections are . . . expressly rooted in background principles of sovereignty"); *id.* at 413–16 (applying this lesson to *Monell*'s custom-or-policy requirement). As Professor Smith describes, aspects of the custom-or-policy doctrine that "have rendered constitutional accountability against municipalities as entities particularly illusive" include the rules that liability requires "deliberate indifference" rather than mere negligence and that the relevant actor "was a person with final policymaking authority" rather than someone just "[s]erving in a supervisory role." *Id.* at 433.

167. City of Canton v. Harris, 489 U.S. 378, 400 (1989) (O'Connor, J., concurring in part and dissenting in part).

168. *See* City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 270–71 (1981) (worrying that "add[ing] the burden of exposure for the malicious conduct of individual government employees may create a serious risk to the financial integrity of these governmental entities").

for determining which rights violations can serve as the basis for *Bivens* actions. *Bivens* contained soaring language about the importance of providing remedies for what seemed like all rights.[169] But the Court actually recognized a damages action for Fourth Amendment claims only,[170] and the decision contained two critical caveats. "The present case involves no special factors counselling hesitation in the absence of affirmative action by Congress," the Court said.[171] Nor was there an "explicit congressional declaration that persons injured by a federal officer's violation of the Fourth Amendment . . . must . . . be remitted to another remedy" seen as "equally effective."[172]

In the course of expanding the regime by incremental steps in *Davis v. Passman*[173] (a Fifth Amendment sex-discrimination case[174]) and *Carlson v. Green*[175] (an Eighth Amendment deliberate-indifference case[176]), the Court made clear that the special-factors and alternative-remedies caveats could still foreclose *Bivens* actions in the future.[177] Then, the next case to decide a *Bivens* question, *Bush v. Lucas*,[178] invoked the special-factors qualification to deny relief and broadened the alternative-remedies inquiry by stating that Congress could "indicate its intent" through "statutory language, by clear legislative history, or perhaps even by the statutory remedy itself."[179]

Critically, the Court has relied on these restrictions to reject *Bivens* actions every single time it has decided the issue since *Bush* came down in 1983.[180] As the Court recently reiterated, expanding the

169. *See, e.g.*, Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803))).

170. *See id.* ("Having concluded that petitioner's complaint states a cause of action under the Fourth Amendment, we hold that petitioner is entitled to recover money damages for any injuries he has suffered as a result of the agents' violation of the Amendment." (internal citation omitted)).

171. *Id.* at 396.

172. *Id.* at 397.

173. Davis v. Passman, 442 U.S. 228 (1979).

174. *Id.* at 231.

175. Carlson v. Green, 446 U.S. 14 (1980).

176. *Id.* at 16 & n.1.

177. *See Davis*, 442 U.S. at 245–47; *Carlson*, 446 U.S. at 18–19.

178. Bush v. Lucas, 462 U.S. 367 (1983).

179. *Id.* at 378–90.

180. *See* Hernandez v. Mesa, 140 S. Ct. 735, 743 (2020) (discussing the history of the Court's rejections of *Bivens* actions following *Bush*).

Bivens remedy has become "a 'disfavored' judicial activity."[181] Separation-of-powers concerns about stepping on Congress's prerogative to create causes of action have served as the primary stated basis for these decisions.[182] But the Court has put forward more policy-oriented justifications as well, including that various federal defendants may warrant protection from litigation costs.[183]

Turning back to qualified immunity, in 1982, the Court justified making a seismic shift along exactly these lines in *Harlow v. Fitzgerald*.[184] In *Harlow*, the Court declared that "bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery."[185] Instead, the Court held, qualified immunity would turn on only "the objective reasonableness of an official's conduct," such that defendants would "generally" be "shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[186] The Court conceived of this inquiry as working to the advantage of both government officials and the public—and as preserving defendants' resources—by "avoid[ing] excessive disruption of government and permit[ting] the resolution of many insubstantial claims on summary judgment."[187]

The rest is history. *Harlow* was a *Bivens* case, but the Court soon made clear that the new standard controlled in the § 1983 context as

181. *Id.* at 742 (quoting Ziglar v. Abbasi, 137 S. Ct. 1843, 1857 (2017)).

182. *Id.* at 739 ("As we have made clear in many prior cases, . . . the Constitution's separation of powers requires us to exercise caution before extending *Bivens* . . . ."); *see also* Crocker, *Scapegoat*, *supra* note 143, at 1956–66 (critiquing the Court's reliance on this rationale).

183. *See Abbasi*, 137 S. Ct. at 1856 (stating that because "[c]laims against federal officials often create substantial costs, in the form of defense and indemnification," Congress "has a substantial responsibility to determine whether, and the extent to which, monetary and other liabilities should be imposed upon individual officers and employees of the Federal Government" and that "the time and administrative costs attendant upon intrusions resulting from the discovery and trial process are significant factors to be considered"); FDIC v. Meyer, 510 U.S. 471, 486 (1994) ("If we were to recognize a direct action for damages against federal agencies, we would be creating a potentially enormous financial burden for the Federal Government. . . . We leave it to Congress to weigh the implications of such a significant expansion of Government liability.").

184. Harlow v. Fitzgerald, 457 U.S. 800 (1982).

185. *Id.* at 817–18.

186. *Id.* at 818.

187. *Id.* at 818–19.

well.[188] Within just a few years of *Harlow*'s publication, the Court began stating that qualified immunity protected "all but the plainly incompetent or those who knowingly violate the law."[189] Since then, the Court has continued to recite the *Harlow* standard while surreptitiously strengthening both the substantive and procedural advantages that qualified immunity confers on defendants.[190]

B. Federal-Court Dockets

To understand how rulings on qualified and sovereign immunity and related doctrines interconnect with respect to what the Supreme Court has sought to accomplish for federal-court dockets, take a wide-angle view of constitutional-tort suits during the period in question. For rights violations committed under color of state law, the Court effectively made monetary remedies available against individual officers in 1961 (with *Monroe*) and municipalities in 1978 (with *Monell*).[191] For some rights violations committed under color of federal law, the Court made monetary remedies available against individual officers starting in 1971 (with *Bivens*) and continuing through 1980 (with *Davis* and *Carlson*).[192] These rulings caused the volume of constitutional-tort litigation to increase.[193] By the early 1980s, however, several Justices perceived the case counts as exceeding what federal courts could comfortably handle—and began looking to lighten the load.[194]

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188. Davis v. Scherer, 468 U.S. 183, 194 n.12 (1984); *see also* Sanborn v. Wolfel, 458 U.S. 1102, 1102 (1982) (mem.) (remanding "for further consideration in light of *Harlow*" and stating that it is "'untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials'" (quoting Butz v. Economou, 438 U.S. 478, 504 (1978))); Crocker, *Constitutional Structure*, *supra* note 13, at 1432–33 (discussing these cases).

189. Malley v. Briggs, 475 U.S. 335, 341 (1986).

190. Crocker, *Constitutional Structure*, *supra* note 13, at 1414–15. *See generally* Kit Kinports, *The Supreme Court's Quiet Expansion of Qualified Immunity*, 100 MINN. L. REV. HEADNOTES 62 (2016) (arguing that the Court has expanded qualified immunity in multiple ways without acknowledging so).

191. *See supra* note 150 and accompanying text.

192. *See supra* notes 169–76 and accompanying text.

193. *See* Aziz Z. Huq, *Judicial Independence and the Rationing of Constitutional Remedies*, 65 DUKE L.J. 1, 15–17 (2015) [hereinafter Huq, *Rationing of Constitutional Remedies*].

194. For an extended account putting the Court's caseload concerns into a broader socio-legal context, see generally *id.* Professor Aziz Huq argues that the Court incorporated governmental-fault requirements for relief into doctrinal areas ranging from "constitutional tort law to postconviction habeas law and . . . the exclusionary rule" around the early 1980s, when

With sovereign immunity closing off constitutional-tort litigation to the greatest extent realistic, the Justices were forced to find alternative avenues to forestall the ostensible flood. For short of drastic action like formally extending sovereign immunity to municipalities (which would have nullified *Monell* and flown in the face of nearly a century of precedent[195]), there was no way to make the doctrine friendlier to defendants in the damages context. Other mechanisms would have to do.

Sometimes Justices expressing caseload concerns met success. The 1981 decision in *Parratt v. Taylor*[196] offers an example involving the substantive content of a constitutional right. *Parratt* held that plaintiffs could not state due-process claims for "random and unauthorized" property deprivations as long as adequate post-deprivation process was available.[197] A contrary conclusion, then-Justice William Rehnquist's majority opinion said, would have "almost necessarily result[ed] in turning every alleged injury which may have been inflicted by a state official acting under 'color of law' into a violation of the Fourteenth Amendment cognizable under § 1983."[198]

But sometimes the movement to reduce constitutional-tort caseloads faltered, like in the 1982 case *Patsy v. Board of Regents*.[199] There, the majority held that § 1983 plaintiffs were not required to

"new pressures" on the judiciary emerged from the "rise of mass incarceration, which created metastasizing demands for criminal adjudication and postconviction review." *Id.* at 8. And for accounts of the legislative process whereby the Justices successfully implored Congress to alleviate caseload concerns by decreasing the Court's mandatory appellate jurisdiction (and correspondingly increasing its discretionary certiorari jurisdiction) during the 1970s and 1980s, see Tara Leigh Grove, *The Exceptions Clause as a Structural Safeguard*, 113 COLUM. L. REV. 929, 969–72, 976–78 (2013); Tara Leigh Grove, *The Structural Case for Vertical Maximalism*, 95 CORNELL L. REV. 1, 50–53 (2009). Finally, for a thorough examination of the Court's concerns about opening the proverbial litigation floodgates, see Marin K. Levy, *Judging the Flood of Litigation*, 80 U. CHI. L. REV. 1007 (2013).

195. *See supra* note 149 and accompanying text.

196. Parratt v. Taylor, 451 U.S. 527 (1981).

197. *Id.* at 540–41.

198. *Id.* at 544. The Court went further in *Daniels v. Williams*, 474 U.S. 327 (1986). While *Parratt* said that "the alleged loss, even though negligently caused, amounted to a deprivation," 451 U.S. at 536–37, *Daniels* held that "the Due Process Clause is simply not implicated by a *negligent* act of an official causing unintended loss of or injury to life, liberty, or property," 474 U.S. at 328. Writing for the Court, Justice Rehnquist again hinted at caseload concerns. *See, e.g.*, *id.* at 330 ("agree[ing]" that "we should not 'open the federal courts to lawsuits where there has been no affirmative abuse of power.'" (quoting *Parratt*, 451 U.S. at 549 (Powell, J., concurring in the result))).

199. Patsy v. Bd. of Regents, 457 U.S. 496 (1982).

exhaust state administrative remedies before filing suit.[200] Justice O'Connor (joined by Rehnquist) concurred "[r]eluctantly," writing that an exhaustion rule would have "decreas[ed] the number of § 1983 actions filed in the federal courts," which she said were "straining under excessive caseloads."[201]

The volume concern appears to have been significant to the development of the doctrines under consideration here. On the municipal-liability side, the Court justified a custom-or-policy decision by stating that "[t]o adopt lesser standards of fault and causation" would "engage the federal courts in an endless exercise of second-guessing municipal employee-training programs."[202] As another example, the Court in *Davis* took the prospect of "deluging federal courts with claims" seriously, going out of its way to assert that extending *Bivens* relief in an incremental fashion posed no such risk.[203]

Harlow in particular presented the Justices who worried about the volume of constitutional-tort litigation with the perfect opportunity to take a large leap. As the case arrived at the Court, the main issue was whether the defendants' positions as senior White House aides at the relevant time afforded them *absolute* immunity, a total bar to suit.[204] By answering in the negative, some members of the Court probably intended to rule in a relatively plaintiff-oriented direction.[205] But by easing the burden to attain qualified immunity, the members with caseload concerns were able to curve the decision to their advantage.

The new qualified-immunity standard appeared aimed not only at saving defendants from supposedly unjustified costs, but also (among other things) at decreasing the number of suits courts would have to oversee. *Harlow* quoted a lower-court judge's warning that "[w]e should not close our eyes to the fact that" plaintiffs were filing constitutional-tort suits "with increasing frequency in this jurisdiction

200. *Id.* at 516.

201. *Id.* at 516–17 (O'Connor, J., concurring).

202. City of Canton v. Harris, 489 U.S. 378, 391–92 (1989).

203. Davis v. Passman, 442 U.S. 228, 248 (1979) (quoting Davis v. Passman, 571 F.2d 793, 800 (5th Cir. 1978), *rev'd*, 442 U.S. 228 (1979)).

204. Harlow v. Fitzgerald, 457 U.S. 800, 806–07 (1982).

205. *See id.* at 820–21 (Brennan, J., joined by Marshall & Blackmun, JJ., concurring) (approving of "the substantive standard announced by the Court today" but asserting that "the clever and unusually well-informed violator of constitutional rights will not evade just punishment for his crimes" and that "it seems inescapable . . . that some measure of discovery may sometimes be required to determine exactly what a public-official defendant [knew] at the time of his actions").

and throughout the country."[206] And *Harlow* explained that the most immediate point of discarding the subjective part of the previous test was facilitating "the dismissal of insubstantial lawsuits without trial"—a theme that recurred throughout the opinion.[207] That *Harlow* aimed to reduce litigation in part for the benefit of judges themselves draws support from the fact that Justice Powell—who was perhaps more troubled by the swell of constitutional-tort cases than any of his colleagues—wrote for the Court.[208]

With reference to the Court's goals for both defense-side expenses and federal-court dockets, therefore, the conceptual arrangement underlying today's constitutional-tort system starts in important ways with sovereign immunity and ends in important ways with qualified immunity. One of the system's primary pillars is providing the possibility of damages relief for at least some forms of constitutional injury. But another primary pillar is protecting government finances and functions to the maximum extent feasible, including through a robust recognition of sovereign immunity. The main construct spanning these opposing supports is officer liability bound tightly by qualified immunity and *Bivens* doctrine, with limited municipal liability running alongside.

C. The Larger Legal Landscape

The legal landscape is more complex than a simple version of the narrative outlined above—that constitutional-tort liability plus

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

207. *Id.* at 814; *see also id.* at 815–19, 819 n.35 (repeatedly emphasizing interests in preventing insubstantial claims from going to trial).

208. In *Parratt*, for instance, Powell made clear that he would have gone even further than the majority did. Concurring in the result, he said failing to hold that haphazard property losses *never* violated due-process principles would encourage plaintiffs to "litigate under a statute that already has burst its historical bounds." Parratt v. Taylor, 451 U.S. 527, 553–54 (1981) (Powell, J., concurring in the result). He then cited statistics showing what he called a "striking escalation of suits under § 1983" and protested that "'the existence of the statutory cause of action means that every expansion of constitutional rights [through § 1983] will increase the caseload of already overburdened federal courts.'" *Id.* at 554 n.13 (alteration in original) (quoting Christina B. Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5, 25 (1980)). Powell also dissented in *Patsy*, which came down just three days before *Harlow*. In *Patsy*, he argued that requiring exhaustion for § 1983 suits would have "conserve[d] and supplement[ed] scarce judicial resources," which he found "highly relevant to the effective functioning of the overburdened federal court system." Patsy v. Bd. of Regents, 457 U.S. 496, 533 (1982) (Powell, J., dissenting).

sovereign immunity largely equals qualified immunity—would suggest. For one thing, the Supreme Court began developing the contours of qualified immunity (with *Pierson* in 1967[209]) several years before it started directly addressing the scope of sovereign immunity in this context (with *Bivens* in 1971 on the federal side and *Edelman v. Jordan*[210] in 1974—which declared that § 1983 does not allow retrospective relief against states—on the state side[211]). Likewise, the Court did not settle the status of states in the constitutional-tort scheme (with *Will v. Michigan Department of State Police*[212] in 1989—which held that § 1983's reference to "person[s]" does not include states[213]) until several years after it converted qualified immunity into a major obstacle to damages relief (with *Harlow* in 1982[214]).

