

Qualified Immunity and Statutory Interpretation

*Ilan Wurman**

INTRODUCTION

Before the 1989 case of *Graham v. Connor*, excessive force cases were pursued under either state law or the insuperable “shocks the conscience” test of the Fourteenth Amendment. Only after *Graham* did excessive force cases—now under the Fourth Amendment and 42 U.S.C. § 1983—inundate the federal courts, which had by then granted far-reaching immunities to officers for their constitutional torts. As a result of federal qualified immunity doctrine, which many states have adopted for themselves, excessive force cases rarely get to trial, plaintiffs often cannot recover, and courts struggle to find principled distinctions from one qualified immunity case to the next.

In Part I of this Article, I describe the evolution of excessive force cases in the federal courts through § 1983 and *Bivens* actions. Part II describes the evolution of qualified immunity doctrine and demonstrates how common law immunities were traditionally held to have been incorporated into § 1983 by the Congress of 1871 as a matter of statutory interpretation. It claims that only when the Court began hearing federal *Bivens* actions and created an immunity doctrine untethered from statutory interpretation, the common law approach was lost and the modern, nearly insurmountable, qualified immunity doctrine was adopted. Part II thus establishes the historical importance of common law interpretation to § 1983 suits.

Part III shows how differently excessive force cases would have to be treated were the court to return to the common law interpretive methods in § 1983 cases. At common law, excessive force actions were quite common and more liberal toward plaintiffs seeking redress, officers were expected to pay damages for any unnecessary force, and it was the province of the jury to determine such questions.

* Law Clerk to the Honorable Jerry E. Smith, U.S. Court of Appeals for the Fifth Circuit. J.D., Stanford Law School, 2013. Thanks to Will Baude, Scott Glabe, and Kenny Young for insights, comments, and edits at various stages. All errors are my own.

Finally, Part IV and Part V make the theoretical case under both constitutional and statutory interpretation for replacing modern qualified immunity doctrine with a return to its common law variety in excessive-force actions—an approach that would also be far more judicially workable than the current doctrine. Once we approach excessive force cases from a common law perspective, the immunity and *Graham* inquiries are each modified somewhat into a single inquiry that is to be determined by a jury.

I. EXCESSIVE FORCE IN THE MODERN ERA

This Part describes the evolution of excessive force cases in the federal courts through § 1983 and *Bivens* actions. Today, these cases are analyzed under the *Graham v. Connor*¹ three-part (or four-part) standard to determine if there has been a constitutional violation.² The test requires courts to undertake an objective analysis of the circumstances surrounding the use of force.³ Even if a court decides that the use of force was unreasonable and thus unconstitutional, the second step of the inquiry is the qualified immunity analysis: Was it “clearly established” that this kind of force in this kind of circumstance is unconstitutional?⁴ If not, the officer escapes liability.⁵ The implications of this two-step approach are significant in light of the traditional common law method for trying such cases.

First, the modern approach removes power from the jury who traditionally decided whether the use of force was excessive. However, under the qualified immunity analysis, the first prong of the inquiry is usually a prerequisite to the second prong,⁶ which gives power to the courts to decide whether the force was excessive as a matter of law.⁷ If at the second

1. 490 U.S. 386 (1989).

2. The test often has been read to include a fourth prong in addition to the three outlined by the United States Supreme Court in *Graham*: the *Graham* test has been interpreted by the lower courts to require at least some quantum of physical injury that is more than *de minimis*. See, e.g., *Fisher v. City of Las Cruces*, 584 F.3d 888, 897 (10th Cir. 2009); see also *infra* note 174 and accompanying text.

3. *Graham*, 490 U.S. at 397.

4. *Pearson v. Callahan*, 555 U.S. 223, 232 (2009).

5. See, e.g., *Poole v. City of Shreveport*, 691 F.3d 624 (5th Cir. 2012); see also *infra* note 62 and accompanying text.

6. The Court recently permitted courts to start with the second “clearly established” prong. See *Pearson*, 555 U.S. at 231–32. Whether this will have much impact on the consequences I am describing remains to be seen.

7. In other words, because the court must decide the qualified immunity issue, it automatically decides whether there has been a constitutional violation—the first prong of the analysis—and therefore whether there has been excessive force.

prong the court decides that it was clearly established that the use of force was unconstitutional, then—as a matter of law—the officer is liable, and the case still logically should not get to a jury.⁸

Second, the “clearly established” prong’s inquiry into qualified immunity is contrary to the common law. As will be discussed in Part II, immunity doctrine traditionally looked to the common law to derive immunities in § 1983 cases.⁹ This approach was lost, quite possibly as a result of historical accident as the Court began to hear *Bivens* actions directly under the Constitution and not under any statute. I believe the common law approach is theoretically more satisfying as a matter of statutory interpretation.

Finally, once we approach excessive force cases from a common law perspective, the immunity and *Graham* inquiries are each modified somewhat into a single inquiry that is to be determined by a jury. This Article argues that in § 1983 actions under the civil rights statute and in *Bivens* actions directly under the Constitution, the common law approach is more consistent with original understanding and principles of interpretation.

A. Excessive Force Before and After *Graham*

Before 1989 most federal courts addressed claims of excessive force under the Due Process Clause of the Fourteenth Amendment.¹⁰ Those depending on the Due Process Clause took the lead from Judge Friendly’s opinion in *Johnson v. Glick*,¹¹ a pretrial detainee case. Finding that the facts did not fit neatly under either the Fourth or the Eighth Amendment, Judge Friendly held that the right to be free from police brutality was protected more generally by the Fourteenth Amendment’s

8. At that point, the court will have determined all the issues—that a constitutional violation occurred and that the officer’s actions were clearly established as unconstitutional—and so there is nothing left for a jury to do. Interestingly, at this point in the litigation qualified immunity would be denied, and a trial on the merits could be had. But the merits trial seems redundant: after all, if the use of force was excessive as a matter of law and it was clearly established that it was unconstitutional, a police-friendly jury could only conclude otherwise if it were to nullify the law. Thus, a merits trial after a denial of qualified immunity is a logical contradiction. It appears that there are few merits trials, likely because these cases settle after a denial of qualified immunity.

9. See *infra* Part II.

10. See, e.g., Karen M. Blum, *Qualified Immunity: A User’s Manual*, 26 IND. L. REV. 187, 219 (1993); Daniel J. O’Connell, Note, *Excessive Force Claims: Is Significant Bodily Injury the Sine Qua Non to Proving a Fourth Amendment Violation?*, 58 FORDHAM L. REV. 739, 739 n.2, 741 nn.14–15, 741–44 (1990) (collecting cases).

11. *Johnson v. Glick*, 481 F.2d 1028 (2d Cir. 1973).

due process protections.¹² Judge Friendly wrote that the factors relevant to determine whether the police conduct “shocks the conscience” and thus violates due process are

the need for the application of force, the relationship between the need and the amount of force that was used, the extent of injury inflicted, and whether force was applied in a good faith effort to maintain or restore discipline[,] or maliciously and sadistically for the very purpose of causing harm.¹³

As one commentator wrote in the late-1980s, this standard had “until recently enjoyed unanimous if unreflective approval in the federal district and circuit courts. These courts have applied this standard mechanically—to the claims of prisoners, pretrial detainees, suspects[,] and free citizens alike—regardless of the surrounding circumstances or the specific constitutional right implicated by the use of force.”¹⁴ Some courts did, however, analyze excessive force cases in situations such as apprehending criminals under the Fourth Amendment, as the Supreme Court did in the case of officers shooting a fleeing suspect.¹⁵

The *Glick* test posed a challenge for plaintiffs. It is difficult to prove that an officer acted maliciously and without good faith. Because many instances of force may be excessive but very few will truly “shock the conscience,” *Glick* was an effective bar to recovery. *Graham v. Connor*¹⁶—the decision that changed the standard for all excessive force cases—demonstrates these propositions.

In *Graham*, the plaintiff (Graham) had his friend take him to a store to resolve a blood sugar problem.¹⁷ Because the line in the store was too long, he ran out of the store back to his friend.¹⁸ Officers who saw him grew suspicious and detained him while another officer went to investigate.¹⁹ The officers refused his friend’s request to give him orange juice, though Graham was manifestly having some reaction.²⁰ When they learned that nothing was wrong the officers drove Graham home, but

12. *Id.* at 1031–32 (“[B]oth before and after sentence, constitutional protection against police brutality is not limited to conduct violating the specific command of the Eighth Amendment or . . . of the Fourth. . . . [Q]uite apart from any ‘specific’ of the Bill of Rights, application of undue force by law enforcement officers deprives a suspect of liberty without due process of law.”).

13. *Id.* at 1033.

14. R. Wilson Freyeremuth, Comment, *Rethinking Excessive Force*, 1987 DUKE L.J. 692, 693.

15. *Tennessee v. Garner*, 471 U.S. 1, 7–9 (1985).

16. *Graham v. Connor*, 490 U.S. 386 (1989).

17. *Id.* at 389.

18. *Id.* at 388–89.

19. *Id.* at 389.

20. *Id.*

Graham had by then “sustained a broken foot, cuts on his wrists, a bruised forehead, . . . an injured shoulder[, and] developed a loud ringing in his right ear that continues to this day.”²¹

Few who read the Court’s full opinion can doubt that the officers acted excessively and unreasonably. Of course, they probably did not intend to act unreasonably, but surely they should have known better? Under *Glick* that question hardly matters: even if their acts were unreasonable, they were not acting maliciously or sadistically, and they were acting on a good faith belief that Graham may have committed a crime at the store he had hastily exited.

That is exactly what the district court, relying on *Glick*, found in *Graham*.²² The trial had even proceeded to a jury, but the district judge granted the officers’ motion for a directed verdict.²³ Graham did not have a claim as a matter of law because the court found that the use of force was “‘appropriate under the circumstances,’ that ‘[t]here was no discernable injury inflicted,’ and that the force used ‘was not applied maliciously or sadistically for the very purpose of causing harm,’ but in ‘a good faith effort to maintain or restore order in the face of a potentially explosive situation.’”²⁴

The Supreme Court reversed and held that all excessive force cases arising out of arrests or investigatory stops must be analyzed under the Fourth Amendment, the proper textual home for them.²⁵ The Court eliminated the subjective components of the excessive-force inquiry in favor of an objective multi-factor test to determine the reasonableness of the application of force. The proper application of the test

requires careful attention to the facts and circumstances of each particular case, including [1] the severity of the crime at issue, [2] whether the suspect poses an immediate threat to the safety of the officers or others, and [3] whether he is actively resisting arrest or attempting to evade arrest by flight.²⁶

This is an explicitly objective test, with no reference to subjective intent.²⁷

21. *Id.* at 389–90.

22. *See id.* at 390–91.

23. *Id.* at 391.

24. *Id.* at 390–91 (quoting *Graham v. City of Charlotte*, 644 F. Supp. 246, 248–49 (W.D.N.C. 1986)) (alteration in original).

25. *Id.* at 394–95.

26. *Id.* at 396.

27. *See id.* at 397.

This test opened the floodgates to plaintiffs litigating excessive force claims against police officers. Those floodgates were promptly re-closed by the application of the Court's reinvented qualified immunity doctrine.

B. Qualified Immunity: A Mess in the Circuits

Qualified immunity had already been established as a doctrine divorced from the common law at this point.²⁸ The Court held in *Saucier v. Katz*²⁹ that in excessive force cases qualified immunity requires, as a first step, an inquiry into whether a cognizable constitutional violation has occurred and thus a determination of whether excessive force was used under the *Graham* standard.³⁰ Then, as a second step, the courts must determine whether it was "clearly established" at the time that the particular use of force was unconstitutional.³¹

The level of generality at which the courts apply the second prong is crucial. Surely, it is clearly established that excessive force is unconstitutional. That is too high a level of generality, however, and the Supreme Court has instructed the courts to conduct a more specific inquiry: was the particular use of force in these particular circumstances so clearly unconstitutional as to violate clearly established law?³² Answering this more specific inquiry requires an examination of prior case law to see whether it has been previously held that this kind of use of force in these kinds of circumstances was unconstitutional.³³

Two major problems have resulted from this doctrine. First, qualified immunity in excessive force cases has created a complete mess in the circuit courts. As one scholar recently put it, "Despite the almost annual ritual of doctrinal clarification, the federal reporters are crammed with dissents and en banc decisions taking issue over the proper scope and role of qualified immunity."³⁴ One only needs to choose a circuit

28. *See infra* Part II.

29. 533 U.S. 194 (2001).

30. *See id.* at 201.

31. *Id.* at 201-02.

32. *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) (citing *Saucier v. Katz*, 533 U.S. 194, 202 (2001)).

33. *See, e.g.*, Amanda K. Eaton, Note, *Optical Illusions: The Hazy Contours of the Clearly Established Law and the Effects of Hope v. Pelzer on the Qualified Immunity Doctrine*, 38 GA. L. REV. 661, 680 (2004) ("This survey of Eleventh Circuit qualified immunity case law demonstrates that the court will deny qualified immunity only when prior case law has articulated plaintiff's constitutional rights in a nearly identical factual situation.").