But these are insignificant wrinkles. "Both *Pierson*'s holding and its reasoning were circumscribed," as Professor Aziz Huq has explained.[215] "[O]nly official actions taken 'in good faith,' and, with respect to police, on the basis of 'probable cause' secured an exception from liability," and the Court recognized this exception "only because it presumed that *Congress* did not lightly unsettle 'solidly established' common-law principles."[216] *Pierson* thus provided "historical anchorage" from which "the Court's later expansions of qualified immunity"—which occurred along the same timeline as the cases shoring up sovereign immunity—"came unmoored."[217]

In any event, the relative lack of attention to sovereign immunity in § 1983 suits for many years seems to have stemmed not from a lack of concern about state suability, but largely from the assumption that *Monroe*'s subsidiary holding rejecting municipal liability meant that neither local governments nor states were suable "person[s]" under the statute's text.[218] And while *Will* was not decided until 1989, some courts

209. *See supra* notes 154–55 and accompanying text.

210. Edelman v. Jordan, 415 U.S. 651 (1974).

211. *See supra* note 148.

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

213. *See supra* note 148.

214. *See supra* notes 185–87 and accompanying text.

215. Huq, *Rationing of Constitutional Remedies*, *supra* note 193, at 21.

216. *Id.* at 21–22.

217. *Id.* at 22.

218. *See* Will v. Mich. Dep't of State Police, 491 U.S. 58, 70 (1989) ("[P]rior to *Monell* the Court had reasoned that if municipalities were not persons then surely States also were not. And *Monell* overruled *Monroe*, undercutting that logic." (citing Fitzpatrick v. Bitzer, 427 U.S. 445, 452 (1976))).

thought the 1979 case *Quern v. Jordan*[219]—which predated *Harlow* and held that § 1983 was insufficiently clear to abrogate state sovereign immunity[220]—had again laid to rest questions concerning whether states were "person[s]" under § 1983.[221]

For another (more fundamental) thing, neither qualified nor sovereign immunity has ever been hermetically sealed from the rest of the law. Sovereign immunity as applied in the constitutional-tort context can claim additional consequences, and qualified immunity can claim additional causes. On the sovereign-immunity side, the discussion above has already shown how imposing defense-side costs on individual officers and local governments rippled across areas ranging from *Monell*'s custom-or-policy rule to the *Bivens* regime's retrenchment to *Parratt*'s due-process requirement.[222] On the qualified-immunity side, among other things, separation-of-powers concerns about *Bivens* actions likely encouraged the Court to refashion the doctrine in *Harlow*, a case against federal officials, while federalism concerns likely encouraged the Court to extend the new standard into the § 1983 sphere afterward.[223]

The vision of constitutional-tort doctrine advanced here, with qualified and sovereign immunity comprising parts of a larger whole, is consistent with all this complexity. The law surrounding constitutional remedies is composed of myriad doctrines that relate to each other in complicated and contingent ways, meaning that expanding liability exposure along one dimension may create pressure to contract such exposure along others. Professor Daryl Levinson coined the term "remedial equilibration" to describe an idea like this,[224] and Professor Dick Fallon's "Equilibration Thesis" proves especially relevant.[225]

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219. Quern v. Jordan, 440 U.S. 332 (1979).

220. *See id.* at 338–45.

221. *See Will*, 491 U.S. at 63 (collecting citations).

222. *See supra* Parts II.A, II.B.

223. *See* Crocker, *Constitutional Structure*, *supra* note 13, at 1424–31, 1435–39.

224. Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 858 (1999) [hereinafter Levinson, *Remedial Equilibration*] (describing remedial equilibration as the theory that "rights and remedies are inextricably intertwined," with rights "dependent on remedies not just for their application to the real world, but for their scope, shape, and very existence").

225. Fallon, *supra* note 165, at 963.

Descriptively, Fallon points out that there are "both pragmatic and conceptual" relationships "among substantive rights, causes of action to enforce those rights, and immunity doctrines."[226] Normatively, he urges decision-makers to recognize that "any individual element" of the rights–remedies package "is potentially adjustable to preserve or enhance" the package's overall "attractiveness."[227] Specifically, he says, decision-makers should operationalize constitutional provisions "with deep respect for the interests that rights guarantees reflect" but "should not ignore social costs" that can come from increasing access to remedies, including the possibility that courts could cut back or calcify the reach of substantive protections.[228] In addressing fiscal, caseload, and rights-based concerns, the reformative sketch outlined below puts this advice into practice regarding the possibility of altering qualified immunity, sovereign immunity, and the broader constitutional-tort system.

III. A FUNCTIONAL CRITIQUE

The previous Part establishes that as a doctrinal matter, qualified immunity grew out of a constitutional-tort framework based on sovereign immunity and bolstered by the Supreme Court's concerns about defense-side expenses and federal-court dockets. While prior work of mine critiques the resulting system from a more formal point of view,[229] the present Part critiques it from a functional perspective. The purpose is to show that reconsidering qualified immunity without also reconsidering sovereign immunity and related protections for government entities would fail to uproot the real-life problems plaguing the constitutional-tort system. The analysis examines concerns within two particular areas: the impacts of indemnification and the economics of unconstitutional acts. The discussion then considers some initial responses in starting to think through the future of constitutional-tort law.

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226. *Id.* at 964.

227. *Id.* at 963.

228. *Id.* at 964, 967.

229. *See generally* Crocker, *Reconsidering*, *supra* note 46 (offering arguments against the Court's holding that § 1983 does not abrogate state sovereign immunity); Crocker, *Constitutional Structure*, *supra* note 13, at 1440–60 (offering arguments against the Court's apparent grounding of qualified immunity in additional structural constitutional concerns).

A. The Impacts of Indemnification

The scholarship surrounding constitutional enforcement took a large step forward in 2014 when Professor Joanna Schwartz published the results of a major empirical study asking how often state and local governments indemnify police officers from constitutional-tort costs.[230] The answer: "virtually always."[231] Schwartz reports that

> [b]etween 2006 and 2011, in forty-four of the country's largest jurisdictions, officers financially contributed to settlements and judgments in just .41% of the approximately 9225 civil rights damages actions resolved in plaintiffs' favor, and their contributions amounted to just .02% of the over $730 million spent by cities, counties, and states in these cases. Officers did not pay a dime of the over $3.9 million awarded in punitive damages. And officers in the thirty-seven small and mid-sized jurisdictions in [the] study never contributed to settlements or judgments in lawsuits brought against them. Governments satisfied settlements and judgments in police misconduct cases even when indemnification was prohibited by statute or policy. And governments satisfied settlements and judgments in full even when officers were disciplined or terminated by the department or criminally prosecuted for their conduct.[232]

Attorneys' fees were not a specific focus of the study, but Schwartz also reports that the "[a]vailable evidence indicates that law enforcement officers are almost always provided with defense counsel free of charge."[233]

Schwartz, with Professors Jim Pfander and Alex Reinert, repeated the feat in 2020 by showing that suits against federal officials follow a similar pattern.[234] The coauthors investigated who paid settlements and judgments resulting from *Bivens* actions against Bureau of Prisons ("BOP") employees that wrapped up between 2007 and 2017.[235] "[T]he data," they report, "reveal that individual government officials almost

230. *See* Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 885 (2014) [hereinafter Schwartz, *Police Indemnification*].

231. *Id.* at 890.

232. *Id.*

233. *Id.* at 915–16, 915 n.132, 916 n.33.

234. *See* James E. Pfander, Alexander A. Reinert & Joanna C. Schwartz, *The Myth of Personal Liability: Who Pays When* Bivens *Claims Succeed*, 72 STAN. L. REV. 561, 561 (2020) [hereinafter Pfander, Reinert & Schwartz, Bivens *Claims*].

235. *Id.* at 565–66.

never contribute any personal funds to resolve claims."[236] Instead, "the federal government effectively held its officers harmless in over 95% of the successful cases brought against them, and paid well over 99% of the compensation received by plaintiffs in these cases."[237]

These studies come with some caveats. They were limited to particular kinds of agencies with employees who are frequently sued for constitutional torts, for instance.[238] But there does not seem to be much evidence that governments indemnify officials in other lines of work significantly less often.[239] Both studies, moreover, examined only a specific time period, and the first study included only a sample of the kind of agency under consideration. But comprehensive reviews would have been prohibitively complex, and the jurisdictions scrutinized in the first study were "broadly representative in size, location, agency type, indemnification policy, and indemnification procedure."[240]

The results match anecdotal and other suppositions that previous scholarship had offered.[241] But they run counter to one of the Supreme Court's most prominent rationales for qualified immunity: that individual officers—for themselves and for all society—need protection from the possibility of financially ruinous constitutional-tort litigation. A significant purpose of qualified immunity, the Court has made clear, is to prevent constitutional-tort suits from overdeterring people from taking government positions and from fulfilling their job duties in a robust, even aggressive way.[242]

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236. *Id.* at 566.

237. *Id.*

238. *See* Joanna C. Schwartz, *After Qualified Immunity*, 120 COLUM. L. REV. 309, 355 (2020) [hereinafter Schwartz, *After Qualified Immunity*] (stating that "law enforcement liability" is "the most common and costly type of government litigation"); Pfander, Reinert & Schwartz, Bivens *Claims*, *supra* note 234, at 615 & n.227 (reporting that "BOP employees are responsible for the lion's share of *Bivens* claims against federal government actors").

239. *See* Schwartz, *Police Indemnification*, *supra* note 230, at 888–89, 899–902.

240. *Id.* at 937.

241. *See, e.g.*, Jeffries, *Eleventh Amendment*, *supra* note 141, at 50 n.16 (recounting how "[f]or nearly 20 years," he asked state and local law-enforcement officers training at the FBI Academy whether they knew "personally of any case where an officer sued under § 1983 was not defended and indemnified by his or her agency" and that they all answered "'no'"); Pillard, *supra* note 148, at 77–78, 78 n.61 (arguing that "indemnification is a virtual certainty" for *Bivens* defendants based largely on an interview with a Department of Justice official, an agency memorandum, and regulations); *id.* at 76 n.51 (reporting that "[t]he federal government provides representation in about 98% of the cases for which representation is requested" based on an agency memorandum).

242. *See, e.g.*, Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982) (stating that the "social costs" of meritless claims in this context "include the expenses of litigation, the diversion of official energy

To the extent government employers cover constitutional-tort costs, this rationale loses much (but not all) force.[243] So it comes as little surprise that critics point to indications of near-universal indemnification to argue against qualified immunity.[244] The recent literature, however, largely overlooks the important implication that evidence of near-universal indemnification should matter for how *sovereign* immunity (as distinct from municipal-liability doctrine, which has attracted more attention) operates in the constitutional-tort system as well.[245] Sovereign immunity has been described as furthering dignitary values too,[246] but its primary functional justification has long been protecting the public fisc.[247] The need to shield government coffers from damages actions thus serves as a background assumption against which sovereign immunity rests. And sovereign immunity in turn serves as a background assumption against which the entire framework of constitutional-tort law, including but not limited to qualified immunity, rests. If governments undermine the first assumption by providing their employees extensive indemnification, they call into question much more than qualified immunity alone.

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from pressing public issues, and the deterrence of able citizens from acceptance of public office," plus warning of "the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties'" (alteration in original) (footnote omitted) (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949))).

243. It does not lose *all* force because negative employment or political consequences, for example, could still attend findings of unconstitutional conduct. *See* Jeffries, *Eleventh Amendment*, *supra* note 141, at 75–78.

244. *See, e.g.*, Pillard, *supra* note 148, at 102 ("Given that government addresses the prospect of its employees incurring personal liability by consistently shouldering the costs of constitutional tort claims against them, that purpose no longer supports also applying qualified immunity to those same officials."); Schwartz, *Police Indemnification*, *supra* note 230, at 894 ("Evidence that officers are virtually always indemnified would contradict one of the foundational assumptions underlying the Court's qualified immunity doctrine.").

245. *See* Pfander, Reinert & Schwartz, Bivens *Claims*, *supra* note 234, at 596–621 (exploring multiple implications but not specifically examining consequences for sovereign immunity); Schwartz, *Police Indemnification*, *supra* note 230, at 938–49 (same); *see also* Pillard, *supra* note 148, at 67–68, 80–90 (mentioning potential implications for sovereign immunity but not including it among the doctrines considered at length).

246. *See, e.g.*, P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 146 (1993) (stating that the Eleventh Amendment recognizes that states "maintain certain attributes of sovereignty" and gives states "the respect owed them as members of the federation").

247. *See, e.g.*, Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 39 (1994) (stating that the "[Eleventh] Amendment responded most immediately to the States' fears that 'federal courts would force them to pay their Revolutionary War debts, leading to their financial ruin'" (quoting Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 151 (1984) (Stevens, J., dissenting))).

The impacts of indemnification reveal two particular grounds on which policymakers should reconsider how sovereign immunity applies to constitutional-tort suits. The first relates to the administration of justice; the second, to political accountability.

1. *The Administration of Justice.* Widespread indemnification distorts the administration of justice in several ways. Systemic impacts may be especially pronounced on the *Bivens* side. Pfander, Reinert, and Schwartz show that *Bivens* claims in cases resulting in payments to plaintiffs are regularly recharacterized as arising under the Federal Tort Claims Act ("FTCA"), which waives federal sovereign immunity for certain state-law torts, or are dropped from suits alleging both causes of action.[248] The apparent purpose behind these maneuvers is for the Department of Justice ("DOJ") to facilitate paying settlements out of the U.S. Treasury's general Judgment Fund rather than out of BOP's specific budgetary appropriation.[249] Pfander, Reinert, and Schwartz also show that DOJ commonly engages in this conduct even when FTCA claims appear subject to dispositive timeliness or exhaustion defenses.[250]

These practices seem to support a misperception among federal judges that *Bivens* claims are almost always meritless, which can have ripple effects for case-management and dispositive-motion decisions.[251] And these practices circumvent both statutory limitations on Judgment Fund use and regulatory constraints on DOJ indemnification—

248. Pfander, Reinert & Schwartz, Bivens *Claims*, *supra* note 234, at 583 (stating that "[a]side from one outlier," the 163 cases in their dataset in which BOP employees paid no personal funds (out of 171 "successful *Bivens* actions") proceeded down "one of three paths"); *id.* (specifying that "[i]n 59 (36.2%) of the 163 no-contribution cases, courts dismissed *Bivens* claims during the course of litigation, or plaintiffs voluntarily dismissed *Bivens* claims"; that "[i]n 63 (38.7%) of these cases, plaintiffs settled their cases—which alleged both *Bivens* and FTCA claims—in return for payments made by the U.S. government"; and that "in 40 (24.5%) of these cases, the government appears to have restyled *Bivens* claims in various ways as FTCA claims at or around the time of settlement . . . .").

249. *See id.* "[T]he Judgment Fund provides for the payment of final judgments under the FTCA . . . and other federal statutes that provide for the adjudication of money claims against the United States." *Id.* at 567 n.17. By contrast, Congress "has never accepted Judgment Fund liability for *Bivens* claims." *Id.* at 568; *see also id.* at 572–73 & n.43, 578–79, 613–14 (discussing this scheme in more detail).

250. *See id.* at 589–91, 594, 610–12.

251. *Id.* at 609.

boundaries presumably set to promote agency and personal accountability, respectively, for constitutional wrongs.[252]

Widespread indemnification can also have distorting effects on individual cases. In litigation, defense counsel representing both federal and other officials (many of whom are government attorneys, others of whom are paid from government funds) have recurrently stated or suggested that indemnification is unlikely to occur.[253] Again among other consequences, these representations may discourage plaintiffs from bringing claims in the first place or from pushing for more substantial settlements, may motivate judges to give jury instructions focusing on individual finances and obscuring the possibility of public underwriting, and may persuade jurors to limit damages awards.[254]

The legal community should hope for more candor from its members—and the public, from government attorneys and other lawyers compensated with government resources. Where a defendant puts their ability to pay in issue and where punitive damages are concerned, courts have sometimes allowed plaintiffs to introduce information about the likelihood of indemnification.[255] But increasing transparency in this way provides only a partial solution to the candor

252. *Id.* at 613–14.

253. *Id.* at 605; Schwartz, *Police Indemnification*, *supra* note 230, at 931–36; *see also* Pillard, *supra* note 148, at 76–77 (describing federal-official representation); *id.* at 92–93 (arguing that "[t]he individual liability fiction" influences "the courtroom narrative"). Pfander, Reinert, and Schwartz present evidence, for instance, that "[s]ince the 1980s, [DOJ] has argued in court filings and public documents"—including in Supreme Court briefs—"that the agency rarely if ever indemnifies individual *Bivens* defendants" or otherwise portrays a "narrative of personal liability." Pfander, Reinert & Schwartz, Bivens *Claims*, *supra* note 234, at 605. The coauthors concede that the terms of DOJ's indemnification policy provide "a superficially plausible basis for these representations." *Id.*; *see* 28 C.F.R. § 50.15(c)(1) (2022) (stating that DOJ "may indemnify" employees if "the conduct giving rise to the verdict, judgment, or award was taken within the scope of employment" and if "indemnification is in the interest of the United States, as determined by the Attorney General or his designee"); *id.* § 50.15(c)(3) (providing that "[a]bsent exceptional circumstances as determined by the Attorney General or his designee, the Department will not entertain a request either to agree to indemnify or to settle a personal damages claim before entry of an adverse verdict, judgment, or award"). But the reality appears to be that in part because of the way DOJ attorneys avoid the policy by recharacterizing and settling claims, "*Bivens* defendants rarely contribute their own funds to resolve successful constitutional litigation brought against them," and "[e]ven when they do, the amounts in question do not threaten financial devastation." Pfander, Reinert & Schwartz, Bivens *Claims*, *supra* note 234, at 606.

254. *See* Schwartz, *Police Indemnification*, *supra* note 230, at 932–33.

255. *See* Scherer v. City of New York, Nos. 03 Civ. 8445(RWS), 04 Civ. 2713(RWS), 2007 WL 2710100, at *8–10 (S.D.N.Y. Sept. 7, 2007) (discussing cases).

problem. Evidence rules and intangible factors render indemnification information susceptible to the vicissitudes of individual cases, counsel, and courts[256]; to attacks of being too much like inadmissible insurance information to come in[257]; and to differences in juries' attitudes about even remote possibilities of individual financial harm.

Insufficient candor, moreover, is not the only problem here. Many jurisdictions do not keep robust records of indemnification decisions,[258] which could cast doubt on the accuracy and completeness of any information defendants produce. In addition, many constitutional-tort plaintiffs proceed pro se and may have little or no idea that they should attempt to uncover indemnification information or that formal directives seeming to proscribe or limit reimbursement or similar practices may not tell the whole story.[259] And even if courts permit them to try, unrepresented plaintiffs may lack the resources to present complex and voluminous indemnification information in a format jurors find compelling. Of course, there are many areas where pro se parties face regrettable disadvantages in litigation. The point, however,

256. *See id.* at *9–10 (stating that indemnification information regarding punitive damages is relevant only where defendants present evidence about their own financial circumstances and that admissibility then turns on "the likelihood of indemnification," with the court "determin[ing] whether the 'probative value' of the evidence would be 'substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury'" (quoting FED. R. EVID. 403)).

257. *See id.* at *10–11.

258. *See* Pfander, Reinert & Schwartz, Bivens *Claims*, *supra* note 234, at 595 ("The records we examined . . . suggest that the BOP has only incomplete information about the cases that were settled on behalf of their officers."); Schwartz, *Police Indemnification*, *supra* note 230, at 956 (stating that "[t]his study of police indemnification shows that law enforcement agencies . . . have little information about the volume and costs of lawsuits brought against them and their officers"—and in particular that "[f]ew police departments had ready access to information about the number of lawsuits filed against their department and their officers, the amount paid in settlements and judgments, whether punitive damages were awarded, and whether their officers were indemnified for all or some of these financial penalties").

259. *See* Emery G. Lee III, *Law Without Lawyers: Access to Civil Justice and the Cost of Legal Services*, 69 U. MIA. L. REV. 499, 506 (2015) ("Non-prisoner pro se litigants appear in around 10% of federal cases. Not surprisingly, slightly more than half of the pro se filings were in the civil rights category (e.g., Section 1983 lawsuits, *Bivens* actions, employment discrimination, and Americans with Disabilities Act cases)." (footnotes omitted)); Joanna C. Schwartz, *Civil Rights Without Representation*, WM. & MARY L. REV. (forthcoming) (manuscript at 27–28 & n.110), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4046203 [https://perma.cc/SAY7-BLL5](stating that "[b]etween 2000 and 2019, 1,017,043 *pro se* prisoner petitions and 204,661 *pro se* non-prisoner civil rights suits were filed in federal district courts" and that "[t]here are more *pro se* prisoner petitions and civil rights actions than all other types of *pro se filings*, combined in federal court"—but that "the access to justice crisis is much more acute in state courts, where millions of people each year go to court in civil matters without the assistance of counsel").

is that this is just one way in which current indemnification and disclosure practices undermine the administration of justice.

At bottom, the pervasive nature of indemnification is not readily apparent to (and may be actively concealed from) plaintiffs, juries, and judges alike. This warps the administration of justice, and there is no easy mechanism for improving transparency. Sovereign immunity and similar limitations on municipal liability play a causal role by making constitutional-tort costs fall so heavily on individual officers in the first place, which in turn makes government employers respond by paying or reimbursing these costs themselves. And sovereign immunity and similar limitations on municipal liability also allow government employers to do this largely in secret.[260] Paradoxically, then, widespread indemnification reveals the illogic of sovereign immunity's main functional justification in this area—that covering constitutional-tort costs could have disastrous consequences for the public fisc.

Congress could cut this Gordian knot by establishing entity liability for both state and federal governments and by expanding entity liability for municipalities. With governments paying up front, the perceptions of everyone in the system—from unrepresented plaintiffs to Supreme Court Justices—would better fit the reality of which parties ultimately absorb defense-side costs. Removing sovereign immunity and instituting related reforms would help match doctrine with experience, reduce the incentives for defense counsel to hide the ball in ethically dubious ways, and allow all participants to make and implement strategic decisions with a more accurate understanding of the dynamics in play.

2. *Political Accountability.* On top of its effects on the administration of justice, the way that widespread indemnification works can result in a lack of political accountability for government agencies' decisions to defray their employees' constitutional-tort costs—and thus to subsidize their misconduct. When indemnification decisions are "made at the front end, as the product of collective bargaining arrangements and political lobbying" leading to public-facing policies, they "are easily justified as costs of doing business"

260. *See infra* note 262 and accompanying text.

since the facts of future cases are not in view.[261] When indemnification decisions are made at the back end, the evidence suggests they are frequently hashed out in the relative secrecy of closed settlement discussions, bureaucratic black holes, and ad hoc personnel processes.[262]

All this runs counter to the Supreme Court's emphasis on political accountability in shaping sovereign immunity. In *Hess v. Port Authority Trans-Hudson Corp.*,[263] the Court refused to extend immunity to the Port Authority Trans-Hudson Corporation ("PATH"), a railway linking New York and New Jersey that came about through an interstate compact.[264] Entities formed under the Constitution's Compact Clause "owe their existence to state and federal sovereigns acting cooperatively, and not to any 'one of the United States,'" the Court explained.[265] So "their political accountability is diffuse; they lack the tight tie to the people of one State that an instrument of a

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261. Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 GA. L. REV. 845, 862 (2001) [hereinafter Gilles, *Deterrent Effect*].

262. *See* Pfander, Reinert & Schwartz, Bivens *Claims*, *supra* note 234, at 605–06 (explaining that, on the federal-official side, DOJ's indemnification policy provides that employees "cannot request or secure any assurance as to indemnity for any personal liability until after they lose in court"); *id.* at 623–25 (describing the great lengths to which they went to obtain data pertaining to settlements and judgments in *Bivens* cases against BOP, including submitting an initial request under the federal Freedom of Information Act ("FOIA"), engaging in additional communication with the agency, reviewing the dockets of cases provided in response to the initial request, contacting attorneys involved in these cases, performing follow-up electronic-database research to identify cases the agency had failed to disclose, and submitting more FOIA requests to acquire files for these cases); *id.* at 625 (noting that even after all this effort, "[t]here remain some gaps in our information about the . . . cases in the dataset"); Schwartz, *Police Indemnification*, *supra* note 230, at 918–22 (stating that, on the state- and local-officer side, even after working extraordinarily hard to understand the matter, she "d[id] not have comprehensive information about how jurisdictions with statutory limitations on officer indemnification nevertheless indemnify most or all of their officers"—but that some did so via "settlements that they believed sidestepped indemnification prohibitions" or simply "indemnified officers in violation of governing law"); *id.* at 902–05 (describing the great lengths to which she went to obtain data pertaining to settlements and judgments in § 1983 cases involving allegations of police misconduct, including submitting public-records requests to over one hundred jurisdictions, engaging "in an extended series of exchanges—by letter, e-mail, and phone—to several individuals at multiple agencies," interviewing individuals including plaintiffs' attorneys to augment the material provided by government officials, "review[ing] minutes of city council meetings in which settlements and judgments were approved," and conducting additional electronic-database and court-website research).

263. Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30 (1994).

264. *Id.* at 32–33.

265. *Id.* at 42 (quoting U.S. CONST. amend. XI).

single State has."[266] And to the extent special interests or gubernatorial appointees come to dominate, the Court said, a compact entity "is two or more steps removed from popular control."[267] In this the Court found "good reason" to reject PATH's immunity argument.[268] Entities should enjoy protections only for conduct that can realistically result in democratic consequences, the theory goes, because "the possibility of political accountability can be the only counterbalancing check against inequitable applications of sovereign immunity."[269]

Contrast current conditions with how litigation over wrongs committed in the course of government employment unfolded in the antebellum era. Before the law recognized constitutional torts, plaintiffs could sue officials for common-law torts (like in trespass for allegedly unjustified police activity).[270] As a defense, officials could argue their conduct was legally authorized by virtue of their job-related mandates.[271] But to the extent the conduct in question violated constitutional strictures, the defense would fail and the officials would face damages judgments.[272] At that point, federal officers often turned to Congress for help, petitioning for indemnification and regularly, although not uniformly, receiving it by way of private bills.[273] As Professor Jim Pfander and attorney Jonathan Hunt explain, "[c]ourts were to decide whether the conduct in litigation was lawful and award damages against the officer if it was not," while "Congress was to decide whether the officer had acted for the government within the scope of his agency, in good faith, and in circumstances that suggested the government should bear responsibility for the loss."[274] A similar

266. *Id.*

267. *Id.* (quoting MARIAN E. RIDGEWAY, INTERSTATE COMPACTS: A QUESTION OF FEDERALISM 300 (1971)).

268. *Id.*

269. Jameson B. Bilsborrow, Comment, *Keeping the Arms in Touch: Taking Political Accountability Seriously in the Eleventh Amendment Arm-of-the-State Doctrine*, 64 EMORY L.J. 819, 841 (2015); *see also, e.g.*, Gregory C. Sisk, *A Primer on the Doctrine of Federal Sovereign Immunity*, 58 OKLA. L. REV. 439, 442 (2005) ("[W]hen government conduct becomes removed from policymaking, the arguments for sovereign immunity are at their weakest.").

270. *See* John Harrison, *State Sovereign Immunity and Congress's Enforcement Powers*, 2006 SUP. CT. REV. 353, 356.

271. *See id.*

272. *See id.*

273. James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. REV. 1862, 1867 (2010) (estimating the success rate at around 60 percent).

274. *Id.* at 1868.

process appears to have played out for state officers seeking indemnification from their own legislatures.[275]

Sovereign immunity sat at the core of this system. Sovereign immunity meant that individual officers bore the initial penalty for unconstitutional acts.[276] But Congress then stepped in, employing private indemnification legislation to "preserve[] the formal doctrine of sovereign immunity while assigning the ultimate loss associated with wrongful conduct to the government."[277] The result was that "sovereign immunity in the early republic served less to authorize lawless conduct on the part of the federal government than to allocate responsibility" for legal determinations (whether defendants acted unlawfully) to judges and for policy determinations (whether the government should bear the cost) to congressmen.[278] In fact, the federal private-bill process was remarkably transparent, encouraging meaningful political accountability for indemnification decisions.[279]

The constitutional-tort system works much differently now. Rather than focusing on liability and leaving indemnification to the legislature, the federal judiciary has assumed responsibility both for legal questions surrounding whether constitutional lines were crossed and—by adopting qualified immunity and other litigation-limiting doctrines—for policy determinations about who should pay and under what circumstances.[280] Bound up in this shift is the expanding way in which the Court has viewed sovereign immunity over time. Rather than "block[ing] recovery" as the doctrine does today, sovereign immunity historically "ensured that each branch would exercise the powers . . . that the Constitution had assigned."[281]

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275. *See id.* at 1872–73, 1889–90.

276. *Id.* at 1876.

277. *Id.* at 1868.

278. *Id.*; *see also id.* at 1918–20 (fleshing out the argument that "the role of sovereign immunity was quite limited" and that "the dismissal of a suit against the government was not understood as depriving the individual of a remedy, but as directing the individual's application for redress into the proper procedural channels" (emphasis omitted)).

279. Private bills were subject to bicameralism and presentment. *Id.* at 1928. They were also published and indexed in a manner meant to facilitate their use as precedent for both the primary conduct of future officials and the secondary review of future legislators. *Id.* at 1893, 1910–11. Congress even went out of its way to explain its indemnification rationale in the bills' text. *Id.* at 1893.

280. *See supra* Part II.