34. Chaim Saiman, *Interpreting Immunity*, 7 U. PA. J. CONST. L. 1155, 1155-56 (2005).

court at random to see the confusion that has resulted. I shall choose the Fifth Circuit.³⁵

In December 2012, a panel of the court decided *Newman v. Guedry*.³⁶ The facts in this case are too good to summarize, but summarize we must. After an investigative stop and subsequent arrest of the driver, the passenger, Newman, who had not received or resisted any orders, was subject to a pat-down search.³⁷ The officer remained uncomfortably long over Newman's crotch, at which point the officer alleged that Newman grabbed hold of his hand.³⁸ The officer pushed him up against the car, and another officer came over and struck Newman's arm with a baton—ten times.³⁹ After Newman's shorts had fallen, the officer struck his exposed thigh an additional three times.⁴⁰ Newman (taking his facts as true) had not received any orders or resisted at this point.⁴¹ He was then tased thrice, the third time while he was on the ground.⁴² Remarkably, the officer's defense was that "after the blows to his leg, Newman's body failed to comply."⁴³

Even these facts could not produce a unanimous panel opinion. The majority held the use of force objectively unreasonable, thus satisfying the first prong of the qualified immunity test.⁴⁴ But the second prong was more difficult: Was it clearly established that the particular use of force in these particular circumstances was unconstitutional? The officer argued that there was no binding case law on the use of tasers.⁴⁵ Even if there had been binding case law, the matter would not have been clear-cut. What if five, rather than three, tases were applied in a prior case? What if the tasers had not been used after thirteen baton strikes?

The qualified immunity test poses an almost insurmountable analytical problem—the permutations are infinite. A given situation is rarely exactly like another. There will always be sufficient distinguishing facts to decide that there was no clearly established law. The flexibility of this kind of approach has led some commentators to charge that qualified

35. Based on the author's own experience as a current clerk in the Fifth Circuit Court of Appeals. Beyond the confusion in the reported cases, there is tremendous internal disagreement over the qualified immunity defense and how it ought to be applied.

36. *Newman v. Guedry*, 703 F.3d 757 (5th Cir. 2012).

37. *Id.* at 759–60.

38. *Id.* at 760.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* at 763.

44. *Id.*

45. *Id.*

immunity doctrine permits judges to decide cases on the basis of their own policy judgments.⁴⁶

The *Newman* panel did away with this issue entirely and denied qualified immunity by holding that, “‘in an obvious case,’ the *Graham* excessive-force factors themselves ‘can clearly establish the answer, even without a body of relevant case law.’”⁴⁷ The dissenting judge, however, saw no case law clearly establishing the unconstitutionality of this level of force in this kind of circumstance.⁴⁸ “[E]xisting precedent must have placed the statutory or constitutional question beyond debate.”⁴⁹ The dissenting judge compared several cases with slightly varying facts to determine that the present facts were more like those cases in which no violation had been found.⁵⁰

*Ramirez v. Martinez*⁵¹—decided only five months later—resulted in another divided panel. In that case, officers had a warrant to search Ramirez’s business premises to serve an arrest warrant on his sister-in-law.⁵² When Ramirez arrived on the premises, officers allegedly had their guns drawn, pointed at his employees.⁵³ When Ramirez asked what was going on, he and Officer Martinez apparently exchanged profanities, with Ramirez saying, “This is my business, ok?”⁵⁴ The officer told Ramirez to turn around so he could be cuffed, and when Ramirez refused the order, he was tased and handcuffed.⁵⁵ When on the ground, he was tased again.⁵⁶ Charges against Ramirez for disorderly conduct were later dismissed.⁵⁷

The divided panel that resulted demonstrates the difficulty in applying the clearly established standard. First, the court had not before “addressed a fact pattern precisely on point,” which is of course true because

46. See, e.g., Diana Hassel, *Living a Lie: The Cost of Qualified Immunity*, 64 MO. L. REV. 123, 149–150 (1999); Richard A. Matasar, *Personal Immunities Under Section 1983: The Limits of the Court’s Historical Analysis*, 40 ARK. L. REV. 741, 744 (1987).

47. *Newman*, 703 F.3d at 764 (quoting *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004)).

48. See *id.* at 764–69.

49. *Id.* at 767 (Barkesdale, J., dissenting) (quoting *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2083 (2011)).

50. *Id.* at 768–69. The dissenting judge first listed egregious cases in which qualified immunity was denied, and decided that this case was not as egregious. Those other cases involved an arrestee in a diabetic coma being beaten with flashlights, an officer slamming a door on an arrestee’s head, and an officer firing two rounds into a car occupied by children.

51. *Ramirez v. Martinez*, 716 F.3d 369 (5th Cir. 2013).

52. *Id.* at 372.

53. *Id.*

54. *Id.*

55. *Id.* at 372–73.

56. *Id.* at 373.

57. *Id.*

these *precise* facts were never before the court.⁵⁸ Nevertheless, because one case had held that use of force after the subject was subdued was excessive, the court decided the plaintiff alleged sufficient facts to support a finding of excessiveness because he was tased once he was already subdued.⁵⁹ The panel in *Ramirez* relied on the same case to decide that the law was also clearly established.⁶⁰ The dissent, however, relied on other similar cases to suggest that “a jury could not find that no reasonable officer would have tased Ramirez two times.”⁶¹

Those were two cases in which qualified immunity was denied. In what was arguably a more egregious case than either *Ramirez* or *Newman*, the Fifth Circuit *granted* qualified immunity to officers in the 2012 case *Poole v. City of Shreveport*.⁶² The evidence, assessed in a light most favorable to the plaintiff, showed that Poole was pulled over for a traffic violation, passed a field sobriety test, and argued with an officer who had tailgated him in an unmarked car.⁶³ He refused to give his hand when the officers wanted to arrest him, at which point he was tased and forcibly handcuffed.⁶⁴ Poole claimed that while he refused to be arrested, he was not otherwise physically resistant or violent to the officers.⁶⁵ At the end of the encounter, Poole had suffered an arm injury requiring “multiple surgeries,” and his left arm and hand suffered “permanent disabilities.”⁶⁶ The court held that the officers’ use of force was not unreasonable because Poole had refused to surrender his right arm so he could be cuffed.⁶⁷

In 2013, the Fifth Circuit again granted qualified immunity, this time to an officer who had shot three times at a suspect, Robbie Tolan, with one bullet hitting him in the chest.⁶⁸ Tolan was suspected of stealing the vehicle he exited, although he was in his own driveway and his parents had even come out to argue with the officers, insisting that it was their own car.⁶⁹ Tolan was shot when he got off of the ground (where he was lying face down) once one of the officers shoved his mother against

58. *Id.* at 378.

59. *Id.* (citing *Bush v. Strain*, 513 F.3d 492, 501–02 (5th Cir. 2008)).

60. *Id.* at 379. (citing *Bush*, 513 F.3d at 501).

61. *Id.* at 382 (Jones, J., dissenting).

62. 691 F.3d 624 (5th Cir. 2012).

63. *Id.* at 625.

64. *Id.* at 625–26.

65. *Id.* at 626.

66. *Id.*

67. *Id.* at 629.

68. *See Tolan v. Cotton*, 713 F.3d 299 (5th Cir. 2013).

69. *Id.* at 301–02.

the garage door.⁷⁰ This case was so egregious that it resulted in a state-court trial, and yet it was apparently not egregious enough for the Fifth Circuit panel to deny qualified immunity.⁷¹

Whatever the individual merits of each case, what they show in tandem is that under modern qualified immunity doctrine it is very difficult to discern a *principled* way to decide such cases.

The second problem resulting from the modern qualified immunity doctrine, which needs little illustration, is that plaintiffs rarely get recovery.⁷² As the Fifth Circuit cases surveyed above illustrate, it is difficult to show that the law “clearly established” that certain force under particular circumstances was unconstitutional given the almost infinite possibilities for distinguishing facts.

In addition to the two major problems previously discussed, there is a third problem, which is the crux of this Article: These results are hardly required by the common law or principles of statutory or constitutional interpretation. For now, we should keep in mind the above practical consequences when considering the importance of the theoretical claims made in Parts IV and V below. Not only is the common law approach better as a matter of theory, there is a considerable argument that it will be superior on a practical level.

The next Part describes how the doctrine of qualified immunity evolved. In the doctrine’s first few decades, the court examined the immunities that existed at common law for a public official’s conduct. These common law immunities were held as a matter of statutory interpretation to have been incorporated by Congress into the Civil Rights Act of 1871, which included the language that is now 42 U.S.C. § 1983. It was only when the Court began to hear federal *Bivens* actions untethered from any statute that the common law approach was lost. This next Part thus demonstrates the importance of returning to a common law approach when trying excessive force cases. Part III describes how exces-

70. *Id.* at 303.

71. *Id.*

72. “Most academics and jurists agree, however, that the qualified immunity defense is one of the most substantial barriers to the success of lawsuits seeking damages against federal officials for constitutional violations.” Alexander A. Reinert, *Does Qualified Immunity Matter?*, 8 U. ST. THOMAS L.J. 477, 479 (2011). Diana Hassel writes, “An apparent duplication of the objective reasonableness standard of the Fourth Amendment in excessive force cases and the same objective reasonableness standard in the qualified immunity doctrine has created a nearly impenetrable defense to excessive force claims.” Diana Hassel, *Excessive Reasonableness*, 43 IND. L. REV. 117, 118 (2009). The standards are not quite the same—establishing that the unconstitutionality was clearly established is much more difficult than establishing the underlying unconstitutional behavior—but Hassel’s point is well-taken. It is still my view, however, that a merits trial after a denial of qualified immunity would be a contradiction. *See supra* note 8.

sive force cases were tried at common law and also demonstrates that the legal disarray described above would be resolved with the common law approach. The remainder of the Article concludes with the theoretical case for a return to this historical method for trying excessive force cases.

II. EVOLUTION OF QUALIFIED IMMUNITY DOCTRINE

A. Common Law Immunities and § 1983: 1951–1982

The Supreme Court first discussed common law immunities in a § 1983 suit in the middle of the twentieth century.⁷³ In 1947, the Senate of the California State Legislature formed a committee to investigate “un-American” activities.⁷⁴ Two years later, William Brandhove circulated a petition apparently encouraging the legislature to defund the committee, alleging that the committee had conspired with the “Republican machine in San Francisco” to smear a particular congressman as a “Red.”⁷⁵ The committee hauled Brandhove before it, where he refused to give testimony, for which he was prosecuted for contempt in state court.⁷⁶ Brandhove then sued Jack Tenney (head of the committee) and others for conspiring to deprive him of his constitutional rights to free speech and petition by harassing him.⁷⁷ He argued that the committee had no legislative purpose in questioning him.⁷⁸

The district court dismissed the suit for failing to state a cause of action under section one of the Civil Rights Act of 1871—what would be later codified as 42 U.S.C. § 1983—but the Ninth Circuit reversed.⁷⁹ The Supreme Court took up the case to explain that even if the facts might otherwise state a cause of action under the enforcement statute (the Civil Rights Act), it did not do so on these facts.⁸⁰ The Court delved into English and American political and constitutional history to find that legislators are essentially completely immune for acts they undertake as legislators and that, in passing the Civil Rights Act of 1871, Congress did not abrogate these legislative privileges so deeply rooted in our constitutional and political history.⁸¹

73. *Tenney v. Brandhove*, 341 U.S. 367 (1951).

74. *Id.* at 369–70.

75. *Id.* at 370.

76. *Id.* at 370–71.

77. *Id.* at 371.

78. *Id.*

79. *Id.*

80. *See id.* at 372.

81. *Id.* at 376.

The Court held,

We think it is clear that the legislation on which this action is founded does not impose liability on the facts before us, once they are related to the presuppositions of our political history. The privilege of legislators to be free from arrest or civil process for what they do or say in legislative proceedings has taproots in the Parliamentary struggles of the Sixteenth and Seventeenth Centuries.⁸²

The Court further cited to the English Bill of Rights Act of 1689, which had capped an almost century-long constitutional struggle with the Stuarts, and which unequivocally guaranteed the right of members of parliament to be free from prosecution for their actions in parliament.⁸³ The Act had declared, among other rights, “That the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament.”⁸⁴

The American colonists retained this constitutional victory, and the American founders cemented it in their founding documents:

Freedom of speech and action in the legislature was taken as a matter of course by those who severed the Colonies from the Crown and founded our Nation. It was deemed so essential for representatives of the people that it was written into the Articles of Confederation and later into the Constitution.⁸⁵

The Supreme Court brought to bear all of the sources modern originalists would use to establish the historical understanding of a particular constitutional provision.⁸⁶ It gave the reasons for this constitutional rule, as articulated by James Wilson, one of the Framers of the Constitution; it established the rule’s presence in three state constitutions at the time of the founding; and it noted that the rule became so well-entrenched that forty-one of the forty-eight state constitutions contained its protection.⁸⁷

The Court was not using this history for purposes of constitutional interpretation but rather for purposes of *statutory* interpretation.⁸⁸ When Congress passed section one of the Civil Rights Act of 1871, did it *intend* to impose liability for the actions of legislators long held—because of an old and profound constitutional and political history dating back to the

82. *Id.* at 372 (capitalization in original).

83. *Id.*

84. *Id.* (quoting Bill of Rights Act of 1689, 1 W. & M., c. 2) (capitalization in original).

85. *Id.* at 373; *see also* U.S. CONST. art. I, § 6, cl. 1 (“Senators and Representatives . . . for any Speech or Debate in either House . . . shall not be questioned in any other Place.”).

86. *See Tenney*, 341 U.S. at 373–75.

87. *Id.*

88. *See id.* at 376.

1600s—immune from such liability? The Court held almost unanimously (with only Justice Douglas dissenting) that Congress did not abrogate this deeply rooted tradition of legislative immunity; or at least, the Court would not assume that Congress abrogated it without more specific legislative language:

Let us assume, merely for the moment, that Congress has constitutional power to limit the freedom of [s]tate legislators acting within their traditional sphere. That would be a big assumption. But we would have to make an even rasher assumption to find that Congress thought it had exercised the power. These are difficulties we cannot hurdle. The limits of [sections] 1 and 2 of the 1871 statute . . . were not spelled out in debate. We cannot believe that Congress—itself a staunch advocate of legislative freedom—would impinge on a tradition so well grounded in history and reason by covert inclusion in the general language before us.⁸⁹

Thus, the immunity doctrine in § 1983 actions was born.⁹⁰ It is worth detailing the reasoning of the Court in *Tenney v. Brandhove* because of the difference in the Court's approach then and now in modern qualified immunity cases. The former, as described above, is rooted in statutory interpretation, which itself is rooted in history, tradition, and common law. The latter, as we shall see in Part II.B, is a judicially created doctrine rooted in the Justices' views of public policy (and arguably, poor public policy at that). Moreover, the Court's reasoning in *Tenney* may help persuade us, in Part V, that its approach is satisfying as a theoretical matter. To preview, a strong case can be made that common law immunities were indeed incorporated into the 1871 statute, not because they are written there explicitly but because the legislators and the people would have *understood the language* to include these deeply rooted common law and constitutional principles.

In *Tenney*, the Court dealt with an unquestionable application of § 1983. There, the state laws (and specifically the Constitution) gave the legislature authority to undertake the acts in question.⁹¹ Thus, Brandhove had a proper claim under § 1983 because the defendants were literally acting “under color of” a “law” or “statute”; that is, they were acting consistently with an authority bestowed upon them by statute. It was hardly clear then whether an officer acting in *violation* of his statutory authority—say, by conducting an admittedly illegal search or seizure—

89. *Id.*

90. Note that in *Tenney*, the Court held that legislators had an *absolute*, not a *qualified*, immunity.

91. *See Tenney*, 341 U.S. at 369–70.

could still be liable for § 1983 violations for merely acting under color of state “authority.” *Monroe v. Pape*,⁹² decided ten years after *Tenney*, answered this question in the affirmative.

There has been tremendous historical and legal debate over the holding of *Monroe*. Justice Frankfurter in that case, followed most notably by Justice Scalia in more modern cases, argued that only if a state statute authorized the particular actions could the officer be liable under § 1983.⁹³ An officer acting in excess of his statutorily granted authority could only be liable under state law, for example, in a battery or trespass case. Only when state law did not provide for adequate redress—and interestingly enough, if the state provided *immunity* for the violation, then that was state action sufficient for Justice Frankfurter—could § 1983 be implicated.⁹⁴

The correctness of *Monroe* is beyond the scope of this Article. Even if *Monroe* was wrongly decided and state officers can only be held liable under state law for violating the authority granted to them by state law, Justice Frankfurter’s understanding of § 1983 might still be implicated if modern *state* law immunity is expansive. As I argue later, state immunity law has tracked the modern federal immunity law and, as such, may very well implicate § 1983 insofar as these immunities offer state law protection to officers for constitutional wrongs. Regardless, that *Monroe* may have been wrongly decided does not mean that federal *immunity* doctrine as it has evolved since the 1980s—to which this Article seeks to provide a corrective—is such a cornerstone of constitutional law that *it* cannot be corrected.

Thus, we come to the earliest common law immunity case involving an individual officer, *Pierson v. Ray*.⁹⁵ The action there probably could have been sustained under the pre-*Monroe* understanding of § 1983. Several officers had arrested the plaintiffs for attempting to use segregated facilities at a bus terminal in Mississippi because of a state statute making it a misdemeanor to congregate in public “under circum-

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

93. Compare *id.* at 202–59 (Frankfurter, J., dissenting), with *Crawford-El v. Britton*, 523 U.S. 574, 611 (1998) (Scalia, J., dissenting).

94. *Monroe*, 365 U.S. at 211 (Frankfurter, J., dissenting) (“If, for example, petitioners had sought damages in the state courts of Illinois and if those courts had refused redress on the ground that the official character of the respondents clothed them with civil immunity, we would be faced with the sort of situation . . . [of State sanction that] ‘would run counter to the guaranty of the Fourteenth Amendment.’” (quoting *Wolf v. Colorado*, 338 U.S. 25, 28 (1949))). For further discussion of *Monroe*, see *supra* text accompanying note 92.

95. 386 U.S. 547 (1967).

stances such that a breach of the peace may be occasioned thereby.”⁹⁶ The statute was later found to be unconstitutional,⁹⁷ but the officers at the time were acting under color of a statute.

In any event, the lower court held that the officers would be liable notwithstanding that the statute was later found unconstitutional and that good faith (and probable cause) was a defense at common law for an illegal arrest.⁹⁸ The Supreme Court first addressed the liability of the judge in the case, holding him absolutely immune from liability for his role in the convictions of the plaintiffs: “Few doctrines were more solidly established at common law,” the Court declared, “than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction.”⁹⁹ Echoing and citing *Tenney*, the Justices again supposed that Congress did not abolish this common law doctrine: “We do not believe that this settled principle of law was abolished by § 1983 The legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities.”¹⁰⁰ As with immunity for legislators, the doctrine of judicial immunity “is equally well established, and we presume that Congress would have specifically so provided had it wished to abolish the doctrine.”¹⁰¹

As for the officers, under the common law of torts, “the prevailing view in this country [is that] a peace officer who arrests someone with probable cause is not liable for false arrest simply because the innocence of the suspect is later proved.”¹⁰² The same principles ought to apply to enforcement of a statute later found to be unconstitutional.¹⁰³ Thus, the Court held that the defense of good faith and probable cause, which was “available to the officers in the common law action for false arrest and imprisonment, [wa]s also available to them . . . under § 1983.”¹⁰⁴

The Court ostensibly began to deviate from this common law incorporation method in *Scheuer v. Rhodes*¹⁰⁵ and *Wood v. Strickland*,¹⁰⁶ and perhaps considered policy more than common law history.¹⁰⁷ That is

96. *Id.* at 549.

97. *Id.* at 550 (citing *Thomas v. Mississippi*, 380 U.S. 524 (1965)).

98. *Id.*

99. *Id.* at 553–54. (citing *Bradley v. Fisher*, 80 U.S. 335 (1872)).

100. *Id.* at 554.

101. *Id.* at 554–55.

102. *Id.* at 555.

103. *Id.*

104. *Id.* at 557.

105. See *Scheuer v. Rhodes*, 416 U.S. 232 (1974).

106. See *Wood v. Strickland*, 420 U.S. 308 (1975).

107. Several authors claim or assume that policy arguments drove the Court’s decision. See, e.g., John D. Kirby, Note, *Qualified Immunity for Civil Rights Violations: Refining the Standard*, 75

not a necessary reading of those opinions, however. In *Scheuer*, the Court found a qualified immunity for executive officials (such as the governor) “dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based.”¹⁰⁸ Yet this holding did not derive out of whole cloth from the Justices’ own policy views. It derived from the common law principles discussed in *Pierson*, where an officer who acts in good faith and with probable cause is immune from liability.¹⁰⁹ It was an extension of the common law principle with respect to police officers; there was a common law tradition of immunity for executive officers.

In *Wood*, the finding of immunity for school officials who did not in bad faith violate the constitutional rights of students (in this case by expelling a student) was again an extension of the good faith principle established in earlier cases.¹¹⁰ Even if it was a “policy” extension of those same principles, the Court, addressing the statute before them—§ 1983—relied “on those same sources in determining whether and to what extent school officials are immune from damage suits” that were discussed in the previous § 1983 cases.¹¹¹ The same is true of *Procunier v. Navarette*,¹¹² where the Court held that violation of a right established only after the actions in question occurred was not “clearly established.”¹¹³ Thus, the development of immunity doctrine was still a matter of statutory interpretation, even if the Court was giving less attention to specific common law analogs.

Finally, in *Owen v. City of Independence*,¹¹⁴ the Court engaged in an analysis of the common law to determine that municipalities had no good faith defenses to § 1983 liability.¹¹⁵ Thus, as late as this case in

CORNELL L. REV. 462, 472–73 (1990); Adam L. Littman, *A Second Line of Defense for Public Officials Asserting Qualified Immunity: What “Extraordinary Circumstances” Prevent Officials from Knowing the Law Governing Their Conduct?*, 41 SUFFOLK U. L. REV. 645, 648 n.36 (2008); David P. Stoelting, Comment, *Qualified Immunity for Law Enforcement Officials in Section 1983 Excessive Force Cases*, 58 U. CIN. L. REV. 243, 259 (1989).

108. *Scheuer*, 416 U.S. at 247.

109. *Id.* at 243–44.

110. *Wood*, 420 U.S. at 318.

111. *Id.* at 320. One author has written that while *Wood* continued the Court’s traditional reliance on common law, the “pedigree” of the two-pronged test including the objective “clearly established” element is “uncertain.” Jack M. Beermann, *A Critical Approach to Section 1983 with Special Attention to Sources of Law*, 42 STAN. L. REV. 51, 68 (1989).

112. 434 U.S. 555 (1978).

113. *Id.* at 565. See generally Saiman, *supra* note 34, at 1160 (discussing *Wood* and *Procunier* as early uses of the “clearly established” standard).

114. 445 U.S. 622 (1980).

115. *Id.* at 638–50.

1980, the Court was still engaged in what was fundamentally a statutory interpretation analysis. The Court by now was also considering policy, but as in *Owen*, it was largely doing so to buttress its conclusions with respect to the common law doctrines.¹¹⁶

It is my contention that the Supreme Court erred in the following decade when it divorced immunity doctrine from the common law and focused solely on policy. Examining why the Court began this deviation will lead to a fuller understanding of the theoretical legitimacy of the common law approach and the theoretical problems with the modern approach. I argue that, whether intentionally or not, the Court developed modern qualified immunity doctrine—based solely on its particular conception of public policy—in the context of *Bivens* actions against federal officials. It appears that, when not confronted with a statute to interpret, the Justices did not feel constrained by considerations of statutory interpretation. That is, they did not feel constrained by the common law history so relevant to § 1983 cases. Our problem arises as a result of the Court deciding that it would be impractical to have a separate immunity doctrine for federal cases under *Bivens* and state cases under § 1983, for it also decided to import the immunity doctrine from the federal cases into the state cases, thus divorcing § 1983 from all common law analysis.

B. Bivens and Modern Qualified Immunity

In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,¹¹⁷ the Supreme Court opened the door to claims against federal officials for the violation of constitutional rights. Whether *Bivens* is correct as an originalist matter ultimately will not matter much for our purposes.¹¹⁸ What is important is that the Court seems to have dramatically altered qualified immunity doctrine in the context of *Bivens* actions when it had less need (if any at all) to shape the doctrine as a matter of statutory interpretation. The doctrine may have been trending in this direction, but it was in the context of *Bivens* that matters of policy took the reins completely and the Court abandoned any common law underpinnings to immunity doctrine.

116. See, e.g., *id.* at 650–56.

117. 403 U.S. 388 (1971).

118. Interestingly, one might observe that if *Bivens* provides a cause of action directly under the Fourth Amendment, then even state officials can be sued without the need to invoke § 1983 because the Fourth Amendment has been incorporated against the states. (Incorporation is another relevant doctrine whose correctness is questionable but perhaps ultimately unimportant for our purposes.)

The key turning points were *Butz v. Economou*,¹¹⁹ *Harlow v. Fitzgerald*,¹²⁰ and *Anderson v. Creighton*.¹²¹ These cases all involved *Bivens* actions or other claims against federal officials on the basis of federal law. In *Butz*, the plaintiff sued officials in the federal Department of Agriculture and alleged violations of the First Amendment and other federal rights, claiming they retaliated against him for levying criticism against the agency.¹²² The Court examined the existing case law respecting the liabilities and immunities of federal officers for violations of constitutional rights, reciting cases dating back from as early as 1804.¹²³ The Court acknowledged that none of these cases dealt with a federal official acting clearly outside the scope of his duties, but it noted that several cases have addressed that issue in the context of state officials sued under § 1983.¹²⁴

It thus addressed those § 1983 cases and concluded that federal officials should have no more immunity than their state counterparts:

None of these decisions with respect to state officials furnishes any support for the submission of the United States that federal officials are absolutely immune from liability for their constitutional transgressions. On the contrary, with impressive unanimity, the Federal Courts of Appeals have concluded that federal officials should receive no greater degree of protection from constitutional claims than their counterparts in state government.

....

We agree with the perception of these courts that, in the absence of congressional direction to the contrary, there is no basis for according to federal officials a higher degree of immunity from liability when sued for a constitutional infringement as authorized by *Bivens* than is accorded state officials when sued for the identical violation under § 1983.¹²⁵

The Court held that federal officials were entitled to the same immunities to which state officials were entitled under *Scheuer*.¹²⁶

The move in *Butz* was crucial and not necessarily incorrect. Thus far, the Court was importing immunity doctrine developed as a matter of

119. 438 U.S. 478 (1978).

120. 457 U.S. 800 (1982).

121. 483 U.S. 632 (1987).

122. *Butz*, 438 U.S. at 480.

123. *See id.* at 489–96 (citing *Little v. Barreme*, 2 Cranch 170 (1804)).

124. *Id.* at 495–96.

125. *Id.* at 498, 500.

126. *Id.* at 508–09.

statutory interpretation in § 1983 cases to federal cases not involving any statute whatsoever. It did not take long, however, for the Court to lose sight of the direction of this movement. It subsequently invented immunity doctrine out of whole cloth in other federal-officer cases and exported *that* doctrine to the § 1983 cases rather than importing the relevant doctrine from the state-officer cases. In cases of first impression—such as excessive force cases decided under the Fourth Amendment—the court could have determined how the immunities would operate under § 1983 before creating immunities for federal officials in such cases. The Court instead, as we shall see, created immunities in these cases out of whole cloth without the benefit of any § 1983 cases.