281. Pfander & Hunt, *supra* note 273, at 1930.

One way to think about the present situation is that the Court has taken a "fiction" far too "seriously," as then-Professor (now-Judge) Nina Pillard puts it.[282] Instead of treating sovereign immunity as a coordinating mechanism for facilitating legislative decisions about who bears the ultimate monetary burdens of unconstitutional conduct, the Court regards sovereign immunity as a near-sacrosanct barrier to governmental relief. This attitude has caused the modern Court to feel compelled to protect the available defendants from the consequences of unlawful acts in a way the early Court did not: through qualified immunity and its doctrinal cousins.[283] By thus subjecting only some of the worst conduct committed by government officials to monetary sanction, the Court has allowed law-enforcement and other executive entities to maintain the pretense of individual liability for constitutional violations while driving determinations about who actually pays underground. Accordingly, sovereign immunity plays a pivotal part in curbing political accountability for indemnification decisions[284]—just as it does in warping the administration of justice through indemnification practices.

Again, Congress could address this problem by permitting entity liability at all levels of government for constitutional-tort claims. Doing so could enhance political accountability by attracting public attention to the circumstances of successful cases and to who carries the costs, whether directly or indirectly, to a much greater extent than the current system does.[285] What is more, if Congress also alters or abolishes

282. Pillard, *supra* note 148, at 79 (writing, of the modern era, that "[a]lthough federal officials do not in practice pay the costs of defending themselves or compensating the victims of constitutional violations, the federal courts have not accounted for that reality" and "instead have taken the fiction of individual liability seriously, acting as if individual officials continue to bear the costs of litigation and liability personally").

283. *See* Pfander & Hunt, *supra* note 273, at 1924.

284. *See* Pillard, *supra* note 148, at 102 (stating that "by creating the individual liability fiction and maintaining qualified immunity, the Court has bolstered the system of sovereign immunity" and that "by perpetuating the fiction of individual liability, it has precluded itself, as well as society at large, from ever having to make the choice of whether the government should truly be held responsible for the constitutional violations of its agents").

285. *See* LYNN A. BAKER, CLAYTON P. GILLETTE & DAVID SCHLEICHER, LOCAL GOVERNMENT LAW: CASES AND MATERIALS 840 (6th ed. 2022) (positing, as an argument against providing qualified immunity to local governments, that "[e]nhancement of the political process presumably occurs when residents are required to bear the social costs of depriving individuals of their federally protected rights" because "[t]o the extent that tort damages are reflected in local taxes, residents will have incentives to monitor the conduct of local officials and to lobby for 'cheaper' local customs and policies, i.e., those that do not violate federally protected rights").

qualified immunity for individual defendants, pressure would presumably build for legislatures to establish more formal—and, compared to the present situation, more public-facing—indemnification procedures.[286]

B. The Economics of Unconstitutional Acts

Because of widespread indemnification, the public both sponsors and suffers the government's unconstitutional acts. This calls to mind the two kinds of costs that economic theory says any given behavior can involve: internalized and externalized costs.[287] The public sponsors government conduct through taxes, fees, and the like, which provide funds to keep the proverbial lights on. Government conduct, in turn, produces consequences for the community that may be positive or negative. The former kinds of costs are internalized: agencies themselves, through public resources, have to pay for them.[288] The latter kinds are externalized: agencies themselves, absent legal interventions, do not have to pay for them. Instead, affected individuals absorb these costs.[289]

In theory, system designers can eliminate externalities by making it possible for actors to internalize them—that is, to account for them as part of their budgeting processes, just as they account for goods and services like toilet paper and technological assistance.[290] This should encourage parties to make their conduct socially efficient—meaning to act in ways that balance all the costs for themselves and others with all the benefits for themselves and others.[291] Applying this rational-actor model to the context at issue here, the argument goes, policymakers should subject government actors to damages (or to increased

286. *See infra* note 376 (describing how the Colorado legislature recently provided that state-law qualified immunity will not protect law-enforcement officers from certain claims and simultaneously established broad indemnification protections).

287. *See* JEFFREY L. HARRISON, LAW & ECONOMICS IN A NUTSHELL 45–46, 49 (7th ed. 2020) (discussing negative and positive externalities and cost internalization).

288. *See id.*

289. *See id.*

290. *See* Robert Cooter, *Unity in Tort, Contract, and Property: The Model of Precaution*, 73 CALIF. L. REV. 1, 3–4 (1985) (describing situations in which parties fully internalize the cost of harm).

291. *See id.* at 3 ("[S]ocial efficiency is achieved by balancing all costs and benefits.").

damages) to help dissuade them from committing unconstitutional acts.[292]

This argument, however, depends on complicating and contestable assumptions, including (1) that, as relevant, there are net negative externalities associated with the constitutional violations at issue under the extant system and (2) that government actors will actually respond to the incentives arising from monetary internalization by committing fewer constitutional violations. The contention that qualified immunity protects against "overdeterring" officials from vigorously fulfilling their job duties takes issue with the first assumption. For if at present there are net *positive* externalities associated with the constitutional violations to which qualified immunity applies, the doctrine essentially allows officials to capture some of the social benefit by discounting the price of the social harm.[293] And the contention that some government actors, especially employing entities, are relatively impervious to monetary inducements takes issue with the second assumption.[294]

It would be unrealistic to try to resolve the long-running debates surrounding these assumptions in the space available here. Instead, the ensuing discussion offers a concise contribution to each conversation—with a focus on the relationship between concerns about racial justice in U.S. policing and the role of sovereign immunity in constitutional-tort law.

1. *Externality Effects.* As for the first pro-liability assumption outlined above (that there are net negative externalities associated with the constitutional violations at issue under the extant system), there are good arguments that more should be done to allow

292. *See* Pillard, *supra* note 148, at 90.

293. *See* Aziz Z. Huq, *Habeas and the Roberts Court*, 81 U. CHI. L. REV. 519, 588 (2014) (stating that the "leading account of qualified immunity" that "insists on the need to liberate state officials to 'act upon their own free, unbiased convictions, uninfluenced by any apprehensions'" relies on "the observation that officials typically do not internalize all positive externalities from their decisions, and a liability rule forcing them to internalize negative externalities would create an undesirable asymmetry in incentives and so lower levels of desirable government action" (quoting Filarsky v. Delia, 566 U.S. 377, 383 (2012))); *see also* John C. Jeffries, Jr., *Disaggregating Constitutional Torts*, 110 YALE L.J. 259, 265–69 (2000) [hereinafter Jeffries, *Disaggregating Constitutional Torts*] (describing the overdeterrence rationale of qualified immunity, especially in search and seizure cases).

294. *See, e.g.*, Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 345–47 (2000) [hereinafter Levinson, *Making Government Pay*].

government actors to capture benefits arising from the predominantly constructive nature of their work.[295] But that does not mean that permitting them to escape monetary accountability for constitutional violations should be among such strategies. For positive externalities, like negative externalities, do not necessarily flow to all populations in proportional measure.

Viewing the situation with a wide-angle lens, if a community wants a government agency (say, a police department) to produce a particular benefit (say, enhanced public safety) by engaging in conduct that may violate individuals' constitutional rights (say, responding assertively to emergency calls), then the community, not the injured individuals, should have to finance that benefit.[296] "[I]t is important," in other words, "that those who enjoy the benefit" of government action "also bear the burdens."[297]

Critically, the argument for loss-spreading through entity liability should be especially persuasive where constitutional violations are not uniformly or even randomly distributed among community members, for "[g]overnment is in a unique position to spread individual losses across a large, diverse tax base."[298] The argument for loss-spreading through entity liability should be exponentially persuasive where constitutional violations are concentrated on marginalized populations, and evidence indicates that police violence, at least, is indeed concentrated on marginalized populations—and on racial minorities in particular. "By one estimate, Black men are 2.5 times more likely than white men to be killed by police during their lifetime," the scientific publication *Nature* recently reported.[299] "And in another

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295. *See* Jeffries, *Disaggregating Constitutional Torts*, *supra* note 293, at 266–68.

296. Of course, "[s]ome scholars would take issue with the notion that any constitutionally infringing conduct may have social utility." Gilles, *Deterrent Effect*, *supra* note 261, at 850 n.20; *see also* Levinson, *Remedial Equilibration*, *supra* note 224, at 859–60 ("We might think . . . that the optimal level of some types of constitutional violations . . . is close to zero, and for that reason, that remedies in constitutional law should be regarded primarily as sanctions rather than prices."). For a landmark discussion of the broader concept of "harm-efficient policing" ("that is, policing that imposes harms only when, all things considered, the benefits for law, order, fear reduction, and officer safety outweigh the costs of those harms"), see Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 792–94 (2012).

297. BAKER, GILLETTE & SCHLEICHER, *supra* note 285, at 840 (posited as an argument against providing qualified immunity to local governments).

298. Mark R. Brown, *The Demise of Constitutional Prospectivity: New Life for* Owen*?*, 79 IOWA L. REV. 273, 309 (1994).

299. Lynne Peeples, *Brutality and Racial Bias: What the Data Say*, 583 NATURE, July 2, 2020, at 22, 22 (citing Frank Edwards, Hedwig Lee & Michael Esposito, *Risk of Being Killed by Police*

study, Black people who were fatally shot by police seemed to be twice as likely as white people to be unarmed."[300]

As other commentators have pointed out, this argument provides yet another reason to do away with, or drastically alter, qualified immunity, which forces injured individuals to eat the damages caused by much unconstitutional conduct.[301] This argument, however, also strikes against the most basic rationale for recognizing sovereign immunity in the constitutional-tort context. The notion that sovereign immunity provides protection for the public fisc neglects the fact that this "protection" is not experienced by all members of the "public" in equal (or equitable) measure—and that differential gains and losses may be unjustly distributed around racial and other demographic lines.[302]

In short, both qualified and sovereign immunity fall hardest on the individuals subject to the greatest magnitude of unconstitutional conduct, often meaning people of color and members of other disadvantaged groups.[303] That the law forces these individuals to bear a disproportional share of the social burden when government officials act unlawfully should render the constitutional-tort system unsustainable as currently constructed.

2. *Incentive Effects.* Much scholarship debates the second pro-liability assumption outlined above (that government actors will actually respond to the incentives arising from monetary internalization by committing fewer constitutional violations).[304] At the threshold, a common thread posits that even if liability is placed exclusively on individual officers, the fact that "the costs of liability

Use of Force in the United States by Age, Race–Ethnicity, and Sex, 116 PROC. NAT'L ACAD. SCIS. U.S. 16793 (2019)).

300. *Id.* (citing Justin Nix, Bradley A. Campbell, Edward H. Byers & Geoffrey P. Alpert, *A Bird's Eye View of Civilians Killed by Police in 2015: Further Evidence of Implicit Bias*, 16 CRIMINOLOGY & PUB. POL'Y 309 (2017)).

301. *See* Huq, *Rationing of Constitutional Remedies*, *supra* note 193, at 73–74.

302. *See* Alison L. Patton, Note, *The Endless Cycle of Abuse: Why 42 U.S.C. § 1983 Is Ineffective in Deterring Police Brutality*, 44 HASTINGS L.J. 753, 756 (1993) ("The typical victim of excessive force is a young African-American or Latino male, from a poor neighborhood, often with a criminal record.").

303. *See* Huq, *Rationing of Constitutional Remedies*, *supra* note 193, at 74 (stating that "the Court has rendered most difficult to remedy" constitutional injuries that affect "many of the least politically powerful communities in the United States").

304. *See* Pfander, Reinert & Schwartz, Bivens *Claims*, *supra* note 234, at 597–98, 597 n.147, 598 n.148, 602 n.172 (discussing the conversation and collecting citations).

may be shifted voluntarily" means that as a general matter, "the government, as employer, will have no realistic choice but to compensate its employees for their risk."[305] This is what seems to be happening with the widespread indemnification against constitutional-tort costs evident at the federal, state, and local levels.[306]

Again, commentators point to evidence of extensive indemnification as weighing against qualified immunity.[307] But even in a world where agencies take on most defense-side constitutional-tort expenses, sovereign immunity and similar limitations on municipal liability matter because indemnification is neither certain nor free from transaction costs. The absence of coverage in a small percentage of cases, especially when combined with the liability-reducing effects of the individual-accountability artifice, decreases the governmental consequences of constitutional violations. And widespread ex post indemnification must entail significant financial friction.[308] We could reduce this loss by allowing more suits against government entities from the start (assuming lower transaction costs from any reimbursement the entities might then seek from especially blameworthy officials).[309] So how government entities would respond to direct constitutional-tort liability still bears significance.

A classic article by Professor Levinson argues that "government does not internalize costs in the same way as a private firm."[310] Instead, Levinson contends, "[g]overnment actors respond to *political* incentives, not *financial* ones—to votes, not dollars."[311] Levinson thus asserts that "[i]f the goal of making government pay compensation is

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305. Pillard, *supra* note 148, at 76.

306. *See id.* at 76–77 (arguing that "[t]he federal government's response to *Bivens*"—under which "[a]s a practical matter, . . . indemnification is a virtual certainty"—"shows that the economic analysis equating employee and employer liability has much force"); *supra* notes 230–41 and accompanying text (discussing indemnification at all three levels).

307. *See supra* note 244 and accompanying text.

308. *See* Martin Petrin, *Circumscribing the "Prosecutor's Ticket To Tag the Elite"—A Critique of the Responsible Corporate Officer Doctrine*, 84 TEMP. L. REV. 283, 321 (2012) (arguing, in the corporate-law context, that "even in instances where the risk can be shifted away from managers and agents via indemnification and/or insurance, the process of risk-shifting entails transactions costs" and that "it is preferable in most cases to allocate the initial liability risk to the corporation").

309. *See* Larry Kramer & Alan O. Sykes, *Municipal Liability Under § 1983: A Legal and Economic Analysis*, 1987 SUP. CT. REV. 249, 272 (discussing transaction costs in the indemnification context).

310. Levinson, *Making Government Pay*, *supra* note 294, at 345.

311. *Id.*

to achieve optimal deterrence with respect to constitutionally problematic conduct, the results are likely to be disappointing and perhaps even perverse."[312]

Professor Myriam Gilles presents an opposing view, submitting that two aspects of allowing damages awards against agencies directly can cause them to clean up their acts. Focusing on municipal liability, Gilles argues first that making agencies answerable for their employees' unlawful conduct "serves important informational functions" by encouraging plaintiffs to pursue litigation through which "valuable" data about practices affecting the public can be "unearthed and exposed."[313] Second, Gilles contends, "municipal liability claims serve a 'fault-fixing' function, localizing culpability in the municipality itself, and forcing municipal policymakers to consider reformative measures."[314] Individual indemnification, she argues, does not have the same effect, in part because the "bad-apple theory" of blameworthiness—"under which municipal governments or their agencies attribute misconduct to aberrant behavior by a single 'bad apple'"—"deflect[s] attention from systemic and institutional factors contributing to recurring constitutional deprivations."[315]

With Levinson's and Gilles's arguments as archetypes, the debate continues between commentators who doubt that government liability makes much difference and those who think it may.[316] Empirical research indicates there is no universal answer to this vexing question.[317]

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312. *Id.*

313. Gilles, *Deterrent Effect*, *supra* note 261, at 859.

314. *Id.* at 861.

315. *Id.* at 862 (alteration in original) (quoting Myriam E. Gilles, *Breaking the Code of Silence: Rediscovering "Custom" in Section 1983 Municipal Liability*, 80 B.U. L. REV. 17, 31 & n.56 (2000)).

316. On the former side of the debate, see, for example, Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 475 (2004) ("[G]overnmental actors, unlike private actors, are much more likely to be motivated by political incentives than by purely financial ones."). John Rappaport puts an important spin on the latter side of the debate by showing how government-liability insurers can use financial incentives to force wide-reaching reforms. *See* John Rappaport, *How Private Insurers Regulate Public Police*, 130 HARV. L. REV. 1539, 1548–49 (2017).

317. *See* Joanna C. Schwartz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking*, 57 UCLA L. REV. 1023, 1023 (2010) (stating that "[s]ome departments intentionally ignore information from suits" and that "[t]echnological kinks, employee error, and deliberate efforts to sabotage data collection combine to undermine other departments' limited efforts to gather information"—but that "those law enforcement agencies

Nevertheless, two points are worth making here. First, Gilles's arguments in favor of government liability at the local level should apply to government liability at the state and federal levels as well. In some circumstances, the kind of information plaintiffs could seek in suing state and federal agencies could be qualitatively different and more pertinent to potential reforms than the kind of information they can seek in suing individual officers. As civil-rights lawyer Flint Taylor puts it, a *Monell* action "permits wider discovery, broadens the scope of admissibility at trial, facilitates holding supervisory and command officials responsible, and allows plaintiffs' litigators to properly apportion the blame between the individual officers and the municipality."[318] Even without the custom-or-policy requirement that limits *Monell* claims to collective concerns,[319] one would expect many models of entity liability to produce information about entity defendants to a greater extent than personal officer liability does.[320] And fixing fault on state and federal agencies should likewise spotlight communal rather than (or in addition to) individual contributors to unconstitutional conduct, increasing the likelihood of real progress.

Second, as suggested above, "much official wrongdoing is ultimately rooted in organizational conditions and can only be organizationally deterred."[321] Crucial changes to training, technology, and culture, including understanding and counteracting the effects of structural racism, cannot happen through individual initiative alone.[322]

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with functioning systems to gather and analyze data about lawsuits have used that information to reduce the likelihood of misconduct").

318. G. Flint Taylor, *A Litigator's View of Discovery and Proof in Police Misconduct Policy and Practice Cases*, 48 DEPAUL L. REV. 747, 749 (1999).

319. *See supra* notes 164–65 and accompanying text.

320. The respondeat superior model advocated below, for example, depends on whether an official's conduct fell within the scope of employment, *see infra* Part IV.A.2, which invites inquiries into general job duties and perhaps even particular agency policies, *see, e.g.*, Williams v. Hughes Moving & Storage Co., 578 So. 2d 1281, 1285 (Ala. 1991) (stating, in a personal-injury case premised on respondeat superior liability for a vehicle accident, that "[the employer's] only evidence that [the employee] was not acting in the scope of his employment was the evidence that company policy prohibited employees from taking vehicles home" but that this evidence came up "far short of rebutting the presumption that [the employee] was acting within the scope of his employment, because of the fact that [the employer] had not enforced the policy in the past, with respect to [the employee], but had virtually condoned [the employee's] practice of taking company vehicles home").

321. PETER H. SCHUCK, SUING GOVERNMENT 98 (1983); *see supra* notes 43–44 and accompanying text.

322. *See* Fred O. Smith, Jr., *Beyond Qualified Immunity*, 119 MICH. L. REV. ONLINE 121, 129 (2021) [hereinafter Smith, *Beyond Qualified Immunity*] (stating that "[a]ddressing the[] causes

To the extent one believes that agencies respond in a meaningful way to monetary incentives (especially when combined with the kind of political pressure recently present in this context), now is the time to put cost-justified civil accountability mechanisms in place.[323]

C. The Future of Constitutional Torts

For all the reasons described above, there is ample cause to doubt that sovereign immunity and similar limitations on municipal liability should play such a large part in constitutional-tort law. Critically, Congress has the power to alter the scope of such protections in this context: it just needs to speak very clearly when it comes to states and the federal government.[324] In thinking through the future of constitutional enforcement, however, a few initial considerations come to mind.

It bears recognizing that removing sovereign immunity and instituting (or in the context of municipalities, expanding) government liability would not provide a panacea for all the indemnification-related problems identified here. Making the federal government liable for unconstitutional conduct, for instance, would not necessarily prevent DOJ from converting constitutional claims into FTCA claims to reach the Judgment Fund for settlements.[325] But the statutory step required to close that loophole would be small compared to the one required to waive sovereign immunity—and, like others, could be accomplished alongside it.

Removing immunity protections could also alter the indemnification calculus. In theory, for example, governments could become less willing to indemnify individual defendants if increasing entity liability—especially while also potentially withdrawing officials'

[of police violence against Black communities] requires more than accountability for *individual* police officers" because "[i]ndividual officers did not invent segregation, stereotyping, and racially inflected dehumanization"; because "[i]ndividual officers do not decide to disproportionately patrol, frisk, or question people of color"; because "[i]ndividual officers do not decide the rules of engagement for physical contact with the citizenry: when officers may legally stop people, or what they may do when they stop them"; and because "[i]ndividual officers do not decide what we label 'crime' and when we as a society decide to invoke the most violent arm of the state to solve social ills").

323. *See* Fallon, *supra* note 165, at 980 ("Given the mixed evidence, we should perhaps not anticipate that transparent governmental liability would optimize training and supervision of government employees, but we could dare to hope for improvement.").

324. *See supra* note 45.

325. *See supra* notes 248–52 and accompanying text.

qualified immunity and making other doctrinal changes—amplified defense-side constitutional-tort costs. But that seems unlikely, at least with respect to the kind of crippling personal consequences that prompted the Supreme Court to adopt modern qualified immunity and related rules in the first place. The market for competent workers (who often make less money than they could in the private sector) appears to have led government employers to adopt today's pervasive indemnification scheme.[326] Perhaps the most likely consequence of this kind, therefore, would be for governments to increase their insistence that individual officers help pay constitutional-tort costs in exceptionally egregious cases.[327]

One could wonder as well whether knowledge that the public ends up footing the bill could make judges and juries less likely to issue substantial damages awards for constitutional wrongs. Courtroom experience suggests not: for otherwise, defense counsel would have long played up the probability of indemnification.[328] And even if government attorneys changed tacks by emphasizing the possible effects of damages awards on the public fisc, there is independent value in disseminating better information about who pays the costs of unconstitutional conduct both for actors involved in the litigation process (including individual defendants, who may suffer under uncertainties about whether their agencies will indemnify them[329]) and for the jurisdiction's taxpayers and voting public.

Also worth noting is that there are other potential ways to modify problematic indemnification-related actions short of instituting state and federal government liability and expanding municipal liability for constitutional torts. While perhaps "[n]o one would argue for a return to the world of the early republic" and its private-bill system,[330]

326. *See supra* notes 305–06 and accompanying text.

327. *See* Pfander, Reinert & Schwartz, Bivens *Claims*, *supra* note 234, at 617 (noting that federal-government lawyers currently possess "negotiating leverage with employee defendants who have engaged in particularly egregious forms of misconduct").

328. *See supra* note 253 and accompanying text.

329. *See* Schwartz, *Police Indemnification*, *supra* note 230, at 932–33 (explaining that upon "sending officers a reservation-of-rights letter at the beginning of the case—stating that the county has decided to represent and indemnify the officer but that it reserves the right to reverse their decision," a county risk manager reported responding to situations in which "an officer will call after receiving the letter, anxious that he may not be indemnified," by offering assurances that the "letter is part of the process that benefits both officers and the department, and that they will be indemnified in the end").

330. Pfander & Hunt, *supra* note 273, at 1930.

legislatures could regulate this area far more closely than they currently do. They could require agencies to keep and make public full and frank records about which defendants had costs covered, in what ways, and why.[331] They could also require agencies to abide by concrete ex ante indemnification policies, including through independent ex post review. But limiting sovereign immunity and increasing municipal liability would provide a single, straightforward path toward making both the justice system and the political process serve the public in this area more effectively than they do today.[332]

In addition, withdrawing sovereign immunity and the *Monell* custom-or-policy requirement would not solve all problems surrounding how externalities and incentives related to constitutional enforcement flow between and among government entities and the broader community.[333] And other strategies could likewise bear fruit. But much about the recent reevaluation of police practices suggests that extending government liability—and dropping qualified immunity—in the excessive-force context, at least, would promote cost-justified improvements as a result of both inside financial factors and outside political pressure.

IV. A REFORMATIVE SKETCH

This Part provides a reformative sketch, first presenting an outline for doctrinal modification and then accounting for issues related to remedial equilibration. In other work, I introduce a stepwise idea for peeling away sovereign immunity from constitutional-tort suits, arguing that Congress should abrogate protections for states from Fourth Amendment excessive-force claims while laying the groundwork for further-reaching changes.[334] The proposal delineated here is broader, touching on liability (or expanded liability) not only

331. *See* Crocker, *Retreat*, *supra* note 46, at 16 (arguing that "[a]t least in the law-enforcement context, shining this kind of sunlight on payment realities should help illuminate faulty assumptions underlying much constitutional-tort doctrine" and discussing the congressional Cost of Police Misconduct Act of 2021); Miller & Wright, *supra* note 59, at 760 (arguing for publicity-related remedies for problematic police practices).

332. *See* Fallon, *supra* note 165, at 979 (noting, in advocating limited government liability, that "[a]s matters now stand, both voters and jurors may be confused or even misled about who will bear the burden of a damages award").

333. Consider, for instance, the potential problem of moral hazard—and other incentive effects—arising from the increased use of government-liability insurance. *See* Rappaport, *supra* note 316, at 1595–1603 (warning that liability insurance "tends to *increase* harm by reducing the insured's incentive to take care").

334. *See* Crocker, *Reconsidering*, *supra* note 46, at 585–88.

for state entities, but also for federal and municipal entities and individual officers. The goal is to advance the cause of equal justice under law while showing that removing unwarranted obstacles to damages claims would be unlikely to wreak havoc on individual or government finances, the federal-court system, or the content of constitutional rights. It bears emphasizing, however, that the ideas offered here are just some among many imaginable improvements to constitutional-enforcement doctrine. Other ideas may emerge as equally or even more attractive. But tracing the contours and implications of the present proposal proves useful at the very least as a thought experiment for exploring multiple points of potential reform.

A. Doctrinal Modification

Congress should undertake systemic constitutional-enforcement reform, but it can do so in a gradual way. To be specific, Congress should codify *Bivens* and waive the federal government's sovereign immunity from constitutional-tort suits. Congress should also amend (or replace) § 1983 to make clear that plaintiffs can sue states themselves (or relevant state agencies). Finally, Congress should eliminate both *Monell*'s custom-or-policy requirement for claims against local governments and qualified immunity for claims against individual officers.[335] Congress, however, should make all these changes for Fourth Amendment excessive-force claims first and then address additional constitutional violations in the future.

These changes would allow entity liability at each level of government. They would help alleviate the administration-of-justice and political-accountability problems discussed previously. They would also stop forcing victims of constitutional violations to finance much of the harm they suffer, instead spreading the costs among the taxpaying and voting public, and could institute better incentives for entities themselves. All this flows directly from the functional critique of the constitutional-tort system above. Less obvious, perhaps, are how excessive-force claims could play a powerful initial role and what

335. These changes are aimed at increasing access to damages relief far more than at increasing access to injunctive relief, an important but somewhat separate concern. It bears mentioning, though, that adopting the proposal outlined here could potentially cause an uptick in suits seeking injunctive relief to the extent formal sovereign-immunity doctrine discourages their filing now irrespective of the functional ability to enjoin government defendants. *See supra* note 150. For proposed reforms focused both on increasing municipal liability and access to injunctive relief, see Smith, *Beyond Qualified Immunity*, *supra* note 322, at 131–34.

substantive liability standard to set. The following discussion addresses these topics in turn.

1. *Beginning with Excessive Force*. As I argue elsewhere, Congress should get the ball rolling on reforming constitutional enforcement by focusing on Fourth Amendment excessive-force claims.[336] As a matter of principle, excessive-force claims are among the most pressing civil-rights problems in the United States.[337] Unjustified and unequal police violence tears apart communities, tells people of color their lives are less valuable than others, and has gone unaddressed by major federal legislation for far too long.[338] As a matter of politics, excessive-force claims sit at the center of the recent congressional interest in reevaluating constitutional-tort law.[339]

Excessive-force claims should provide a starting point and not an ending point for constitutional-enforcement reform. The hope is that allowing excessive-force claims to run against governments themselves will respond to the current crisis while showing there is less reason to fear entity liability than many may suppose. The hope is also that by pursuing systemic reform within the context of a single kind of claim, Congress will have the opportunity to study the excessive-force context as a test case geared at facilitating—and fine-turning—entity liability for constitutional violations more broadly in the future.[340]

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336. Crocker, *Reconsidering*, *supra* note 46, at 585–86.

337. In case there is any doubt, it bears mentioning that Fourth Amendment excessive-force claims are common against not only local law-enforcement officers, but against their state and federal counterparts (as in *Fortunati* and *Bivens*) too. For just a handful of examples from a two-month snapshot of federal case law between December 2020 and January 2021, see *Justiniano v. Walker*, 986 F.3d 11, 15 (1st Cir. 2021) (§ 1983 action against Massachusetts state trooper); *Fagre v. Parks*, 985 F.3d 16, 19 (1st Cir. 2021) (§ 1983 action against Maine state trooper); *Thompson v. Hassett*, 513 F. Supp. 3d 258, 259 (D.R.I. 2021) (§ 1983 action against Rhode Island state troopers); *Perez v. Michigan State Police Department*, No. 1:19-CV-666, 2020 WL 7060216, at *1 (W.D. Mich. Dec. 2, 2020) (§ 1983 action against Michigan state troopers); *Rahim v. United States*, 506 F. Supp. 3d 104, 109–10 (D. Mass. 2020) (*Bivens* action against FBI Joint Terrorism Task Force members).

338. *See* Crocker, *Reconsidering*, *supra* note 46, at 586.

339. *See id.* at 584–85 (observing that legislative proposals had "been gathering steam" since the murder of George Floyd, including "multiple bills and resolutions aimed at altering constitutional-tort law").

340. *See* Saul Levmore, *Interest Groups and the Problem with Incrementalism*, 158 U. PA. L. REV. 815, 816 (2010) ("The case for incrementalism—under which regulation can provide for experimental stopping points that do not necessarily portend further movement along a slippery slope—is built on claims about unintended consequences, expectations, risk aversion, and learning by doing."). A prominent criticism of incrementalism argues that making policy changes gradually can restructure interest-group alignments in a way that increases the chance of

Of course, one could come up with credible counterarguments that Congress should make the kind of changes outlined here in one fell swoop for all constitutional claims. To the extent the political window has not already closed with the failure of bipartisan congressional police-reform negotiations in the fall of 2021, the recent opportunity for national-level reform may be unlikely to reappear anytime soon.[341] And according different treatment to different claims could encourage litigants to recharacterize wrongs in an insincere way. In an ideal world, accelerated reform may well be desirable, but possibly perfect should not be the enemy of the good here. Recent experience suggests Congress is more receptive to proposals focused on policing than to proposals focused on constitutional enforcement more generally.[342] Some strategic litigation behavior is unavoidable, and judges are accustomed to sorting allegations of governmental misconduct into constitutional categories.