The next step in this transformation was *Harlow*, a *Bivens* First Amendment case.¹²⁷ The Court reiterated the importation of the *Scheuer* immunity standard to federal officials in *Butz*.¹²⁸ It further reiterated that the Court had held in *Butz* that it would be “untenable to draw a distinction for purposes of immunity law” between *Bivens* actions and § 1983 actions.¹²⁹ Then the Court took an additional unprecedented step: it determined the scope of immunity based *solely on public policy grounds*. The common law was not mentioned *at all* in *Harlow* as a justification for its particular immunity holding, other than its conclusory statement: “As recognized at common law, public officers require this protection to shield them from undue interference with their duties and from potentially disabling threats of liability.”¹³⁰

Instead, the Court discussed public policy reasons for refusing to adopt absolute immunity,¹³¹ followed by public policy reasons for adopting qualified immunity.¹³² It stated the following rule, not derived from any common law doctrine: “We therefore hold that government officials performing discretionary functions[] generally are 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.”¹³³

*Anderson v. Creighton*¹³⁴ put the final nail in the common law coffin by removing the last vestiges of the earlier approach. The plaintiff

127. See *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

128. *Id.* at 807.

129. *Id.* at 809 (quoting *Butz v. Economou*, 438 U.S. 478, 504 (1978)).

130. *Id.* at 806.

131. *Id.* at 808–13.

132. *Id.* at 813–19.

133. *Id.* at 818 (emphasis added) (citing *Procunier v. Navarette*, 434 U.S. 555, 565 (1978); *Wood v. Strickland*, 420 U.S. 308, 322 (1975)).

134. 483 U.S. 635 (1987).

sued an FBI agent for a warrantless search of his home.¹³⁵ Before *Anderson* but after *Harlow* cemented the “clearly established” rule, the Court still applied some of the earlier common law approaches to immunity cases in § 1983 actions.¹³⁶ Summarizing the recent case law, Justice Scalia described for the Court the qualified immunity test: “[W]hether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the ‘objective legal reasonableness’ of the action . . . assessed in light of the legal rules that were ‘clearly established’ at the time it was taken.”¹³⁷ But moreover, Justice Scalia completely jettisoned the common law from the analysis. The plaintiff suggested that because at common law police officers were strictly liable for the warrantless search of a third party’s home, that was the standard the Court should adopt.¹³⁸ Justice Scalia responded and, in the process, changed the nature of qualified immunity for the next twenty-five years:

[This] notion is plainly contradicted by *Harlow*, where the Court completely reformulated qualified immunity along principles not at all embodied in the common law, replacing the inquiry into subjective malice so frequently required at common law with an objective inquiry into the legal reasonableness of the official action. As we noted before, *Harlow* clearly expressed the understanding that the general principle of qualified immunity it established would be applied ‘across the board.’¹³⁹

The Court in 1992 confirmed in *Wyatt v. Cole*¹⁴⁰—a § 1983 case against a state officer—that *Harlow* and *Anderson* had completely changed the immunity inquiry from one based on the common law to one based on an objective “clearly established” standard.¹⁴¹

135. *Id.* at 637.

136. It was a mixed approach whereby both common law standards and the *Harlow* standard were addressed, thus beginning the exporting of immunity law developed in federal-officer cases into § 1983 state-officer cases. In *Malley v. Briggs*, 475 U.S. 335 (1986), for example, the Court analyzed the common law rules for an officer issuing a warrant that leads to a false arrest. The Court first addressed the question under the common law approach, recognizing that “[o]ur initial inquiry is whether an official claiming immunity under § 1983 can point to a common-law counterpart to the privilege he asserts.” *Id.* at 339–40 (citing *Tower v. Glover*, 467 U.S. 914 (1984)); see also *id.* at 339–43. It then seems to address the *Harlow* standard as well, though it is unclear how necessary that was to the opinion. See *id.* at 343.

137. *Anderson*, 483 U.S. at 639 (citing *Harlow*, 457 U.S. at 818–19).

138. *Id.* at 644.

139. *Id.* at 645.

140. 504 U.S. 158 (1992).

141. *Id.* at 165–67.

C. Conflating Bivens and § 1983: The Excessive Force Cases

This evolution is of particular importance for excessive force cases because such claims were rarely charged against state or federal officials under § 1983 or *Bivens* until the Supreme Court held in 1989 that excessive force claims were cognizable under the Fourth Amendment.¹⁴² By this time, the development of immunity into a doctrine divorced from common law or statutory interpretation was complete. Thus, courts never had the opportunity to discuss how excessive force cases would have been treated at common law and give the Fourth Amendment's protection against excessive force some historical support. Indeed, as discussed in Part III below, common law excessive force cases were hardly rare. It would not be unreasonable to presume that the founding generation would have understood the scope of the right against unreasonable seizures in this common law context, just as the Court assumes the warrant requirement is informed by its common law background. As a matter of statutory interpretation, it would also be reasonable to assume that if the Civil Rights Act of 1871 was intended to give a cause of action against individual officers who used excessive force, then Congress would have intended to incorporate the common law method then existing for prosecuting such cases.

Excessive force and qualified immunity first met at the Supreme Court in the context of a federal *Bivens* action in *Saucier v. Katz*.¹⁴³ The courts of appeals had been finding qualified immunity challenging in excessive force cases, because the inquiry into the constitutional injury under *Graham* seemed to be equivalent to the objective reasonableness standard required by earlier qualified immunity cases.¹⁴⁴ The Court in *Saucier* held that the standards were different. Qualified immunity does require, as a first step, an inquiry into whether a cognizable constitutional violation has occurred—thus, a determination of whether excessive force was used under the *Graham* objective reasonableness standard is necessary.¹⁴⁵ But then, as a second step, the courts must determine whether it was clearly established at the time that the particular use of force was

142. *Graham v. Connor*, 490 U.S. 386 (1989); see generally *supra* Part I.

143. See 533 U.S. 194 (2001).

144. *Id.* at 197, 199–200. For a discussion of the courts' grappling with this issue, see Blum, *supra* note 10, at 219–20 and Lisa R. Eskow & Kevin W. Cole, *The Unqualified Paradoxes of Qualified Immunity: Reasonably Mistaken Beliefs, Reasonably Unreasonable Conduct, and the Specter of Subjective Intent That Haunts Objective Legal Reasonableness*, 50 BAYLOR L. REV. 869, 881–83 (1998).

145. *Saucier*, 533 U.S. at 201.

unconstitutional.¹⁴⁶ There was no discussion of the common law whatsoever, either as a matter of original meaning of the Fourth Amendment or as a matter of statutory interpretation (because it was not a § 1983 case).

A few years later, the Court decided *Brosseau v. Haugen*,¹⁴⁷ this time a § 1983 suit against a state officer for excessive force.¹⁴⁸ Notwithstanding that the Court was now dealing with a statute—section one of the Civil Rights Act of 1871, or 42 U.S.C § 1983—it did not engage in statutory interpretation or discuss the common law at all, nor did it refer to the long history of common law immunity cases dating back to 1951. Without question, it merely applied the “clearly established” test developed in federal cases to the state-based § 1983 claim.¹⁴⁹

More recently, the Court decided a § 1983 case, *Pearson v. Callahan*,¹⁵⁰ in which it abandoned the strictness of the two-part *Saucier* qualified immunity inquiry.¹⁵¹ The Court gave the lower courts discretion to consider either of the two prongs as the initial inquiry.¹⁵² There was no discussion of common law or statutory interpretation. The Court assumed without argument that the qualified immunity framework developed in *Harlow* and *Anderson* applied.¹⁵³

As a result of this doctrinal evolution, modern courts are inundated with excessive force cases, with panels of the same circuit often disagreeing on qualified immunity in very similar circumstances. But more significantly, plaintiffs who have suffered at the hands of overzealous and abusive law enforcement officers are often left without relief.¹⁵⁴ The clearly established standard is extremely difficult to prove at the low level of generality at which the courts analyze it. A court may have held that three taser shots when a suspect resisted the first order is not excessive, but that does not mean it is clearly established that five taser shots when the suspect resisted only the third repetitive order is unconstitutional. Very little is clear or established under modern qualified immunity doctrine.

146. *Id.* at 204–07; see also Saiman, *supra* note 34, at 1156 (describing the two-part test developed by *Saucier*).

147. 543 U.S. 194 (2004).

148. *Id.*

149. *Id.* at 198–99.

150. 555 U.S. 223 (2009).

151. See *id.*

152. *Id.* at 236.

153. *Id.* at 231–32.

154. At either the federal or state level. I will have more to say on this later, see *infra* note 226 and accompanying text, but for now it will suffice to point out that state immunity law has evolved to mirror federal immunity law. See, e.g., *Cantu v. Rocha*, 77 F.3d 795, 808 (5th Cir. 1996) (“Thus, Texas’ law of qualified or official immunity is substantially the same as federal immunity law.”).

This state of affairs can be remedied. As this Part has shown, common law immunities were traditionally held to have been incorporated into § 1983 as a matter of statutory interpretation. This approach was lost before excessive force cases became prevalent in the federal court system because of a faulty conflation of immunity doctrine in *Bivens* actions and § 1983 actions. Even if the Court wanted to have only one immunity doctrine, it should have imported the doctrine from the § 1983 cases into the federal cases. Instead, by happenstance and accident—most likely by virtue of the temporal order of the cases the Supreme Court happened to agree to hear—it developed a qualified immunity doctrine in federal cases totally divorced from the common law that it then exported to the § 1983 cases.¹⁵⁵

The next Part examines evidence from common law excessive-force cases to determine what the common law approach was. The rest of the Article will then return to first principles and argue that, as a matter of constitutional and statutory interpretation, courts should return to the common law.

III. EXCESSIVE FORCE AT COMMON LAW

A. Blackstone and Some Early Cases

Any discussion of common law doctrine must start with Blackstone. Regardless of whether he was accurate on all the common law doctrines he explicated, it has been well-established that his views greatly influenced the Founders.¹⁵⁶ With respect to § 1983 suits, this Article is mostly concerned with how the common law treated excessive force cases around 1871; presumably, that is the common law the Congress of

155. I should emphasize that my historiography of the Court's qualified immunity cases is my own interpretation of events. Although no one can *prove* that the advent of *Bivens* actions muddled the Court's reasoning, I think one can show that it is a likely possibility. That is all I have done here. One other scholar has also implied this possibility, arguing that a "federal common law" has superseded state common law in constitutional tort cases. *Cf.* Beermann, *supra* note 111, at 68.

It may be, indeed, that the Court only considered policy and that it would have shaped qualified immunity doctrine in the same way, even if it only had § 1983 cases to interpret. Nevertheless, I think I have made a strong case that *Bivens* played a role. Either way, my version of events serves as a helpful reminder of the traditional role the common law has played in § 1983 cases, no matter the reasons for the Court's about-face. For a few other accounts of the evolution of the Court's qualified immunity doctrine, see Saiman, *supra* note 34, at 1159–68 and see generally Beermann, *supra* note 111.

156. See DANIEL J. BOORSTIN, *THE MYSTERIOUS SCIENCE OF LAW* 3–4 (1941); Anthony J. Franze, *The Confrontation Clause and Originalism: Lessons from King v. Brasier*, 15 J.L. & POL'Y 495, 548–49 (2007); Vasan Kesavan, *The Three Tiers of Federal Law*, 100 NW. U. L. REV. 1479, 1515 n.179 (2006).

1871 incorporated when it wrote section one of the Civil Rights Act (which became 42 U.S.C. § 1983). Yet Blackstone must be the starting point because he is one of the earliest authorities and thus sets the background for such cases in the coming century. Further, insofar as this Article argues that the common law method should be adopted in *Bivens* actions directly under the Constitution, the original meaning of the Fourth Amendment to the founding generation is directly relevant.

Although Blackstone did not write on the issue of “excessive force,” his analysis of the immunities of public officers is instructive. From his discussion, general principles of immunity doctrine as it existed at the time of his writing emerge. The following elements are particularly relevant to future developments in § 1983 and immunity law: whether the common law’s test was an objective or subjective one; whether it was the province of the judge or the jury to decide these cases; and whether it was expected that officers would be personally liable for damages at law.

Blackstone’s work echoes the concern that modern Supreme Court Justices have expressed regarding the challenges officers face in the execution of their duties. The law must give them much discretion, for the offices of the justices of the peace and other law enforcement

are such and of so great importance to the public, that the country is greatly obliged to any worthy magistrate, that without sinister views of his own will engage in this troublesome service. And therefore, if a well-meaning justice makes any undesigned slip in his practice, great lenity and indulgence are shewn to him in the courts of law.¹⁵⁷

“But, on the other hand,” writes Blackstone, “any malicious or tyrannical abuse of their office is usually severely punished; and all persons who recover a verdict against a justice, for any willful or malicious injury, are entitled to double costs.”¹⁵⁸ Thus far it would appear that subjective intent matters a great deal at least for the *criminal* prosecution of misfeasors. Intent, after all, has always been a crucial element of a criminal act.

However, Blackstone suggests that subjective intent does not matter in civil cases and may not matter even in some criminal cases. Note that at common law any individual could “prosecute” someone in the courts by virtue of an indictment; the government could institute criminal proceedings on its own accord with the issuance of an information.¹⁵⁹

157. SIR WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND 354 (Forgotten Books 2012) (1765–1769).

158. *Id.*

159. *Private Prosecution: A Remedy for District Attorneys’ Unwarranted Inaction*, 65 YALE L.J. 209, 225 (1955).

With this background in mind, consider Blackstone's following discussion:

But the courts of king's bench have frequently declared that though a justice of peace should act illegally, yet, if he has acted honestly and candidly, without any bad view or ill intention whatsoever, the court will never punish him by the extraordinary mode of an information, *but will leave the party complaining to the ordinary method of prosecution by action or indictment.*¹⁶⁰

Thus, it appears that subjective intent, while naturally necessary for a criminal prosecution on the part of the government, is not necessary for an action at law commenced by the wronged party or a criminal action "prosecuted" by the wronged party as a private citizen. In those actions, good faith may have been no defense.

Blackstone continues in the same footnote, after pointing out the procedural protections granted to justices of the peace accused of wrongdoing, to say, "Indeed, where a justice has committed an involuntary error, without any corrupt motive or intention, it may be questioned whether it is an indictable offence [sic]; for the act in that case is either null and void, *or the justice is answerable in damages for all the consequences of it.*"¹⁶¹ While the last clause seems somewhat ambiguous, in light of the preceding discussion it can be justly paraphrased as follows: It is not a criminal offense, because it is either null or void, or in any event the justice is answerable in an action for damages. Taken together, these statements suggest that it was accepted at common law that *subjective intent* does not matter. The exceeding of authority—which can be determined objectively—is sufficient to make officers liable.

Blackstone's discussion is at a high level of generality. Might excessive force cases have been treated in some particular way that refute these general principles? It is hard to locate English cases from this period relating to the use of force that were not disposed of on some technicality of pleading. But such cases did seem to occur at least occasionally.¹⁶² We even have some reasoning in some cases; they are not too de-

160. BLACKSTONE, *supra* note 157, at 354 n.17 (emphasis added) (citing *Rex v. Palmer*, 2 Bur. 1162 (1761)).

161. *Id.* (emphasis added).

162. We know, for example, that one Mr. Waller sought an information against one Richards, a justice of the peace, in 1730 for "violent battery" in the conduct of his office. The report we have is a short paragraph dealing with the extent of notice required in such an action. Anonymous, 1 Barnardiston K.B. 379 (1730) (Eng.). In 1629, a husband and wife instituted an action against a constable for battery done in the course of his office. Anonymous v. Heylers, Croke, Car. 174 (1629) (Eng.).

tailed or helpful, but they are at least not inconsistent with Blackstone's description.

In the 1697 case of *Truscott v. Carpenter and Man*,¹⁶³ the plaintiff was seized by officers for failure to pay a debt, and he alleged "trespass, assault, battery, wounding[,] and imprisonment." The court of the King's bench held that while the authority to imprison implies the right to commit a battery, it is not an unlimited right:

[I]f an officer has a legal process to arrest a man, yet he cannot beat him, unless he resists; but no such thing appears here, and therefore for this reason also the plea is ill. . . . And of this opinion was the whole Court; for where an express battery is laid it is not enough to justify the imprisonment upon legal process, which includes a battery; but the defendant ought to go on, and shew that he arrested the plaintiff, and the plaintiff offered to rescue himself, and so the defendant was compelled to beat him. For otherwise if it be not upon some such occasion, a man cannot justify a battery in an arrest.¹⁶⁴

Similarly, in the 1736 case of *Williams v. Jones*, the question was "whether a battery of the plaintiff can be justified by shewing an arrest by lawful process," and "upon consideration of the cases," the court was of the opinion that "a battery cannot be justified by shewing an arrest barely; but that in order to make it good, something further should be shewn: as . . . that the plaintiff made resistance, and was going to rescue himself, and by reason of that he beat him to take him."¹⁶⁵

These cases are less instructive regarding the issue of reasonable force,¹⁶⁶ but when tying them back to the general principles related in Blackstone, it appears that subjective intent was not a feature of such claims. An officer had to show an objective reason (e.g., flight or resistance) that justified the use of force. Ill will or malice was not a consideration.

The point is important because a major concern of the U.S. Supreme Court in *Graham* was precisely the subjective malice component of the *Glick* test that it overturned.¹⁶⁷ Further, this same concern is partly what motivated the Court to abandon the old common law immunity defenses—which often depended on subjective good faith—for the objec-

163. *Truscott v. Carpenter and Man*, (1697) 91 Eng. Rep. 1050 (K.B.); 1 Lord Raymond 229.

164. *Id.* at 1051.

165. *Williams v. Jones*, (1736) 95 Eng. Rep. 193 (K.B.) 194; Cases Temp. Hardwicke 298.

166. Though perhaps they provide a glimpse of what would develop into the purpose principle in 18th century cases. See *infra* Part III.B.

167. See *Graham v. Connor*, 490 U.S. 386 (1989); *Johnson v. Glick*, 481 F.2d 1028 (2d Cir. 1973).

tive “clearly established” test under modern doctrine.¹⁶⁸ Blackstone and these cases show, however, that at least with respect to excessive force cases, subjective intent was no consideration in an action at law. Thus, at least one of the *policy* reasons the Court has advanced for the modern variant of qualified immunity is nullified in these cases.

Additionally, the assumption in all these cases is that an officer is personally liable at law for any excess force he uses. An officer is only *immune* from liability for those batteries committed with justification. This liability speaks to the Supreme Court’s other significant policy reason for modern immunity doctrine: that officers should not have to risk their personal financial resources except for the most exceptional errors in judgment. As the Court famously said in *Pierson v. Ray* (one of the first immunity cases discussed in Part II), “A policeman’s lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does.”¹⁶⁹

At common law, however, being “mulcted” in damages was precisely the deterrent for errors in judgment. To be sure, in the centuries of Coke and Blackstone, the public officers had tremendous wealth. Blackstone explains that it was a requirement of the various public offices that the occupant have sufficient wealth so they could afford the fines and damages for their transgressions.¹⁷⁰ This personal liability may be a doctrine unfit for the modern police force, as some scholars have observed:

The liability of the individual official for wrongdoing committed in the course of his duty on which so much praise has been bestowed by English writers, is essentially a relic from past centuries when government was in the hands of a few prominent, independent and substantial persons, so-called Public Officers, who were in no way responsible to ministers or elected legislatures or councils. . . . Such a doctrine is utterly unsuited to the twentieth-century state, in which the Public Officer has been superseded by armies of anonymous and obscure civil servants, acting directly under the orders of their superiors, who are ultimately responsible to an elected body.¹⁷¹

This observation is undoubtedly true but does not mean the doctrine should be abandoned. After all, it is more consistent with common law to

168. *Id.*

169. *Pierson v. Ray*, 386 U.S. 547, 555 (1967).

170. BLACKSTONE, *supra* note 157, at 345, 347.

171. Fleming James, Jr., *Tort Liability of Governmental Units and Their Officers*, 22 U. CHI. L. REV. 610, 639–40 (1955) (quoting William A. Robson, *Report of the Committee on Ministers’ Powers*, 3 POL. SCI. Q. 346, 357–58 (1932)).

let a jury decide under the common law standard whether a transgression has occurred and what the damages are. The solution for the modern day dilemma is not to abandon liability but rather to *indemnify* officers for their wrongs. That way the state—the equivalent of high officers—pays the price for its agents' transgressions.¹⁷²

B. Police Force in Conducting Arrests: 1786–1871

After the American Revolution, as modern police forces arose in cities for the first time, we saw an increase in the number of excessive force cases. The common law courts of the various states, relying upon fundamental common law principles, began developing a framework for analyzing such cases. The state of the common law in 1871 is particularly relevant. We thus begin with the service of process and arrest cases from 1786 to 1871.¹⁷³ However, the decades after also offer evidence of how the common law was seen at the time, and some cases from this period will be discussed as well. Given the dearth of cases in the 1700s, the earliest cases after the founding offer only some suggestion as to how the founding generation would have understood excessive force in the context of the Fourth Amendment.

Some courts developed a test that included both a subjective and an objective component, but this was the exception. More often than not, the courts settled on a single objective inquiry: Did the officer use more force than was necessary to accomplish his purpose? If so, then he was personally liable for the excess. It would appear that the *Graham* test is quite consistent with this common law inquiry, insofar as its factors are relevant to a determination of the question.¹⁷⁴ The common law cases reveal, however, that beyond this inquiry, there were no immunities, and whether an officer used excessive force was always a question for the jury, not the judge.

The 1786 case of *Gilbert v. Rider*¹⁷⁵ sheds some light on how the founding generation (and after) may have understood the limits of police force. The court did not pass judgment on this particular issue, but the

172. Akhil Reed Amar has suggested that such an approach of liability and indemnification is consistent with the original understanding of the Fourth Amendment. Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 812–13 (1994).

173. The earliest American case I could find with a reference to excessive or unreasonable force is from 1786, though the court in its opinion did not address the issue. The next earliest case I could find was from 1824. Earlier cases may, of course, exist.

174. The *Graham* test has been interpreted by the lower courts to require at least some quantum of physical injury that is more than *de minimis*. See *supra* note 2. This particular requirement is inconsistent with the common law cases.

175. 1 Kirby 180 (Conn. Super. Ct. 1786).

reporter had written the following: “Gilbert peremptorily refused to go any other way; his obstinacy obliged the officer to bind him, and compel him to go by force; he used no greater force than was necessary.”¹⁷⁶ This reasoning implies that officers believed it necessary to plead that they used no more force than was “necessary” as a defense to actions, such as in *Gilbert*, for trespass or false imprisonment in conducting an arrest.

In an 1824 case from Kentucky, the state’s high court again did not directly address the issue, but it declared that a plea from the defendant-constable was insufficient when it did not describe what the precept (in this case, a *capias pro fine*) commanded the constable to do (e.g., arrest and imprison the plaintiff).¹⁷⁷ The court did not take issue with the rest of the plea, in which the defendant argued he should be absolved because “he did use only so much force, and no more than was necessary to put into execution the commands of said precept.”¹⁷⁸ This opinion offers the first glimpse of the “no more than necessary” test that would come to define most common law cases in this era. Indeed, not only does the Kentucky court raise no qualms with the language (perhaps no error was raised), requiring the constable to aver what he was commanded to do was crucial for a finding of excessive force: if the defendant does not plead what he was commanded to do, it would be difficult to determine whether he used more force than necessary for his purpose.

An excessive force case from 1854, arising in the context of a sheriff (or his agent) serving process, demonstrates a similar principle. In *Hager v. Danforth*,¹⁷⁹ Danforth procured from the justice of the peace a subpoena to serve on Hager for purposes of a pending suit. Danforth entered the kitchen door, which was open, and encountered Hager’s wife, who ordered him to leave.¹⁸⁰ Danforth sought to go upstairs to serve Hager but the wife resisted, so Danforth “choked her and threw her back against the catch of a door, and slightly bruised her.”¹⁸¹ The trial judge instructed the jury that once Danforth was ordered to leave, he was not justified in continuing his attempt to serve the subpoena.¹⁸²

The state supreme court disagreed. Having a legal license to make service in the house, he “[d]eriv[ed] his authority to be there from the law”; therefore, “[i]f he used more force than was necessary to enable

176. *Id.* at 181.

177. *Smith v. McGuire*, 15 Ky. 302 (1824).

178. *Id.* at 303.

179. 20 Barb. 16 (N.Y. Sup. Ct. 1854).

180. *Id.*

181. *Id.* at 16.

182. *Id.* at 16–17.

him to accomplish his purpose, to that extent [only] he is liable as a wrongdoer.”¹⁸³ The judge ought to have instructed the jury “that the defendant was justified, notwithstanding such resistance, in using all the force necessary to enable him to serve the subpoena, and that he was only liable for any excess of violence used by him more than was necessary to overcome the resistance with which he met.”¹⁸⁴ The test was thus an objective one, and the limits of the use of force were strictly governed by the purpose for or the necessity of its use. The case was remanded for a new trial, and it is unclear whether a jury would have found the force excessive. For whatever reason (perhaps the parties settled), it does not appear that there was a second trial.

State v. Lafferty, an 1845 case, squarely addressed the issue of necessary force in the arrest context. In that case, a city watchman, Lafferty, arrested the “prosecuting witness,” Barclay, who resisted and fled; “Lafferty struck [Barclay] several times with a stick.”¹⁸⁵ “The case rested on the questions whether the defendant arrested Barclay under circumstances requiring the interference of the police officers; and whether, after the arrest, he used unnecessary force and violence in attempting to carry him to a place of custody.”¹⁸⁶

The court answered:

The officer has no right to use force where no force is necessary, or reasonably anticipated to be necessary; nor ever to beat an unresisting man. For such abuse of authority he would be very properly held responsible even to an exemplary extent; but where he keeps within the line of his duty he is entitled to protection. The jury will judge of this matter from the evidence.¹⁸⁷

The standard in this case was *necessity*—not clearly unreasonable. The question was whether more force than necessary was used. Further, the question of necessity was decided by a jury rather than a judge. Finally, this was a state prosecution instigated by a private party. It would appear that in the 1800s, states had few qualms prosecuting police officers for any excesses in the line of duty. The officers were responsible for their excesses to an “exemplary extent.”

Golden v. South Carolina,¹⁸⁸ from the Supreme Court of South Carolina, is particularly instructive as it was decided in 1870, only one

183. *Id.* at 17.

184. *Id.* at 18.

185. *State v. Lafferty*, 5 Del. 491 (Gen. Sess. 1854).

186. *Id.* at 491.

187. *Id.*

188. 1 S.C. 292 (1870).

year before Congress passed the Civil Rights Act. Significantly, this was a state prosecution of a police officer by indictment at the instigation of the assaulted individual (who was the “prosecutor” of or “informer” in the action).¹⁸⁹ The prosecutor alleged that the defendant, police officer Joseph Golden, struck Christopher Suhrstedt “several severe blows with his policeman’s club, upon the head and arm, by means of which his . . . arm was broken.”¹⁹⁰ The defendant countered that he saw another member of the police attempting to lead Suhrstedt’s wagon horse; that Suhrstedt was “crazy drunk” and being taken to a guardhouse; that as he came up to the wagon, Suhrstedt was pulling the reins such that Golden’s leg was caught between the wagon and the wheel; that when Suhrstedt refused to “loose the reins,” the officer, “for the sole purpose of freeing himself from his perilous position, reached over with his club and struck said Suhrstedt a light blow on his arm or hand,” at which point his leg was freed; and that by this time another police officer got into the wagon and threw Suhrstedt, “who was still resisting, down in the wagon.”¹⁹¹ A modern reader cannot help but think, *plus ça change*. Back then, at least, juries appear to have been more skeptical of police officers. The jury convicted Golden, and the judge not only sentenced the officer to pay a fine of one hundred dollars, but also to four months’ imprisonment should he default on it.¹⁹²

The trial court had instructed the jury that if the defendant “used only proper and sufficient force for [the] purpose” of securing Suhrstedt as a prisoner, “then he is excused, and should be found not guilty.”¹⁹³ The officer claimed on appeal that the court was wrong to reject two other proffered instructions: that if the officer was engaged in the discharge of his duties, then he should be found not guilty; and that if the defendant acted in good faith, “without malice, passion, or ill will,” then he should be found not guilty.¹⁹⁴

The South Carolina Supreme Court had no problem rejecting the first proffered instruction: “The doctrine claimed in the first would give a latitude to public officers, in the execution of their duty, which would be dangerous to the public, and subversive of the proper relation which, as conservators of the peace, they should maintain to the community.”¹⁹⁵

189. *Id.*

190. *Id.* at 292.