The FTCA offers a good illustration of both sides of this particular coin. Early in Congress's consideration process, a defense of what became the so-called intentional-torts exception pointed to the prospect of expanding the Act's scope in a piecemeal manner.[343] To be sure, the FTCA still contains broad yet byzantine carveouts.[344]

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undesirable reform. *See id.* at 822 ("The incrementalism problem is that a legal intervention might be both socially inefficient and democratically disfavored yet come about because advocates can nudge the law to that end step-by-step, taking advantage of uncoordinated opponents."). But the proponent of this criticism notes that when all the steps in a regulatory chain apply to the same parties (as one could conceptualize the case here), this "incrementalism problem" poses no concern. *See id.* at 824.

341. *See* Crocker, *Retreat*, *supra* note 46, at 15–16 (discussing how "[s]ome behind-the-scenes proposals for bipartisan congressional compromise" had "contemplated entity liability instead of or in addition to individual liability for constitutional violations"—but further discussing how prospects for broad-based police reform had recently "been declared dead").

342. *See* Crocker, *Reconsidering*, *supra* note 46, at 587 (describing how the George Floyd Justice in Policing Act, which called for the end of qualified immunity only in the law-enforcement context, progressed further in Congress than legislation calling for the end of qualified immunity in all cases).

343. *See* Aziz Huq, Opinion, *When Government Defames*, N.Y. TIMES (Aug. 10, 2017), https://www.nytimes.com/2017/08/10/opinion/government-defamation-white-house-slander.html [https://perma.cc/P47D-Y4EC].

344. *See* Helen Hershkoff, *Early Warnings, Thirteenth Chimes: Dismissed Federal-Tort Suits, Public Accountability, and Congressional Oversight*, 2015 MICH. ST. L. REV. 183, 196 (stating that "practice under the FTCA has become difficult and complex" and that "[t]he FTCA's 'jurisdictional brand,' as one appeals court has described it, is now 'replete with mandates, deadlines, requirements and exceptions' and 'cannot be reasonably classified as claimant-friendly'" (quoting Mader v. United States, 654 F.3d 794, 807–08 (8th Cir. 2011))).

Nevertheless, Congress has increased the Act's coverage in some ways, including by allowing claims for medical battery and claims against law-enforcement officers for physically abusive behavior and certain other bad acts.[345] This analogy shows that even if coverage for the full range of claims remains elusive, gradual widening of government liability has proved politically possible in the past—and may prove politically possible in the future. For all these reasons, starting to make the changes discussed here in the context of Fourth Amendment excessive-force claims before extending the scheme to other constitutional violations could make good sense.

2. *Setting a Substantive Standard.* Two large questions linger. First, what standard should control government accountability for constitutional torts? Second, why should Congress preserve officer liability rather than instituting entity liability alone? These questions are closely connected. For at the very least, to the extent the answer to the former is anything other than complete vicarious liability (meaning government answerability for any and all unconstitutional acts), some gap between right and remedy will remain, and it may be appropriate to fill that gap with residual officer liability. Indeed, the discussion that follows argues that the common-law concept of respondeat superior, which holds employers liable for torts committed by employees within the scope of employment, provides an appropriate standard for determining when entities should shoulder compensation responsibilities. And because respondeat superior would not extend to some constitutional violations, residual officer liability would become necessary to ensure compensability around the edges.

345. *See* Gregory C. Sisk, *Holding the Federal Government Accountable for Sexual Assault*, 104 IOWA L. REV. 731, 744, 746–47 (2019) (noting that the Gonzalez Act "supersedes the FTCA's general bar on intentional tort claims to authorize a claim for medical battery against the United States" and that the Law Enforcement Proviso "amended the FTCA to allow certain common-law intentional tort claims to be filed directly against the United States when arising from the actions of federal law enforcement"); *see also* 10 U.S.C. § 1089(e) (excluding from "the provisions of section 2680(h)" "any cause of action arising out of a negligent or wrongful act or omission in the performance of medical, dental, or related health care functions"); 28 U.S.C. § 2680(h) (stating that "with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising . . . out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution").

As an initial matter, it bears noting that even complete vicarious liability would not look like the classic model of strict liability in tort,[346] despite the fact that commentators often borrow that label in this context.[347] The merits of constitutional claims very often require the on-the-ground actor to behave unreasonably or with some particular state of mind.[348] Accordingly, even the most rigorous version of entity liability for constitutional torts would count as strict liability only in an attenuated sense.[349]

Complete vicarious liability has much to recommend it. To quote then-Professor Pillard, "[C]onstitutional violations require state action, and thus the government that made an abuse of its official power possible should arguably be held accountable for that abuse."[350] Nevertheless, the law does not normally hold employers automatically liable for quite such a wide range of employee conduct, and there are good reasons to refrain from doing so here. To borrow from Pillard again, "[I]f an official acts unconstitutionally out of personal motives, it seems unjust that the government, and ultimately the taxpayers, should have to bear the costs of that individual's misconduct."[351]

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346. *See Strict Liability*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "strict liability" as "[l]iability that does not depend on proof of negligence or intent to do harm but that is based instead on a duty to compensate the harms proximately caused by the activity or behavior subject to the liability rule").

347. *See, e.g.*, Jeffries, *Eleventh Amendment*, *supra* note 141, at 57 (stating that "[a]s used here, 'strict liability' refers only to the absence of a fault requirement springing from Section 1983 (or the parallel remedial scheme of *Bivens*)" but noting that "in many cases the right itself requires culpability even when Section 1983 does not").

348. As the Supreme Court stated in *Daniels*, "in any given § 1983 suit, the plaintiff must . . . prove a violation of the underlying constitutional right; and depending on the right, merely negligent conduct may not be enough to state a claim." Daniels v. Williams, 474 U.S. 327, 330 (1986). Offering examples, the Court cited *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 252 (1977), for the proposition that "invidious discriminatory purpose" was required to state a claim for "racial discrimination under the Equal Protection Clause" and *Estelle v. Gamble*, 429 U.S. 97, 105 (1976), for the notion that "'deliberate indifference'" to "serious illness or injury" was required to state a claim for cruel and unusual punishment under the Eighth Amendment. *Daniels*, 474 U.S. at 330 (quoting *Estelle*, 429 U.S. at 105).

349. *See* DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 425, at 782 (2d ed. 2020) (explaining that "[f]rom the employer-defendant's point of view, vicarious liability is strict liability, since he is liable without personal fault" but that "[t]he plaintiff must prove that the employee committed a tort and was acting within the scope of employment when he did so," meaning that "[i]n the great majority of cases, . . . the plaintiff must thus prove fault" (footnote omitted)).

350. Pillard, *supra* note 148, at 75.

351. *Id.* at 75–76.

As an illustration, several of the relatively small number of cases that Professor Schwartz and her coauthors have identified as not resulting in total indemnification involved allegations of sexual misconduct or situations where the defendant purported to assert law-enforcement authority while off-duty and acting in a purely private capacity.[352] The unconstitutional acts in cases like these are different from the unconstitutional acts associated with the cost-internalization concern explored above, for they do not arise from public pressure to perform important duties without hesitancy when approaching some constitutional line.[353] The facts in cases like these do not present the same possibility of benefiting the broader community, so the case for making the broader community pay is quite weak. And worries that individual officers will often be judgment proof could be addressed in other ways, including by requiring or encouraging certain public employees to carry liability insurance.[354]

Given these and many other considerations, the best available standard for determining government liability for constitutional torts would appear to be the common-law concept of respondeat superior. Indeed, judges have relied on this doctrine to mediate competing concerns surrounding employer liability for centuries.[355] Other commentators have advocated respondeat superior liability in the constitutional-tort context before, especially for municipal defendants.[356] But prominent theorists continue to endorse more

352. Pfander, Reinert & Schwartz, Bivens *Claims*, *supra* note 234, at 580, 582 & n.90; Schwartz, *Police Indemnification*, *supra* note 230, at 926.

353. *See supra* notes 295–97 and accompanying text.

354. As an analogy, many states require healthcare professionals to carry malpractice insurance. Lydia Nussbaum, *Trial and Error: Legislating ADR for Medical Malpractice Reform*, 76 MD. L. REV. 247, 263 n.75 (2017). And some states require attorneys to do the same. *See* Susan Saab Fortney, *Mandatory Legal Malpractice Insurance: Exposing Lawyers' Blind Spots*, 9 ST. MARY'S J. ON LEGAL MALPRACTICE & ETHICS 190, 192–93 (2019) (discussing a new requirement in Idaho and a longstanding requirement in Oregon). In addition, Congress has required the federal government to reimburse certain employees, including law-enforcement officers, for up to half the annual policy cost of professional-liability insurance. *See* U.S. GEN. SERVS. ADMIN., 9820.1 HRM, GSA ORDER: HRM PROFESSIONAL LIABILITY INSURANCE (Jan. 16, 2020), https://www.gsa.gov/directive/professional-liability-insurance [https://perma.cc/R4QR-RFU3].

355. *See* DOBBS, HAYDEN & BUBLICK, *supra* note 349, § 425, at 781 & n.7 (stating that "[r]espondeat superior liability has ancient roots in Roman law and may have been in continuous use in some form more or less since the Norman Conquest of England" but that it "was probably not a widespread or generalized rule until the 18th century").

356. *See, e.g.*, David Jacks Achtenberg, *Taking History Seriously: Municipal Liability Under 42 U.S.C. § 1983 and the Debate over Respondeat Superior*, 73 FORDHAM L. REV. 2183, 2240–48 (2005); Harold S. Lewis, Jr. & Theodore Y. Blumoff, *Reshaping Section 1983's Asymmetry*, 140

government-protective standards (to the extent the literature has lately considered entity liability at all),[357] so making a case for respondeat superior liability anew should prove worthwhile.

Respondeat superior provides that employers may be held liable for torts that their employees commit "within the scope of employment."[358] Because the employer exercises general control over the work environment, the hope is that respondeat superior liability will produce "optimal deterrence" for harmful behavior.[359] And even when optimal deterrence has been achieved, such that additional safeguards would be cost-unjustified, there remains a good argument that "[an] employer should accept the burdens that go with the benefits of its operation" by assuming responsibility for its employees' conduct "as a matter of justice or fairness."[360] All the more so, it would seem, where constitutional rights implicate a community of interest among the public in a far more meaningful manner than do the commercial contexts where respondeat superior liability often comes into play. Respondeat superior does not apply where an employee's tort is "uncharacteristic of the business," but the employee themself remains liable.[361]

U. PA. L. REV. 755, 829 (1992); Susanah M. Mead, *42 U.S.C. § 1983 Municipal Liability: The* Monell *Sketch Becomes a Distorted Picture*, 65 N.C. L. REV. 517, 532–42 (1987).

357. *See* Fallon, *supra* note 165, at 996 ("In lieu of traditional respondeat superior liability, and consistent with the idea that § 1983 is a common law statute, the Court should hold that municipalities are suable for their officials' constitutional violations on the same terms as the officials themselves would be."); John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 VA. L. REV. 207, 249 (2013) (arguing that "*some version of* qualified immunity should be the liability rule for constitutional torts" and that "the small pocket of strict liability created by [*Monell* doctrine] should be eliminated").

358. DOBBS, HAYDEN & BUBLICK, *supra* note 349, § 425, at 780. Employers may be held vicariously liable for independent-contractor conduct in certain circumstances, including under the apparent-authority and non-delegable-duty doctrines. *See id.* §§ 431–33, at 803–25. To prevent avoiding public accountability by shifting important duties onto private actors, the reasons provided here for adopting a respondeat superior model for employee conduct would seem to weigh in favor of adopting a similar government-liability model to cover a wide range of independent-contractor conduct as well.

359. *Id.* § 426, at 786.

360. *Id.* § 426, at 787.

361. *Id.* § 426, at 788; *see* Ira S. Bushey & Sons, Inc. v. United States, 398 F.2d 167, 171 (2d Cir. 1968) (stating, in a famous case against the federal government, that "respondeat superior, even within its traditional limits, rests . . . in a deeply rooted sentiment that a business enterprise cannot justly disclaim responsibility for accidents which may fairly be said to be characteristic of its activities").

Respondeat superior generally strikes a reasonable balance in the public-sector context for the same reasons it strikes a reasonable balance in the private-sector context. The fact that Congress chose a respondeat superior standard when adopting the FTCA and that many states have done the same when adopting their own tort-claims statutes suggests as much.[362] There is also a great deal to be said for doctrinal familiarity, especially in comparison to *Monell*'s complex custom-or-policy concoction.[363] Respondeat superior has stood the test of time, and courts are well acquainted with how to apply it in a wide variety of factual circumstances.[364]

In addition, respondeat superior appears to align relatively well, and certainly better than a *Monell*- or *Harlow*-style model, with on-the-ground indemnification patterns revealed by recent empirical work[365]—and with formal indemnification policies to boot.[366] For instance, one case where Schwartz found an absence of complete indemnification involved "an off-duty Cleveland police officer who was serving as a security guard in an apartment complex" but allegedly "identified himself as a police officer before shooting the victim."[367] In a factually similar case, a New York court dismissed common-law tort claims against the City of Buffalo and its police department on the

362. *See* 28 U.S.C. § 1346(b)(1) (limiting the FTCA's waiver of sovereign immunity to situations where a federal-government employee "act[ed] within the scope of his office or employment"); Fountain v. Karim, 838 F.3d 129, 135 (2d Cir. 2016) ("We interpret the FTCA's 'scope of employment' requirement in accordance with the *respondeat superior* law of the jurisdiction where the tort occurred . . . ."); DOBBS, HAYDEN & BUBLICK, *supra* note 349, § 425, at 780 n.1 (discussing the FTCA and state analogues).

363. *See* Catherine Fisk & Erwin Chemerinsky, *Civil Rights Without Remedies: Vicarious Liability Under Title VII, Section 1983, and Title IX*, 7 WM. & MARY BILL RTS. J. 755, 796 (1999) (stating that *Monell* doctrine "has become extraordinarily complex and has produced a body of law 'that is neither readily understandable nor easy to apply'" (quoting Bd. of Cnty. Comm'rs of Bryan Cnty. v. Brown, 520 U.S. 397, 433 (1997) (Breyer, J., dissenting))).

364. *Cf. id.* ("Allowing vicarious liability for municipalities would eliminate the need for these complex tests and replace them with the traditional tort law principles that are well-established and vastly simpler.").

365. *See* Schwartz, *Police Indemnification*, *supra* note 230, at 890 ("Although the Court's municipal liability doctrine rests on the notion that there should not be respondeat superior liability for constitutional claims, blanket indemnification practices are functionally indistinguishable from respondeat superior.").

366. *See Brown*, 520 U.S. at 436 (Breyer, J., dissenting) ("[M]any States have statutes that appear to, in effect, mimic *respondeat superior* by authorizing indemnification of employees found liable under § 1983 for actions within the scope of their employment."). DOJ's indemnification policy also turns on the scope of the defendant's employment. *See* 28 C.F.R. § 50.15 (2022).