191. *Id.* at 293.

192. *Id.* at 294.

193. *Id.*

194. *Id.*

195. *Id.* at 301.

The South Carolina Supreme Court then held that the trial court had “correctly laid down the law”:

It is not every resistance that will justify an enormous battery. The force applied must have a due regard to the purpose it is to accomplish. It is allowed, when it may be necessary to overcome, by its interposition, the violence which is opposed to prevent the due exercise of the authority with which the officer is charged. If it proceeds beyond the limit of the necessity which originally permitted its use, it is no justification.

. . . This proposition assumes that the person goes no further in the use of force than the law allows; for when one who, for instance, has the right to inflict personal chastisement on another under him, proceeds with it to an illegal extent, he becomes guilty of an assault; and, generally, where the force is authorized, it must not exceed what is necessary, else the excess will be criminal.¹⁹⁶

The test is objective: Did the officer “exceed”—or “proceed[] beyond the limit of”—the necessity which warranted the use of force? The court explicitly rejected the other proffered instruction on good faith: the jury is welcome to infer from the facts the intent to do harm. If in making the arrest the defendant “used more force than was sufficient and proper, from this the jury may construe a wrongful intent.”¹⁹⁷

Almost all cases and authorities from this period seem in agreement: the test is one of necessity to accomplish a given lawful purpose,¹⁹⁸ which is a question for the jury,¹⁹⁹ and courts should have no qualms

196. *Id.* at 302–03.

197. *Id.* at 303.

198. *See also e.g.*, *Murdock v. Ripley*, 35 Me. 472, 474 (1853) (“The defendant, acting as the aid of the officer in making the arrest of Bridgham, was justified in using such force as was necessary to overcome the resistance of the plaintiff. If he used more force than was necessary to accomplish that purpose, he became a trespasser.”); *State v. Mahon*, 3 Del. (3 Harr.) 568, 569 (1842) (“A person having authority to arrest another must do it peaceably, and with as little violence as the case will admit of.”); *Bellows v. Shannon*, 2 Hill 86, 90 (N.Y. Sup. Ct. 1841) (“That excuse is, however, sufficiently answered by the replication, which alleges, in substance, that the plaintiff was acting as a constable, having a warrant for the defendant’s arrest, and used no more force than was necessary to execute the process.”).

199. *See generally Murdock*, 35 Me. at 475 (“It fell within the province of the jury to determine whether the defendant exercised a proper judgment in repelling the resistance of the plaintiff.”); *State v. Stalcup*, 24 N.C. (2 Ired.) 50, 52 (1841) (“He will indeed be liable, although he does not transcend his powers, if he grossly abuse them; and whether he did or not so abuse them was the proper enquiry to be submitted to the [j]ury.”). Few cases state this proposition in such unequivocal terms; but one searches in vain for excessive force cases that were *not* decided by a jury.

holding officers personally liable for damages.²⁰⁰ Subjective intent and good faith featured in some cases,²⁰¹ but this was rare.

The extant evidence before 1871 demonstrates these propositions to a reasonable degree of certainty. Because so few cases from the period exist, summarily examining excessive force cases developed in the decades immediately following the passage of the Civil Rights Act may provide additional insight into the common law principles in these cases as they were understood in 1871.

With the rise of modern police forces, excessive force cases became a lot more common. The flavor of the common law did not change much in these decades. The test tended to be objective: Did the officer use as much force as was necessary to accomplish his purpose, and no more?²⁰² The test occasionally varied with at least one court suggesting that the jury should assess the facts as they appeared to the officer.²⁰³ In substance, however, these tests are the same; although some courts insisted on a subjective inquiry,²⁰⁴ these seem to have been the exception rather

200. *See, e.g., Murdock*, 35 Me. at 475 (“[I]f his own judgment led him astray, he must be responsible for the consequences.”). Again, few cases announce this principle in such clear terms, but it appears from all the cases that officers were liable *either* criminally or civilly.

201. *See, e.g., Stalcup*, 24 N.C. at 52 (“Upon this enquiry we hold that the instructions should have been, as we have before laid it down in an analogous case . . . that there was an abuse of authority, if the facts testified convinced the Jury that the officer did not act honestly in the performance of duty according to his sense of right, but, under the pretext of duty, was gratifying his malice—but if they were not so convinced, he did not abuse his authority.” (internal citation omitted)).

202. *See, e.g., State v. Dennis*, 43 A. 261, 262 (Del. 1895) (“But the peace officer must use no more force and violence than is necessary to secure the arrest.”); *Beaverts v. State*, 4 Tex. App. 175, 177 (Tex. App. 1878) (“On the contrary, the attack was made upon this person whilst he was quietly taking his meal at the table of a public hotel in the town, when he was rudely seized and thrown upon the floor by the marshal, and compelled by force to yield. The most that is shown is that subsequently he was moving towards the marshal with hands uplifted, saying he would not be arrested, when he was stricken by the marshal over the head with a pistol with such violence as to fell him helpless and senseless to the floor. The only wonder is how the accused escaped, under the evidence, with being convicted of a simple assault. An officer having lawful authority to make arrests may, on meeting with resistance, employ such force as may be necessary to overcome such resistance.”); *Mesmer v. Commonwealth*, 67 Va. (26 Gratt.) 976, 984–85 (1875) (“This court is of opinion, that the evidence certified, conclusively shows, that the alleged assault by the plaintiff in error, was made in the discharge of his official duty; as chief of police of the city of Winchester; and that no more force was employed by plaintiff in error than was necessary to secure the arrest of the party he was charged in the said indictment with having assaulted. . . . It would never do, to hold policemen liable under such circumstances, for a prosecution for assault and battery.”); *Mudrock v. Killips*, 28 N.W. 66, 68 (Wis. 1886) (“Having been appointed by the justice to serve the warrant, and such appointment being in the form prescribed by law, it seems to us that he had all the rights of a constable or sheriff in the execution of such warrant, and if he did no more than was necessary in executing the same he could not be held liable as a trespasser, or for assault and battery.”).

203. *State v. Rose*, 44 S.W. 329, 331 (Mo. 1898).

204. *See, e.g., State v. McNinch*, 90 N.C. 695, 700 (1884) (“[T]here is error in an instruction which makes the criminal act depend, not upon an honest exercise of the judgment of the defendants

than the rule. The question was one for the jury,²⁰⁵ and it was expected that police officers would be subject to the “severest penalties” for use of unnecessary force.²⁰⁶

C. Conclusion: The Common Law’s (Objective) Rule

The common law had a very different approach to excessive force cases. The test was objective rather than subjective, like modern doctrine, but it was emphatically the province of the jury to decide the reasonableness of the action. There were no immunities beyond those the jury was willing to grant, and the officer was to be personally liable or indemnified by the state. The rest of this Article asserts that as a matter of statutory and constitutional interpretation, the common law approach should govern in § 1983 cases as well as in federal-officer cases.

IV. COMMON LAW AND CONSTITUTIONAL INTERPRETATION

There are two ways by which one may conclude that the courts, as a matter of principle, ought to adopt the common law method for trying excessive force cases. The first is that the original understanding of the Fourth Amendment—which applies both to federal officers and state officers (through incorporation)—subsumed the common law principles. The second is that as a matter of statutory interpretation, courts are justified in incorporating common law principles into section one of the Civil Rights Act of 1871. The result would be the same because we have discovered throughout this piece that the common law allowed for no special immunities in these cases. If the officer used reasonable force—in the same way that an officer may have in good faith executed an invalid warrant—then he is immune from liability. If the officer used excessive force—in the same way that an officer may have known that a warrant

as to the degree of force necessary to be exerted, under the restraints mentioned, but upon the conclusion of the jury, in a review of the facts, that the force was needless and the same result would have been obtained by the use of less.”)

205. See, e.g., *Zube v. Weber*, 34 N.W. 264, 268 (Mich. 1887) (“[W]hether or not any more force was used than was necessary . . . was one of the questions to be passed upon by the jury. The witnesses should have been allowed to state facts, and not to assume the province of the jury.”).

206. For a particularly forceful evocation of this principle in an 1876 case, see *Roddy v. Finnegan*, 43 Md. 490, 506 (1876) (“If they fail in the performance of duty, or their conduct proceeds from a spirit of oppression or annoyance, they place themselves beyond the immunity afforded by the law, and become offenders themselves, and are liable to the severest penalties.”); see also *Den- nis*, 43 A. at 262 (“[I]f [the officer] uses more violence than is reasonably necessary, then he acts in an unlawful manner, and he might be held liable to the person injured in a civil action for damages, for an assault and battery, say, or to indictment for assault and battery.”).

was invalid—then he is liable. Whether we define this principle as an “immunity” or simply as a “right” seems inconsequential.

What this Article aims to show is that the Court’s *current* qualified-immunity approach is not justified by either interpretive method. The current approach is inconsistent with original meaning, and it is inconsistent with applying common law background principles to broad statutes. Furthermore, it is a doctrine the Court has invented out of whole cloth, for either policy reasons or because of an accident of history (as described in Part II). As a matter of statutory and constitutional interpretation, the modern doctrine is hard to justify.

This Part thus begins with an examination of the “meaning” of the Fourth Amendment as understood in 1789 and 1871. It argues that as an originalist matter, the meaning of the Fourth Amendment as it was understood in 1789 ought to govern in *Bivens* actions, even if the *Bivens* court was wrong as an originalist matter to provide a cause of action directly under the Fourth Amendment. Further, the meaning of the Fourth Amendment in 1871 ought to govern § 1983 cases. Assuming incorporation doctrine to be correct, the Fourth Amendment rights as understood by the drafters in 1871 are the rights § 1983 protects.

Put differently, to know when a federal officer has violated the Constitution by using excessive force, for which he is liable under *Bivens*, we must know what “unreasonable seizures” meant to the Founders. Similarly, to know when a state officer has violated the Constitution by using excessive force, for which he is liable under § 1983, we must know what “unreasonable seizures” meant either to the drafters of the statute of 1871, or to the Founders in 1789 (if the drafters in 1871 were originalists). In either case, we must understand the common law to understand the constitutional right.

A. Common Law Principles and the Fourth Amendment

Under modern Fourth Amendment doctrine, the Supreme Court assumes that common law principles shape the scope of Fourth Amendment rights. As one scholar has written, “[T]he Supreme Court has declared that the principal criterion for assessing whether searches and seizures are ‘unreasonable’ within the meaning of the Constitution is whether they were allowed by eighteenth-century common law.”²⁰⁷ Several Supreme Court Justices explicitly rely on the common law when

207. David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739, 1739 (2000).

interpreting the Fourth Amendment.²⁰⁸ As Justice Scalia has said, “In my view, the path out of [doctrinal] confusion should be sought by returning to the first principle that the ‘reasonableness’ requirement of the Fourth Amendment affords the protection that the common law afforded.”²⁰⁹ Or in the more recent controversial case of *United States v. Jones*, Justice Scalia wrote for the majority: “Consistent with this understanding, our Fourth Amendment jurisprudence was tied to common-law trespass,” and, “What we apply is an 18th-century guarantee against unreasonable searches, which we believe must provide *at a minimum* the degree of protection it afforded when it was adopted.”²¹⁰

If one assumes that the common law does indeed inform Fourth Amendment doctrine, and assumes that to be a good thing, then the notion that the common law’s excessive force cases should help define unreasonable seizure is unobjectionable. The argument can end here; those Supreme Court Justices who adhere to this Fourth Amendment originalism ought to adopt the common law approach discussed in Part III without much hesitation.

Of course, some judges and scholars oppose the use of common law principles to inform the scope of Fourth Amendment rights.²¹¹ Yet others, such as Akhil Amar, argue that a more complete return to common law principles would dramatically improve what is (or was as of 1994, when he was writing) a complete doctrinal mess.²¹² Many scholars, moreover, acknowledge that if we *are* originalists, then we must read the Fourth Amendment in light of the common law because that is, indeed, how the founding generation understood it.²¹³

This Article has little to contribute to this debate. This Article has already made many significant (yet reasonable) assumptions—that *Monroe v. Pape* was rightly decided, for instance.²¹⁴ It now makes the additional assumption that originalism is correct; or at least, it claims that *if we assume originalism to be correct*—and many do today—then modern courts ought to treat excessive force cases as the common law treated

208. See Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 211 n.47 (1993) (collecting quotations).

209. *California v. Acevedo*, 500 U.S. 565, 583 (1991) (Scalia, J., concurring in judgment).

210. *United States v. Jones*, 132 S. Ct. 945, 949, 953 (2012) (emphasis in original).

211. See, e.g., Sklansky, *supra* note 207.

212. See Amar, *supra* note 172, at 800–18.

213. See, e.g., Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 668–724 (1999).

214. Though as discussed in *Monroe v. Pape*, 365 U.S. 167 (1991) and *supra* text accompanying note 92, § 1983 may be implicated even without *Monroe* given expansive state-law immunity doctrines.

them. Thus, this section merely draws an obvious conclusion once we tie the common law approach with this modern theory of constitutional interpretation.