367. Schwartz, *Police Indemnification*, *supra* note 230, at 908 n.104.

ground that the defendants "established as a matter of law that they cannot be held liable based on the theory of vicarious liability or respondeat superior" by carrying "their prima facie burden of establishing that" the official whose conduct was in question "was not acting within the scope of his employment as a police officer during the encounter with plaintiff."[368] If matching liability doctrine to payment reality is important for political-accountability purposes, respondeat superior presents a promising standard.[369]

A constitutional counterargument bears addressing here. In *Monell*, one reason the Supreme Court adopted the custom-or-policy framework was the belief that "creation of a federal law of *respondeat superior* would have raised all the constitutional problems associated with the obligation to keep the peace, an obligation Congress chose not to impose" when enacting § 1983.[370] But as others have pointed out, establishing respondeat superior liability in this context would be a far cry from placing peacekeeping responsibilities on governments.[371]

Indeed, since *Monell* was decided in 1978, the Court has made clear that "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors" because "[t]he Clause is phrased as

368. Maloney v. Rodriguez, 68 N.Y.S.3d 792, 793–94 (App. Div. 2017). The claims arose from the plaintiff's allegations that he "had a verbal and physical encounter outside a bar" with a police officer who "was employed in a security position while off-duty from his police employment." *Id.* at 793. In New York, statutory law renders local governments vicariously liable for torts committed by police officers "acting in the performance of [their] duties and within the scope of [their] employment," N.Y. GEN. MUN. LAW § 50-j(1) (2021), and courts appear to rely on general understandings of the scope of employment, *see* Mahmood v. City of New York, No. 01 Civ. 5899, 2003 WL 21047728, at *2–3 (S.D.N.Y. May 8, 2003) (outlining that "well-established" New York law holds that "an employer is only liable for the actions of an employee where the employee was engaged in the furtherance of the employer's business and the employer was, or could have been, exercising some control, directly or indirectly, over the employee's activities").

369. *See* Schwartz, *Police Indemnification*, *supra* note 230, at 945 ("Replacing *Monell* with vicarious liability would align doctrine with actual practice, eliminate an exceedingly complex body of case law, and streamline the litigation of these claims.").

370. Monell v. Dep't of Soc. Servs. of N.Y., 436 U.S. 658, 693 (1978).

371. *See, e.g.*, Lewis & Blumoff, *supra* note 356, at 789 ("Many federal constitutional and statutory duties . . . are not tantamount to a 'new' obligation to keep the peace. In this sense, Justice [William] Brennan's argument [in the *Monell* majority opinion] proves too much."); Mead, *supra* note 356, at 537 (stating that while "Congress questioned the constitutionality of the Sherman Amendment because it imposed on municipalities a responsibility to keep the peace by imposing liability for the acts of private citizens," applying respondeat superior under § 1983 "would impose liability only for unconstitutional acts of municipal employees," which "would not impose on municipalities a responsibility to maintain police forces to keep the peace").

a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security."[372] Accordingly, no substantive constitutional violation arises from a bare failure to "keep the peace," and there is no employee liability to pass on to the government employer. As the Court said in 2006, Justices "have disagreed regarding the scope of Congress's 'prophylactic' enforcement powers under § 5 of the Fourteenth Amendment," but "no one doubts that § 5 grants Congress the power to 'enforce . . . the provisions' of the Amendment by creating private remedies against the States for *actual* violations of those provisions."[373]

For all these reasons, starting with excessive-force claims and expanding outward, Congress should adopt a respondeat superior model of government liability for constitutional torts. At the same time, despite the doctrinal drawbacks, Congress should also permit plaintiffs to pursue *Monell*-style custom-or-policy claims government entities if they so choose. These kinds of claims target pernicious species of agencies' own wrongs. So even as Congress cuts back on sovereign immunity and similar protections to allow indirect liability against governments, it should also allow direct liability for entities' separable harms. Many plaintiffs, however, would probably elect to pursue only vicarious-liability claims, which should be easier to prove than custom-or-policy ones.

Much of the previous analysis also explains why Congress should preserve officer liability while adding (or in the case of municipalities, increasing) entity liability for constitutional torts. Besides providing plaintiffs options and the public information, preserving officer liability would allow recovery in situations where unconstitutional conduct occurs beyond the scope of employment (but still within the limits of state action), especially if certain classes of officials are required or encouraged to carry liability insurance. And courts are accustomed to handling claims against individuals and entities at the same time in similar contexts. As a general matter, respondeat superior makes employees and employers jointly and severally liable,[374] and *Monell*

372. DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 195 (1989).

373. United States v. Georgia, 546 U.S. 151, 158 (2006) (alteration in original) (quoting U.S. CONST. amend. XIV, § 5).

374. *See* DOBBS, HAYDEN & BUBLICK, *supra* note 349, § 425, at 780 & n.1. This is less often true in the government tort-claims context, though. *See id.*

doctrine has long permitted plaintiffs to sue officials and municipalities together.[375]

In response, invoking notice and fairness arguments, one could argue that maintaining qualified immunity for individual officers could prove worthwhile in situations where courts simultaneously assign liability to their employers. To be sure, that system would be better than the current one, where the combination of qualified immunity and entity impunity leaves wide swaths of unconstitutional conduct irremediable in damages under federal law. And that system (or something like it) may make sense as a compromise solution. But under the model proposed here, the risk of judgment nonpayment falls on the official who violated the Constitution rather than on the victim whose rights were violated. In effect, *someone* has to "pay" for the harm caused by the constitutional violation, and if the government refuses to do so, the responsibility should rest on the errant official rather than on the prevailing plaintiff. And in any event, it seems exceedingly unlikely that individual defendants would suffer financial devastation under the system envisioned here, not only because government employers have already proved willing to pay the bulk of constitutional-tort judgments, but also because eliminating qualified immunity would presumably encourage the formalization of indemnification arrangements and the greater uptake of individual insurance.[376]

375. *See, e.g.*, Swint v. Chambers Cnty. Comm'n, 514 U.S. 35, 37, 43 (1995).

376. Colorado, for instance, recently established a cause of action for violations of *state* constitutional rights by certain law-enforcement officers. *See* COLO. REV. STAT. § 13-21-131(1) (2021). The law makes clear that "[q]ualified immunity is not a defense to liability pursuant to this section" but softens the potential effects on individual defendants by providing that "a peace officer's employer shall indemnify its peace officers for any liability incurred by the peace officer and for any judgment or settlement entered against the peace officer for claims arising pursuant to this section." *Id.* § 13-21-131(2)(b), (4)(a). The law makes a limited exception, it bears noting, by holding officers who "did not act upon a good faith and reasonable belief" in the lawfulness of their conduct responsible "for five percent of the judgment or settlement or twenty-five thousand dollars, whichever is less," but provides that the "employer or insurance shall satisfy the full amount of the judgment or settlement" if the individual defendant's part proves uncollectible. *Id.* § 13-21-131(4)(a). The law also specifies that "[a] public entity does not have to indemnify a peace officer if the peace officer was convicted of a criminal violation for the conduct from which the claim arises unless the peace officer's employer was a causal factor in the violation, through its action or inaction." *Id.*

B. Remedial Equilibration

How would establishing state and federal government liability, expanding municipal liability, codifying *Bivens*, and even eliminating qualified immunity for constitutional violations affect the actors who make up the constitutional-tort system—and thus the system itself? There are compelling reasons to think that while meaningful consequences represeting real-world changes would follow, the results would be less disruptive than one might assume. And this is especially so if these reforms start in the excessive-force context, providing a practical set of reasons to begin there before progressing to additional kinds of constitutional claims.

Remedial equilibration provides a useful way to think about these issues.[377] To quote a recent framing of Professor Fallon's, the idea behind remedial equilibration is that "[d]ecisions involving how to define constitutional rights, which causes of action to authorize, and which immunity doctrines to create should all reflect a kind of interest-balancing, aimed at yielding the best overall package."[378] For "[s]ometimes," Fallon says, "we may be best off, on balance, with relatively expansive definitions of rights but with limitations on damages remedies that would make those rights' social costs inordinately large."[379] To put the flipside of this notion "oversimply," Professor Jeffries says, "more remedy may mean less right."[380]

The worry about social costs is a worry about consequences. Because of the potential effects of universal damages relief for constitutional wrongs, Fallon defends *Harlow* as "strik[ing] a judicious balance."[381] And he argues that while a "better-designed system" would allow additional government liability, "the functional equivalent" of qualified immunity should protect agencies to the same extent the doctrine would protect individuals sued for the underlying acts.[382] After undertaking a similarly consequentialist analysis, Jeffries comes to a somewhat different conclusion—that both qualified and

377. *See supra* notes 224–28 and accompanying text.
378. Fallon, *supra* note 165, at 939.
379. *Id.*
380. Jeffries, *Eleventh Amendment*, *supra* note 141, at 80.
381. Fallon, *supra* note 165, at 975.
382. *Id.* at 978–79.

sovereign immunity should remain in place, albeit with the former scaled back somewhat.[383]

Three of the consequences Fallon references can help structure an appraisal of the proposal offered here. For the reasons that follow, there should be little cause for concern that the possibility of (1) "unanticipated drains on the public fisc," (2) "frivolous and distracting litigation," or (3) "deterr[ing] courts from expanding the recognized scope of constitutional rights" would materialize in substantial measure.[384] It bears noting that these concerns essentially match—and that their discussion here is meant to close the loop on—the issues surrounding defense-side expenses, federal-court dockets, and the larger legal landscape discussed earlier in relation to the development of constitutional-tort doctrine.[385]

1. *Fiscal Concerns.* First consider "unanticipated drains on the public fisc."[386] If municipalities are any guide, state and federal law-enforcement agencies are, or could easily become, well insured (or can self-insure).[387] They can probably tap into external revenue streams with relative ease,[388] as DOJ does by disposing of *Bivens* claims in a way that funnels money from the Judgment Fund to plaintiffs.[389] And because of the work of Schwartz and her coauthors showing widespread indemnification of law-enforcement officers at all levels of government, one could reasonably expect that "adoption of a formal system of entity liability should not have a huge impact on governmental outlays" in the specific context of excessive-force claims.[390] Governments are already paying the costs flowing from law-

383. *See* Jeffries, *Eleventh Amendment*, *supra* note 141, at 68–81. *See generally* John C. Jeffries, Jr., *What's Wrong with Qualified Immunity?*, 62 FLA. L. REV. 851 (2010) (offering an assessment of and potential fixes for problems with qualified-immunity doctrine).

384. Fallon, *supra* note 165, at 975.

385. *See supra* Part II.

386. Fallon, *supra* note 165, at 975.

387. *See* Rappaport, *supra* note 316, at 1558–70 (describing the liability-insurance market for municipal law-enforcement agencies). Rappaport "refer[s] to all municipalities that decline to purchase primary coverage on the market (that is, from either a commercial carrier or a pool) as self-insured." *Id.* at 1561.

388. *See* Schwartz, *Police Indemnification*, *supra* note 230, at 957 ("[A]necdotal evidence suggests that police litigation costs are often paid from a city's general budget or insurer with limited or no direct impact on the finances of the police department.").

389. *See supra* notes 248–49 and accompanying text.

390. Fallon, *supra* note 165, at 979.

enforcement officers' unconstitutional conduct, so removing sovereign immunity in this particular area should not affect public resources in drastic ways.[391]

This should be roughly true even without providing government agencies protections approximating either qualified immunity for individuals or the custom-or-policy requirement for municipalities. On the state and local side, drawing on her extensive doctrinal and empirical work, Schwartz has recently published a predictive analysis of "how constitutional litigation would function in a world without qualified immunity."[392] She points out that her police-indemnification study found that "law enforcement liability—the most common and costly type of government litigation—amounts to significantly less than one percent of most governments' budgets."[393] Accordingly, she argues that while "[i]t is impossible to know how much more plaintiffs would recover in a world without qualified immunity, . . . the increase would have to be dramatic to create significant drains on most governments' budgets."[394] Schwartz also points out that § 1983 suits "usually fail for reasons unrelated to qualified immunity" and that even without the doctrine, plaintiffs "would still have to overcome the same burdens of pleading, discovery, and proof that are today the primary bases for dismissal."[395] This observation appears applicable to *Bivens* cases too.[396]

What is more, because of extant vicarious-liability schemes for state causes of action, states and municipalities may already bear financial responsibility for much of the behavior underlying excessive-force claims.[397] Likewise, through the FTCA and the Westfall Act, the

391. "This is not to say that the identity of the defendant is completely inconsequential. Juries confronting a flesh-and-blood defendant may be less quick to play Robin Hood," for example. Jeffries, *Eleventh Amendment*, *supra* note 141, at 50. But "[i]n the generality of cases, constitutional tort actions against government officers are functional substitutes for direct access to government treasuries." *Id.*

392. Schwartz, *After Qualified Immunity*, *supra* note 238, at 314–16.

393. *Id.* at 355.

394. *Id.*

395. *Id.* at 336–37.

396. *See* Alexander A. Reinert, *Measuring the Success of* Bivens *Litigation and Its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809, 812–13 (2010) (presenting findings in the *Bivens* context comparable to Schwartz's in the § 1983 context about how often courts dismiss claims on qualified-immunity grounds).

397. *See* Alexander Reinert, Joanna C. Schwartz & James E. Pfander, *New Federalism and Civil Rights Enforcement*, 116 NW. U. L. REV. 737, 760 (2021) ("Most (but not all) states allow government officials to be sued for state torts—assault, battery, false imprisonment, and the like.

United States has previously waived sovereign immunity and declared itself the exclusive defendant for various intentional state-law torts committed by federal law-enforcement officers, including assault and battery, that can arise from the same facts supporting excessive-force claims.[398] And qualified immunity is not a defense in FTCA suits.[399] So while constitutional injuries may well harm plaintiffs in unique ways,[400] government entities would not necessarily have to pay much more to remedy them than statutory law already requires them to pay to remedy subconstitutional injuries flowing from the same conduct.

One could push back by pointing out that among other government-friendly properties, the FTCA proscribes punitive damages and protects discretionary conduct,[401] while state tort-claims statutes may include damages caps and exclude fee relief.[402] Congress, of course, could foreclose punitive damages against entity defendants in the constitutional-tort context (as the Supreme Court has done for

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Many of the state tort regimes in our survey impose respondeat superior liability on government entities." (footnotes omitted)).

398. *See* 28 U.S.C. § 2680(h) ("[W]ith regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising . . . out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution."); *id.* § 2679(b)(1) (stating that "[t]he remedy against the United States provided by sections 1346(b) and 2672 of this title . . . is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee" whose conduct "within the scope of his office or employment" gave rise to the suit and that "[a]ny other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded"). As the Supreme Court has explained, "[t]he Westfall Act amended the FTCA to make its remedy against the United States the exclusive remedy for most claims against Government employees arising out of their official conduct." Hui v. Castaneda, 559 U.S. 799, 806 (2010). Before that, "the FTCA authorized substitution of the United States as a defendant in suits against federal employees for harms arising out of conduct undertaken in the scope of their employment, but it made that remedy 'exclusive' only for harms resulting from a federal employee's operation of a motor vehicle." *Id.* at 806 n.5 (citations omitted).