There is nothing different about *Bivens* actions that require the Court to fashion judicial remedies untethered from the common law. The *rights* that federal officers can potentially violate are still defined by the Fourth Amendment—which is itself shaped by the common law—whether or not *Bivens* was correct to provide a cause of action directly under the Fourth Amendment. Thus, even though the Court has taken the liberty to “use any available remedy to make good the wrong done” when federal rights are violated,²¹⁵ if the original understanding provides an adequate remedy, then there is no theoretical or practical reason to diverge from it.

In sum, federal *Bivens* actions for the use of excessive force ought to track common law principles. Part III discussed what those principles are, and they involve no immunities of the kind in today’s modern doctrine. The test is very much like the test in *Graham v. Connor*, as previously explained:²¹⁶ it was an objective and not a subjective test; it was the province of the jury—not the judge, who so often decides these cases today—to judge the reasonableness of the force; and finally, it was expected that officers would be civilly liable for their transgressions. While there are not many early cases on point, those that exist, along with the authority of Blackstone, are consistent with these principles.

B. Incorporation and the Fourth Amendment

This section provides a constitutional interpretation argument for adopting the common law approach to excessive force cases in § 1983 actions. This section, too, will be brief, because it takes but one step farther from those which the preceding section has taken. This step assumes that as an originalist matter, the Fourteenth Amendment was intended to incorporate the Bill of Rights against the states. That is still to this day a hotly disputed proposition.²¹⁷ Even if one disagrees with this proposition, it is so ingrained in our law that we may as well assume it to be true for purposes of this argument.

The argument goes as follows: If incorporation is “true” as an originalist matter, then the congressional authors of the Civil Rights Act

215. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 396 (1971).

216. *See id.* and *supra* text accompanying note 16.

217. For one of the best articles disputing the correctness of the incorporation theory, see Philip Hamburger, *Privileges or Immunities*, 105 NW. U. L. REV. 61 (2011).

of 1871 presumably understood it to be true. This leads to the conclusion that constitutional rights ran against *state* officers as well as federal officers, which means that a state officer could violate the Fourth Amendment as it was understood at the time and be prosecuted for the violation (even if federal officials could not be prosecuted until *Bivens* almost a century later).

Thus, the right against unreasonable searches and seizures, as the meaning of that right was understood in 1871 (or perhaps 1789), is the right that plaintiffs could enforce against state officers by virtue of section one of the Civil Rights Act of 1871. But the meaning of unreasonable searches and seizures, as I argue and as others have argued as well,²¹⁸ is manifestly connected to the common law history of the Fourth Amendment. That history includes actions for excessive force at common law. Therefore, the common law treatment of excessive force cases fleshes out the meaning of the Fourth Amendment (or perhaps is incorporated in it), which is then incorporated against the states in the Fourteenth Amendment, and which is finally made enforceable against state officers in the 1871 Civil Rights Act.²¹⁹

V. COMMON LAW AND STATUTORY INTERPRETATION

This final Part offers an independent route, via statutory interpretation, to the same conclusions arrived at in our constitutional inquiry for § 1983 cases. It is worth taking this independent route to see where it goes because it is the route by which the courts have traditionally interpreted § 1983 and from which modern qualified immunity doctrine has deviated.

There are two initial hurdles the following statutory interpretation analysis must overcome. Justice Scalia suggests the first in his dissenting opinion in *Crawford-El v. Britton*.²²⁰ What is the point of adhering to common law immunities in § 1983 actions when the underlying under-

218. See, e.g., Davies, *supra* note 213.

219. Indeed, it is worth noting here that one of Justice Scalia's key complaints about *Monroe v. Pape* is that 42 U.S.C. § 1983 had only provided for fifty or so prosecutions between 1871 and 1961. *Crawford-El v. Britton*, 523 U.S. 574, 611 (1998) (Scalia, J., dissenting). Thus, he argues, it was not intended to provide a general federal remedy for constitutional torts committed by state officers. *Id.* Incorporation, however, provides an alternative explanation of the dearth of cases: If the protections of the Constitution did not run against state officers until incorporation took hold in the 1940s–60s, then there would have been very few opportunities to apply § 1983 to state officers. Only when these rights applied to state officers did the issues of personal liability in *Monroe* and subsequent § 1983 cases arise.

220. *Id.*

standing of the statute that *Monroe v. Pape* engendered bears no resemblance to what the Congress of 1871 had in mind?

As Justice Scalia stated in his dissenting opinion,

Monroe changed a statute that had generated only 21 cases in the first 50 years of its existence into one that pours into the federal courts tens of thousands of suits each year, and engages this Court in a losing struggle to prevent the Constitution from degenerating into a general tort law. . . . Applying normal common-law rules to the statute that *Monroe* created would carry us further and further from what any sane Congress could have enacted.²²¹

Again, the correctness of *Monroe*, which has been debated thoroughly in the academic literature,²²² is beyond the scope of this Article. *Monroe* certainly has its originalist justifications, ranging from purpose, to legislative intent, to a not unreasonable textual reading, discussed in the opinion itself²²³ as well as in the literature.²²⁴

One possible reason that the civil rights statute generated so few cases in its early years is that federal constitutional rights did not *apply* against state officers until incorporation in the 1940s–60s. A plaintiff cannot sue a state official for an unreasonable search under § 1983 if the Fourth Amendment does not even apply to the state officer.²²⁵ In any event, we can proceed with our exercise simply accepting *Monroe*'s correctness. Even if its interpretation was a judicial invention, does it follow that judges should take any and all liberties with the statute?

An answer lies in the all-too-pertinent analogy that *Bivens* presents, which Part IV has already discussed. Conservatives may lament that *Bivens* is unoriginalist—that the original Fourth Amendment did not provide a self-enforcing cause of action—but now that the Court has interpreted it to include precisely such a cause of action, the Court is not free to reinvent the meaning of the Fourth Amendment wholesale. There is a *limit* to what the Court can do with any legal text, even after it has diverged from its original meaning. In the context of *Bivens*, the Court has permitted itself to “fashion” the judicial remedy that it created, just as it fashioned suppression doctrine, but surely even a conservative such

221. *Id.*

222. Compare Eric H. Zagrans, “Under Color Of” What Law: A Reconstructed Model of Section 1983 Liability, 71 VA. L. REV. 499 (1985), with Steven L. Winter, *The Meaning of “Under Color Of” Law*, 91 MICH. L. REV. 323 (1992).

223. *Monroe v. Pape*, 365 U.S. 167, 172–87 (1961).

224. See, e.g., Winter, *supra* note 222.

225. The Fourth Amendment was incorporated against the states only in 1949. *Wolf v. Colorado*, 338 U.S. 25 (1949); see also *supra* note 219.

as Justice Scalia could agree that the judicially fashioned remedy should adhere as closely as possible to what the founding generation would have understood the Fourth Amendment to provide.

Moreover, even if suits against officers should be heard in state courts, the immunity laws of several states have evolved to track the robust federal immunity law²²⁶ and might thus implicate § 1983 under Justice Frankfurter's understanding of the statute. In other words, it may be that these suits should be in state court, but if that were so, plaintiffs still will not recover because these states follow a federal immunity law which itself developed from a faulty conflation of federal and state cases in § 1983 suits. This expansion of state immunity doctrines may very well trigger § 1983 even under Justice Frankfurter's more limited view of the statute. He believed that if, for example,

petitioners had sought damages in the state courts of Illinois and if those courts had refused redress on the ground that the official character of the respondents clothed them with civil immunity, we would be faced with the sort of situation . . . [of State sanction that] 'would run counter to the guaranty of the Fourteenth Amendment.'²²⁷

The second hurdle is choosing a method of statutory interpretation. A textualist or purposivist reading of § 1983 may not accord with a reading informed by legislative intent or background principles of law. As the Court said in one of its early immunity cases, "The statute . . . creates a species of tort liability that on its face admits of no immunities, and some have argued that it should be applied as stringently as it reads."²²⁸ Further, the purpose of the statute is remedial, and such statutes are (at least under one canon of construction) broadly construed. In the words of Justice Douglas, dissenting in *Pierson v. Ray*, "Nor should the canon of construction 'statutes in derogation of the common law are to be strictly con-

226. For example, the two largest states in the Fifth Circuit follow federal immunity law. *Cantu v. Rocha*, 77 F.3d 795, 808 (5th Cir. 1996) ("Thus, Texas' law of qualified or official immunity is substantially the same as federal immunity law."); *Moresi v. State*, 567 So. 2d 1081, 1093-94 (La. 1990) ("The same factors that compelled the United States Supreme Court to recognize a qualified good faith immunity for state officers under § 1983 require us to recognize a similar immunity for them under any action arising from the state constitution. . . . If the defendant shows that the state constitutional right alleged to have been violated was not clearly established, the defendant is entitled to qualified immunity.").

227. *Monroe*, 365 U.S. at 211 (Frankfurter, J., dissenting) (quoting *Wolf v. Colorado*, 365 U.S. 25, 28 (1949)); see also *supra* note 94 and accompanying text.

228. *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976).

strued' be applied so as to weaken a remedial statute whose purpose is to remedy the defects of the preexisting law."²²⁹

On the other hand, both judges and legislators presume the existence of certain background principles of the common law. As Justice Douglas acknowledged, "Congress of course acts in the context of existing common-law rules."²³⁰ There is evidence from the congressional debates that at least some members of Congress specifically intended that common law principles would apply.²³¹

Moreover, *each* method of interpretation—or each rung on the “funnel of abstraction,” from the more concrete (text) to the more abstract (general principles of law)²³²—suffers from certain problems. For example, the purpose and intent of the legislature is difficult to define. Justice Scalia has quite properly said that what legislators *leave out* of a statute evinces as much “purpose” as what they put in, and thus “purpose” may be a meaningless interpretive tool.²³³ While some congressmen may have specifically intended for common law principles to apply to section one of the Civil Rights Act, others specifically understood or believed that the statute would allow for no immunities.²³⁴

This Part will not reinvent the wheel of statutory interpretation. It makes the strongest case for incorporating common law principles into the statute based on the most concrete and then the most abstract “rungs” on the funnel of abstraction. As one goes up and back down the levels of abstraction, from text and legislative intent, to purpose and background principles of law, a stronger and stronger case emerges for incorporating common law doctrines in general and in excessive force cases in particular.²³⁵

229. *Pierson v. Ray*, 386 U.S. 547, 561 (1967) (Douglas, J., dissenting).

230. *Id.*

231. See *infra* note 235 and accompanying text.

232. For a discussion of this concept, see WILLIAM N. ESKRIDGE, JR. ET AL., *CASES AND MATERIALS ON STATUTORY INTERPRETATION* 297–99 (2012).

233. ANTONIN SCALIA & BRYAN GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 21, 57 (2012).

234. See, e.g., *Pierson*, 386 U.S. at 561–63 (citing legislative history).

235. One might also consider now the differences, if any, between constitutional and statutory interpretation. Though many seem to disagree, I am not so sure there is much difference between the two. For the same reason common law principles inform the meaning of the Fourth Amendment, as discussed in the preceding Part, surely they also inform the meaning of an open-ended enforcement statute passed in 1871? True, those principles in 1871 may have slightly differed from those of 1789, but has the *method* of interpreting legal texts changed? Just as the Framers assumed a whole host of common law cases and principles when they wrote “unreasonable searches and seizures” into the text of the Fourth Amendment, surely the congressional authors of section one of the Civil Rights Act of 1871 understood that their own statute would be interpreted in light of common law principles. There may be some differences one would need to consider in more depth, but my point now is

A. Text and Language in Context

There may be good textual reasons to assume the incorporation of common law principles in § 1983. If Justice Douglas was correct that the language of the statute admits of no immunities, then the constitutional analysis in Part IV governs without exception. This textual reading would provide further support for the interpretive claims in Part IV. However, that is not the claim of this section. Rather the point is that even if we assume the Congress of 1871 incorporated these principles, they do not justify immunity in *excessive force* cases, where the common law allowed for no immunities beyond what a jury was willing to grant.

The best textual argument for incorporating common law immunities is the common-sense notion that words only have meaning in broader contexts, and Congress understood that it was legislating within the context of the common law. John Manning has been the most prominent advocate of this contextual approach in his defenses of textualism. As he has written in a lengthy passage,

If textualists were literalists, it would be easy to understand the attraction of equitable interpretation. Modern textualists, however, are not literalists. In contrast to their early-twentieth-century predecessors in the ‘plain meaning’ school, they do not claim that interpretation can occur ‘within the four corners’ of a statute, or that ‘the duty of interpretation does not arise’ when a text is ‘plain.’ Rather, modern textualists acknowledge that language has meaning only in context. As discussed, they believe that statutory language, like all language, conveys meaning only because a linguistic community attaches common understandings to words and phrases, and relies on shared conventions for deciphering those words and phrases in particular contexts. Hence, textualists ask how ‘a skilled, objectively reasonable user of words’ would have understood the statutory text, as applied to the problem before the court.

The ‘reasonable user’ approach gives textualists significant room to account for the nuances of language, a factor that is especially significant in a mature legal system with a rich set of background legal understandings and conventions. Textualists, of course, often consult dictionaries as an important historical record of the ways in which speakers have used words in the past. But they do not stop there. As Judge Easterbrook once put it, a dictionary is merely ‘a museum of words, an historical catalog rather than a means to decode the work of legislatures.’ Like any reasonable language user,

only that it does not seem at all odd to do in statutory construction cases what we already do in constitutional interpretation cases.

textualists pay attention to the glosses often put on language (even in ordinary usage), the specialized connotations of established terms of art, and the background conventions that sometimes tell readers how to fill in the gaps inevitably left in statutory directions. Each of these considerations focuses on faithfully decoding the text while sharply reducing the basic justification for the equity of the statute.²³⁶

Applying Manning's argument, a textualist would consider how a reasonable observer in the public would have understood the language "deprivation of any rights, privileges, or immunities secured by the Constitution and laws" in the civil rights statute.²³⁷ Reasonable observers may have understood that these words *meant* that the rights, privileges, and immunities secured by the common law would apply. The common law is part of the "laws," and the Constitution's meaning is informed by its common law history. That is not to say that the common law exclusively defines these rights, but merely that it would be one source of law that explicates the meaning of the statutory provision.

One might object that this "textualism" is nothing but purposivism, intent, or some other kind of interpretive method in textualist's clothing. And perhaps it is. But that does not make it objectionable; it makes it eminently sensible. A better way to look at it, however, is that as one goes up and down the funnel of abstraction, the textual meaning itself becomes clearer.²³⁸

It seems fair to say that this approach is still textualism. McGinnis and Rappaport lend support to this approach in their own recent article on constitutional interpretation.²³⁹ "The possibility of multiple meanings would be significantly reduced or eliminated if legislators understood that the words of a law would be interpreted in accordance with applica-

236. John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 108–09 (2001) (internal citations omitted); see also John F. Manning, *Textualism As a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 702 (1997) ("The burden of explaining the internal consistency of textualism derives from another aspect of textualist interpretive philosophy as well. In their search for context, textualist judges routinely draw interpretive insights from sources outside the statutory text. They recognize, for example, that statutory terms may be terms of art, and that the details of the relevant art may supply a crucial piece of a statute's interpretive context.").

237. 42 U.S.C. § 1983 (2012).

238. Consider the following metaphor: Text is inherently ambiguous, so suppose its meaning is a vector, but we only know where it is pointing to within a five-degree-angle of certainty. One might then look at linguistic conventions, legislative intent, or statutory purpose, and so forth, to see if there are any clues which sharpen our degree of certainty. An analysis of context or purpose might reduce our uncertainty to but one-degree angle.

239. John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751 (2009).

ble rules,”²⁴⁰ they write. “Not only would the background rules promote the enactment of laws with a single meaning, they would also facilitate the determination of that meaning.”²⁴¹

The legislative history also reveals the importance of the common law background. Only three members of Congress actually raised the concern that official immunity would be lost with the passage of section one of the Civil Rights Act.²⁴² These were *opponents* of the bill who had “an incentive to exaggerate the bill’s effects.”²⁴³ Moreover, some legislators specifically responded that these concerns were overwrought because the common law already afforded protections.²⁴⁴

One should keep in mind the purpose of legislative debate and be cautious of reading too much into the legislative history.²⁴⁵ That history offers enough evidence, however, that some and quite possibly most members of Congress—and thus probably the public at large—expected statutes to be interpreted in light of their common law meanings. At least, they understood that their words did not exist in a vacuum. How else would courts come to decide on questions of punitive damages, equitable relief, statutes of limitations, survival of claims, causation, and the like, which were not spelled out in the civil rights statute?²⁴⁶

Because the legislative history is somewhat ambiguous, the next step in our statutory interpretation analysis is a general discussion of the background principles of law accepted in 1871. They reveal that common law principles generally governed ambiguity and fleshed out the meaning of words such as privileges or immunities. A stronger case thus emerges for incorporating common law principles into excessive-force cases pursued under § 1983.

240. *Id.* at 760.

241. *Id.*

242. David Achtenberg, *Immunity Under 42 U.S.C. § 1983: Interpretive Approach and the Search for the Legislative Will*, 86 NW. U. L. REV. 497, 507 & n.62 (1992). These three congressmen were Senator Thurman, Representative Arthur, and Representative Lewis.

243. *Id.* at 505 n.52 (citing *NLRB v. Fruit & Vegetable Packers*, 377 U.S. 58, 66 (1964)).

244. See Larry Kramer & Alan O. Sykes, *Municipal Liability Under §1983: A Legal and Economic Analysis*, 1987 SUP. CT. REV. 249, 257 & n.29 (citing Cong. Globe, 42d Cong., 1st Sess. app. at 707, 771 (1871)).

245. See Achtenberg, *supra* note 242, at 506 (“[A] nineteenth-century member of Congress debated in order to influence his colleagues—not the court.”); Jennifer A. Coleman, *42 U.S.C. Section 1988: A Congressionally-Mandated Approach to the Construction of Section 1983*, 19 IND. L. REV. 665, 673 (1986) (“While the debates may provide a general understanding of the statute’s overriding purposes and goals, they are far too incomplete and equivocal to be determinative of narrowly drawn problems of section 1983 application.”).

246. *Cf.* Beermann, *supra* note 111, at 51.

B. Background Principles and Legislative Intent

David Achtenberg has described the method of statutory interpretation well-known and well-used at the time of § 1983's passage as the "Golden Rule": legal interpreters subject textual language "to the 'golden rule' that a statute should not be read literally if doing so would lead to a result which Congress could not have intended."²⁴⁷ Part II described in depth the Court's historical and constitutional arguments in *Tenney v. Brandhove*.²⁴⁸ Achtenberg cites *Tenney* as a prime example of the golden rule method of statutory interpretation.

The golden rule is rooted in a theory of legislative intent. "The 42nd Congress did not act in a contextual vacuum," writes Achtenberg.²⁴⁹ "Legislative immunity was not an insignificant rule of the common law, known only to the most scholarly members of the legal profession. It was a fundamental political principle deeply embedded in Anglo-American history."²⁵⁰ If the intent is what governs, then common law rules and deeply held political principles must inform the textual analysis. Congress would have expected them to do so.

This type of interpretation was common in 1871. "The Golden Rule Approach represents a type of interpretation with which the lawyers in the forty-second Congress would have been familiar. It was frequently utilized in the early nineteenth century," writes Achtenberg.²⁵¹ He cites opinions from Chief Justice Marshall in the early 1800s, to the famous statutory interpretation cases of *United States v. Kirby*²⁵² and *Holy Trinity*,²⁵³ to confirm this position.²⁵⁴

Although Achtenberg himself implies that the golden rule approach is not satisfactory in immunity cases, his reasons are not fully convincing. He argues that it is wrong because it assumes that a recognition of immunities is inconsistent with a literal reading of the text.²⁵⁵ Regardless of approach—whether jurists believed they were interpreting the meaning of the words, or simply interpreting the intent of Congress—the conclusion is the same: common law immunities should flesh out meaning to give full import to the statute's words, or to be consistent with intent. In either case the result is the same.

247. *Id.*; see also Achtenberg, *supra* note 242, at 512.

248. See *supra* Part II.

249. Achtenberg, *supra* note 242, at 513.

250. *Id.*

251. *Id.* at 514.

252. 74 U.S. (7 Wall.) 482 (1869).

253. 143 U.S. 457 (1892).

254. Achtenberg, *supra* note 242, at 514–15.

255. *Id.* at 516.

Achtenberg then argues that the golden rule approach “fails to recognize the evidence that Congress did not intend to resolve immunity issues itself, but rather intended to give the Court some discretion to do so on a case-by-case basis.”²⁵⁶ That may be true, but it does not contradict the importance of using common law to inform the outcome of cases.

Achtenberg’s third criticism is more persuasive: no unitary body of common law existed at the time for Congress to incorporate.²⁵⁷ “The common law of tort was fragmented both geographically and substantively. . . . The early twentieth-century efforts of the American Law Institute Restatements to bring order out of chaos implicitly recognized that chaos did exist.”²⁵⁸

Fortunately, at least with respect to excessive force cases, the common law courts of the various states appear to have been in agreement about the principles that govern in such cases. Part III has shown that there was, at the time, at least a body of common law in excessive force cases that courts can presume Congress to have incorporated into the statute.

Ultimately, as Achtenberg himself acknowledged, the golden rule approach to interpretation was accepted in 1871. Whether or not we accept it today, it helps us understand as a textual matter what the drafters meant by the words they enacted. It helps us understand as well the legislative intent of the drafters. The background rules against which they were drafting were not only common law rules; as the Court in *Tenney* suggested, they were also deeply held political and constitutional principles. But common law rules were one major source of law that legislative drafters expected would apply.

This does not mean that written words could not amend or shape the common law background principles. As Achtenberg describes, the early common law immunity cases adapted text and history to each other:

If a particular immunity would interfere with [the] purposes [of the statute], it would be irrational to conclude that Congress could not have meant to abrogate it. Thus, an immunity will be recognized if, but only if, it meets both conditions: it must have been a well-

256. *Id.*

257. *Id.* at 522.

258. *Id.*

established common-law immunity in 1871 and its existence must be compatible with the purposes of § 1983.²⁵⁹

But more importantly, the text and the principles reinforce one another.

Some have continued to criticize the Court's incorporation of common law immunities on the grounds that there was no coherent common law at the time²⁶⁰ or that the history is too indeterminate.²⁶¹ As a matter of theory, however, perhaps one can always dispute the specifics, but it is difficult to dispute the generalities: statutory authors and the educated public understood that laws were written in a broader historical, political, and legal context and that those laws would be interpreted in light of that context and its background principles.

To bring us back full circle, none of this is to say that the Court's historic common law immunity cases suffer from no analytical, historical, or theoretical flaws. They very well may be imperfect. The claim here has only been that as a matter of statutory interpretation, the common law immunity cases are much more satisfying than the Court's quite literally invented qualified immunity doctrine, which arose in a context divorced from the requirements of statutory interpretation. If the common law approach were recovered, then excessive force cases could be assessed in light of their common law predecessors.

VI. CONCLUSION AND POLICY OBJECTIONS ANSWERED

This Article has attempted to demonstrate the following: As a result of historical accident or a misguided policy decision by the Supreme Court, excessive force cases, coupled with qualified immunity doctrine, bear no resemblance to the common law mode of trying such cases. The modern doctrine makes it extremely difficult for plaintiffs to recover, for plaintiffs to get to a jury, and for courts to distinguish cases on a principled basis. Yet that need not be the case.

Not only is the common law approach more practical and perhaps more fair and reasonable, it is also an approach more theoretically consistent with interpretive methods in both constitutional and statutory interpretation. The common law shaped the meaning of the Fourth Amendment in both 1789 and 1871, and it shaped the meaning of the statute, which the courts have long presumed to have incorporated common law methods and immunities.

259. *Id.* at 514.

260. See, e.g., Coleman, *supra* note 245, at 676.

261. Matasar, *supra* note 46, at 742–44.

The common law approach to excessive force cases also does not raise the policy concerns that led the Court to adopt modern qualified immunity doctrine in the first place. One concern was the need to abandon the subjective component to many of the common law tests. As the Court said approvingly in *Anderson v. Creighton*, modern immunity doctrine has replaced “the inquiry into subjective malice so frequently required at common law with an objective inquiry into the legal reasonableness of the official action.”²⁶²

We have learned, however, that at least in excessive force cases, the common law doctrine was an objective test. While some cases adopted a subjective component, these cases were few and far between. The test was a straightforward one that a jury could apply: Did the officer engage in more force than was necessary for accomplishing his purpose? His good faith or ill will did not matter at all, except insofar as they might help a jury conclude that the force was objectively reasonable or not.

In completely abandoning the common law when the plaintiff suggested its application in *Anderson*, Justice Scalia also worried about the level of generality at which the common law principles would have to be applied:

The approach suggested by the Creightons would introduce into qualified immunity analysis a complexity rivaling that which we found sufficiently daunting to deter us from tailoring the doctrine to the nature of officials’ duties or of the rights allegedly violated. Just in the field of unlawful arrests, for example, a cursory examination of the Restatement (Second) of Torts suggests that special exceptions from the general rule of qualified immunity would have to be made for arrests pursuant to a warrant but outside the jurisdiction of the issuing authority, §§ 122, 129(a), arrests after the warrant had lapsed, §§ 122, 130(a), and arrests without a warrant, § 121.²⁶³

Justice Scalia then excoriated this approach as “complex” and “unsuitable.”²⁶⁴

In the first place, statutory interpretation may not require applying the common law at such a level of detail. When the drafters of the 1871 Act and the public that read of it understood its language in the context of common law principles, it does not necessarily follow that the common law *alone* is what applies. It may be that the drafters and public would have understood the language to incorporate such detail, but it is

262. *Anderson v. Creighton*, 483 U.S. 635, 645 (1987).

263. *Id.*

264. *Id.*

just as plausible that they did not. But moreover, this concern does not apply in any case to excessive force claims because those common law cases expressed principles—those discussed in Part III—at a rather high level of generality.

We might also worry about officers being “mulcted” for damages if they err in judgment,²⁶⁵ but the common law expected officers to be mulcted in damages for their errors in judgment. Some courts explicitly stated that the law expected that officers would be grievously punished for such errors. Although officers may have had greater wealth in the seventeenth and eighteenth centuries, indemnification by the state may resolve this financial concern while staying more true to the common law.

Finally, it is indeed problematic that § 1983 has devolved into a general tort statute. This Article has explained that historically these excessive force cases were tried in state common law courts. At least one of the Fifth Circuit cases described in Part I included a state criminal trial against the officer as well²⁶⁶—just as the state criminally prosecuted offending officers in the 1800s. Perhaps these cases should be heard in state courts today. As this Article has explained, however, because state law immunities now track the expansive federal immunity doctrine, these immunities might trigger the original understanding of § 1983 liability in any event. These cases might therefore be heard in federal court anyway, and as long as that is so, the federal judiciary should adopt an approach that is more fair and workable and that is all at once more consistent with widely accepted methods in both constitutional and statutory interpretation.

265. *Pierson v. Ray*, 386 U.S. 547, 612 (1967).

266. *Tolan v. Cotton*, 713 F.3d 299, 303 (5th Cir. 2013).