399. John F. Preis, *Constitutional Enforcement by Proxy*, 95 VA. L. REV. 1663, 1718 (2009); Gregory Sisk, *Recovering the Tort Remedy for Federal Official Wrongdoing*, 96 NOTRE DAME L. REV. 1789, 1811 (2021).

400. *See* Fallon, *supra* note 165, at 939 ("[O]fficials cloaked with governmental authority pose distinctive threats to individual rights and the rule of law.").

401. *See* 28 U.S.C. § 2674 ("The United States . . . shall not be liable . . . for punitive damages."); *id.* § 2680(a) ("The provisions of this chapter . . . shall not apply to . . . [a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty . . . .").

402. *See* Mitch Zamoff, *Determining the Perspective of a Reasonable Police Officer: An Evidence-Based Proposal*, 65 VILL. L. REV. 585, 594 n.26 (2020).

§ 1983 suits against municipalities[403]) or consider other adjustments. As for punitive damages in particular, to the extent the worry is *significant* fiscal impacts, the Court has declared that "[w]hen compensatory damages are substantial," it may "reach the outermost limit of the due process guarantee" for courts to award more than that amount in punitive damages.[404] And the FTCA's discretionary-function exception does not do much if any work when it comes to allegations of unconstitutional conduct.[405]

On balance, there seems to be little reason to worry that the changes suggested here would devastate government finances. For reasons discussed above regarding widespread indemnification and the labor-market forces that would likely sustain present patterns (plus the availability of liability insurance), moreover, there also seems to be little reason to worry that the changes suggested here would cause significant harm to government officials' personal pocketbooks.[406] And to the extent the present proposal *would* raise expenditures (without increasing them to a catastrophic degree), greater monetary accountability not only would provide increased compensation to victims of constitutional wrongs, but also could increase the prospect of meaningful public pressure and consequent policy changes.[407]

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403. *See supra* note 168 and accompanying text.

404. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003).

405. *See* Paul David Stern, *Tort Justice Reform*, 52 U. MICH. J.L. REFORM 649, 701, 707 (2019) (noting that courts have held that "[w]ith respect to law enforcement techniques and practices, such as . . . the amount of force to exert, . . . such conduct typically does not involve the type of decision making that the discretionary function exception was intended to protect" and that most courts have held the exception "does not encompass actions by government agents that are 'unconstitutional'" (quoting Thames Shipyard & Repair Co. v. United States, 350 F.3d 247, 254 (1st Cir. 2003))). The discretionary-function exception withholds FTCA relief from "[a]ny claim based upon an act or omission of [a federal official], exercising due care, in the execution of a statute or regulation . . . or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or [official]." 28 U.S.C. § 2680(a).

406. *See supra* notes 305–06, 326 and accompanying text; *see also* Schwartz, *After Qualified Immunity*, *supra* note 238, at 360 ("Eliminating qualified immunity is unlikely to change the fundamental characteristics of government indemnification and budgeting that shield officers and policymakers from the financial consequences of lawsuits.").

407. Of course, greater monetary accountability could also shift resources away from other important public programs. *See* Lawrence Rosenthal, *Defending Qualified Immunity*, 72 S.C. L. REV. 547, 581 (2021) (contending that "a complete accounting of the costs and benefits resulting from government damages liability must also consider the costs to third parties, such as the taxpayers who must fund litigation costs or the members of the public dependent on the government's ability to fund public services" and that "in the intense political competition for scarce public resources, the programs most likely to suffer when resources are diverted to the

2. *Caseload Concerns.* Similar factors make it unlikely that allowing increased government liability for constitutional torts would add an overwhleming amount to the "frivolous and distracting litigation" that governments already experience, even with eliminating qualified immunity as well.[408] Were entity liability available, some potential plaintiffs who would not have sued individual officers based on the (probably mistaken) assumption that defendants would have been required to pay damages out of their own pockets might opt to sue agencies instead, increasing the volume of constitutional-tort litigation by some degree. But it stands to reason that most people who would be motivated enough to sue government employers would have also been motivated enough to sue government employees, meaning that withdrawing sovereign immunity and related protections for government entities would probably not cause a large uptick in suits. This seems especially true for excessive-force claims, where the physical nature of the underlying conduct may make it particularly unlikely that potential plaintiffs would treat individual officers more favorably than they would treat government entities.

The overlap between excessive-force claims and the FTCA and state analogues, moreover, probably means that many people who want to sue the government already can, again reducing the prospect that government liability for constitutional torts would lead to a litigation avalanche.

Removing qualified immunity would probably increase the number of constitutional-tort suits, as Schwartz acknowledges.[409] Importantly, though, "[p]laintiffs' attorneys generally accept civil rights cases on contingency" and receive full attorneys' fees under 42 U.S.C. § 1988 only if they prevail at trial, otherwise collecting just a fraction of any settlement amount.[410] So given the "strong incentives" for counsel "to decline weak cases" plus "the many other barriers to

payment of litigation are those serving those with the least political influence—most likely the poor and disadvantaged"). The analysis offered above should help put the magnitude of this concern into perspective. But the point remains legitimate. The overarching takeaway here, however, should be that the present proposal would allow the public to start from a far more informed baseline in selecting among which competing costs to fund than the present system does.

408. Fallon, *supra* note 165, at 975; *see supra* note 384 and accompanying text.

409. Schwartz, *After Qualified Immunity*, *supra* note 238, at 345.

410. *Id.* at 345–46.

relief," Schwartz predicts the uptick in case counts would be modest and would not skew heavily toward "frivolous" filings.[411]

Finally, while Fallon mentions the possibility that additional litigation could be distracting for defendants, Schwartz presents a forceful argument that eliminating qualified immunity should actually reduce the complexity of constitutional-tort suits—and, therefore, the time and other intangible resources it consumes.[412] "Doing away with qualified immunity," she contends, "would eliminate the need to spend time and money bringing, defending against, and deciding qualified immunity motions and interlocutory appeals; eliminate lengthy delays while motions and appeals are pending; and make irrelevant a complex, uncertain, and shifting area of the law."[413] What is more: "[m]ost qualified immunity motions are denied, only adding to the cost of litigation," and "[e]ven if some cases would go to trial that would have settled or been dismissed because of qualified immunity, eliminating the defense may still be the most efficient course because trials are often quicker and less complex than qualified immunity motion practice and appeals."[414] At bottom, Schwartz concludes, "[a]lthough qualified immunity is intended to reduce litigation burdens, doing away with qualified immunity may actually decrease the average time, complexity, and cost of civil rights cases."[415]

Just as fiscal concerns should not stand in the way of an incremental expansion of government liability for constitutional torts, caseload concerns should not pose an obstacle to the proposal outlined here, either.

3. *Rights-Based Concerns.* Last but not least is the worry that expanding the remedies for constitutional violations could paradoxically "deter[] courts from expanding the recognized scope of

411. *Id.* at 345. Moreover, to the extent removing qualified immunity would cause a substantial increase in suits, scholars have begun suggesting strategies for responding. *See* Andrew Coan & DeLorean Forbes, *Qualified Immunity: Round Two*, 78 WASH. & LEE L. REV. 1433, 1508–09 (2021) (arguing that "judges might be persuaded to respond to the abolition of qualified immunity by increasing the efficiency of their case-management practices" and that "critics of qualified immunity might continue working with social movements to highlight the importance of constitutional tort suits not only to the traditional objectives of corrective justice and deterrence of law-breaking but also to the sociological legitimacy of the American constitutional project").

412. *See id.* at 338–44.

413. *Id.* at 344.

414. *Id.*

415. *Id.*

constitutional rights."[416] As an initial matter, if withdrawing sovereign immunity and extending municipal liability—even while withdrawing qualified immunity too—would be unlikely to threaten government budgets or inundate courts with meritless claims, judges should have little reason to restrict rights in response. The same should hold true, moreover, for any concern that courts could seek to cut back on congressional authority to abrogate sovereign immunity. And whether or not either of these effects might follow from augmenting remedies for some kinds of rights, freedom from excessive force should not be among them.

In assessing excessive-force claims under the Fourth Amendment, courts apply an "objective reasonableness" standard that asks "'whether the totality of the circumstances justifie[s]'" the conduct in question.[417] This standard is malleable to the conditions of every case—and that was the Supreme Court's intent. Whether force is objectively reasonable "is not capable of precise definition or mechanical application," the Court said in *Graham v. Connor*.[418] The Court instructed tribunals to pay "careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of [law-enforcement] officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight."[419]

Scholars are right to lament how "notoriously opaque and fact dependent" excessive-force doctrine has become.[420] But because of the inherent variability in the circumstances underlying arrests, it is difficult to imagine the Court making the framework significantly less flexible. Fallon and Jeffries both cite *Brown v. Board of Education*[421] and *Miranda v. Arizona*[422] as the sort of rights-expanding rulings they worry might come out differently if a massive upswing in damages

416. Fallon, *supra* note 165, at 975; *see supra* note 384 and accompanying text.

417. Cnty. of Los Angeles v. Mendez, 137 S. Ct. 1539, 1546–47 (2017) (alteration in original) (quoting Tennessee v. Garner, 471 U.S. 1, 8–9 (1985)).

418. Graham v. Connor, 490 U.S. 386, 396 (1989) (quoting Bell v. Wolfish, 441 U.S. 520, 559 (1979)).

419. *Id.*

420. Brandon Garrett & Seth Stoughton, *A Tactical Fourth Amendment*, 103 VA. L. REV. 211, 217–18 (2017).

421. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

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

awards could result.[423] But the racial-segregation and self-incrimination areas at issue in *Brown* and *Miranda*, respectively, are amenable to rule-like content—and, therefore, to innovative advances—to a degree that excessive-force doctrine is probably not.[424]

A more pressing concern in the excessive-force context is that courts could subtly narrow the right through stingy application. Given that the substantive standard already allows courts to account for unanticipated and extraordinary circumstances faced by law-enforcement officers in any given case,[425] however, one could reasonably hope that no such shift would occur. Accordingly, courts seem relatively unlikely to manipulate the scope of the Fourth Amendment right against excessive force as a result of increased government liability. Were Congress also to eliminate qualified immunity, Schwartz argues that courts would probably clarify and may even amplify individual rights, including because they would be unable to take advantage of current doctrine allowing them to avoid making any conclusions about the merits of constitutional-tort claims.[426]

It is impossible, of course, to know with any degree of certainty which way the doctrine might swing. The recent case *Ramirez v. Guadarrama*[427]—where police officers allegedly tased a man after he had doused himself with gasoline, which led to his immolation and death[428]—may offer evidence pointing in both directions. On one hand,

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423. Fallon, *supra* note 165, at 968; John C. Jeffries, Jr., *The Right–Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 98–102 (1999).

424. *See Miranda*, 384 U.S. at 439, 444 (holding inadmissible under the Fifth Amendment privilege against self-incrimination statements given under custodial interrogation without the subject being informed of certain rights); *Brown*, 347 U.S. at 494–95 (holding unconstitutional under the Equal Protection Clause school segregation on the basis of race).

425. *See* Graham v. Connor, 490 U.S. 386, 396–97 (1989) ("The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.").

426. Schwartz, *After Qualified Immunity*, *supra* note 238, at 318–19, 324–25; *see* Pearson v. Callahan, 555 U.S. 223, 232, 236 (2009) (holding that "[t]he judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand," where the first prong involves determining "whether the facts that a plaintiff has alleged or shown make out a violation of a constitutional right" and the second prong involves determining "whether the right at issue was 'clearly established' at the time of defendant's alleged misconduct" (citations omitted) (quoting Saucier v. Katz, 533 U.S. 194, 201 (2001))).

427. Ramirez v. Guadarrama, 3 F.4th 129 (5th Cir. 2021) (per curiam).

428. *See id.* at 131–32.

the Fifth Circuit ruled that the police officers at issue "did not violate the Fourth Amendment," purportedly based on the initial, substantive aspect of the qualified-immunity inquiry asking "whether a plaintiff alleges or shows the violation of a federal constitutional or statutory right."[429] But on the other hand, the Supreme Court's rebuke of the Fifth Circuit in *Taylor*[430] may have caused the *Ramirez* panel to smuggle the latter prong of the qualified-immunity inquiry asking "whether the right in question was clearly established at the time of the alleged violation" into its analysis on the former prong.[431] Either way, however, Congress would be well positioned to monitor developments and could respond to shifting rulings on substantive rights with various remedial adjustments—including, perhaps, by limiting punitive damages or by encouraging government entities to seek recovery from individual defendants in especially egregious cases.

In sum, particularly considered in the context of starting with excessive-force claims, there is not much reason to worry that switching the default from sovereign immunity to government liability and removing qualified immunity for constitutional torts would cause colossal consequences for individual or government balance sheets, for agency and judicial case counts, or for the scope of constitutional protections.

CONCLUSION

In the wake of George Floyd's killing, the *New York Times* editorial board asserted that qualified immunity "lets cops get away with murder."[432] Since then, public opposition to the doctrine has skyrocketed. Congress should eliminate qualified immunity. But there is much else about constitutional enforcement that requires attention

429. *Id.* at 133, 137 (footnote omitted).

430. *See supra* notes 122–30 and accompanying text.

431. *Ramirez*, 3 F.4th at 133. Despite saying it was relying on "the first prong of the qualified immunity analysis," *id.* at 134, the panel incorporated whether the alleged constitutional violation was clearly established into its reasoning, *see id.* at 135 & n.3 ("Given the degree of granularity involved in the qualified immunity analysis, we see no reason to engage in a detailed discussion of [cases cited by the plaintiffs]." (citing Morrow v. Meachum, 917 F.3d 870, 875 (5th Cir. 2019) ("[T]he dispositive question is whether the violative nature of *particular* conduct is clearly established. That is because qualified immunity is inappropriate only where the officer had fair notice—in light of the specific context of the case, not as a broad general proposition—that his *particular* conduct was unlawful."))).

432. Editorial, *supra* note 1 (capitalization omitted).

as well—including the closely intertwined doctrine of sovereign immunity.

This Article has sought to shift the focus of reform efforts from qualified immunity to the constitutional-tort system more broadly. In particular, this Article has explored how, in important ways, the problem with qualified immunity is actually sovereign immunity—first by showing as a doctrinal matter how the former grew out of the latter and then by showing how functional arguments against the former should raise questions about how the entity protections like the latter apply in this area too. The doctrinal account has emphasized the role of defense-side expenses, federal-court dockets, and the larger legal landscape in the development of constitutional-tort case law. And the functional critique has highlighted the impacts of indemnification on the administration of justice and political accountability for constitutional violations, as well as the externality and incentive effects associated with the economics of unconstitutional acts.

Finally, this Article has proposed an incremental yet systemic approach to constitutional-enforcement reform where Congress would establish state and federal government liability, expand municipal liability, enact a statutory cause of action against federal officials, and eliminate qualified immunity—all for Fourth Amendment excessive-force claims on the way to revisiting how litigation concerning other constitutional violations works. This Article has argued that increasing accountability in the excessive-force context would advance the cause of equal justice under law because marginalized communities face a disproportional share of police violence—and that doing so should also demonstrate that curtailing unjustified immunities would be unlikely to devastate public or personal pocketbooks, court or other resources, or the content of constitutional rights.