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Qualified Immunity and Statutory Interpretation: A Response to William Baude

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Qualified Immunity and Statutory Interpretation: A Response to William Baude

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INTRODUCTION

Professor William Baude asks, "Is qualified immunity unlawful?"[1] He refers to the § 1983 defense, under which officers avoid liability for damages unless they have violated "clearly established statutory or constitutional rights of which a reasonable person would have known."[2] Baude concludes that qualified immunity is unlawful because neither the text of the statute nor any valid rule of statutory interpretation authorizes this defense.[3] Under his preferred rules of statutory interpretation, common law defenses would be allowed, but the universe of defenses and other tort principles is limited to only those that were available in 1871, which does not include modern qualified immunity.[4] In other words, according to Baude, if a given doctrine did not exist in 1871, it should not be applied today. Thus, modern qualified immunity is "unlawful" because it did not exist in 1871.

The implications of Baude's argument are enormous. If the Supreme Court accepts it, police officers and other officials who deprive citizens of their constitutional rights could be subject to much more liability than the current law permits. This could incentivize officials acting under the color of law to better respect and protect individuals' rights, which is more than the Court's § 1983 doctrine currently encourages. As a policy matter, we are generally sympathetic with this potential development because we tentatively agree with the critiques that the current qualified immunity doctrine leads to far too many constitutional abuses and must be adjusted. But as a matter of statutory interpretation, Baude is off base, both normatively and descriptively. If his argument is only motivated by his approach to statutory interpretation, we suggest that he is simply mistaken. If his argument is also motivated by his policy preferences, then he is not merely mistaken as a doctrinal matter; his argument also deprives him of the most direct means of achieving the change he wants because it is highly unlikely that the Court will reject in toto decades of precedent.

Section 1983 authorizes suits for damages against local governments, state and local officials, and others who violate constitutional rights. The statute, enacted by the 42nd Congress in 1871, provides that "[e]very person" who violates constitutional rights "under color of" state law is subject to suit for damages or injunctive relief.[5] But it makes no mention of tort-like issues that arise in these suits, such as causation, damages, and defenses. Consequently,

1. William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45 (2018).
2. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).
3. Baude, *supra* note 1, at 88.
4. *See id.* at 54–55.
5. 42 U.S.C. § 1983. (2012).

courts must fill these gaps. Common sense suggests that this type of litigation raises issues of statutory interpretation, specifically questions about what rules of statutory interpretation should and do apply. Our fundamental disagreement with Baude is rooted in our different answers to these questions and is methodological rather than substantive. We take no position on the content of actual or proposed constitutional tort rules, we do not object here to Baude's general approach to statutory interpretation, and we put aside any policy preferences about official immunity. Rather, our issue is with Baude's claims about the *sources* the courts should and do look to when interpreting and applying § 1983.

In support of his argument that qualified immunity is unlawful, Baude advances two specific propositions that we challenge. One is his normative claim that conventional rules of statutory interpretation should be used in adjudicating issues raised in § 1983 litigation. We believe that his assertion is flatly wrong. Section 1983 is better understood as a "common law statute," to which different rules apply. Baude acknowledges that such statutes exist and uses the Sherman Act as an example.[6] However, Baude errs when he distinguishes § 1983 from the Sherman Act. If we are right, then Baude is mistaken in his argument that defenses to § 1983 claims are to be understood only by reference to the common law as it stood in 1871. Part I focuses on this normative issue.

Baude's second assertion is harder to pin down. It is clear that he favors treating 1871 tort doctrine as the controlling source of law and that he takes seriously the Court's statements supporting this approach to statutory interpretation. When it comes to the typical modern statute, interpretation begins—and often ends—with the text of the statute, its evident purposes, and perhaps its legislative history.[7] Indeed, plenty of statements in Supreme Court opinions support the view of applying this modern approach to statutory interpretation. For example, the Court has said that a § 1983 issue "is essentially one of statutory construction,"[8] that "[w]e do not have a license to establish immunities from § 1983 actions in the interests of what we judge to be sound public policy,"[9] and that "our role is to interpret the intent of Congress in

6. Baude, *supra* note 1, at 78.

7. Debates about the proper methods of statutory interpretation are extensive. *See, e.g.*, Glen Staszewski, *The Dumbing Down of Statutory Interpretation*, 95 B.U. L. REV. 209, 210–12 (2015) (noting that the resurgence of debates surrounding statutory interpretation began in the late 20th century). However, some commentators argue that different schools of statutory interpretation have become increasingly similar, each following a similar process to the one described above. *See, e.g.*, Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 3 (2006) (suggesting that the differences between textualism and purposivism have begun to fade); John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 75–76 (2006) (arguing that textualism and purposivism share conceptual common ground with some competing justifications).

8. Owen v. City of Independence, 445 U.S. 622, 635 (1980); *see also* Briscoe v. LaHue, 460 U.S. 325, 326 (1983) (noting that a § 1983 case "presents a question of statutory construction").

9. Tower v. Glover, 467 U.S. 914, 922–23 (1983).

enacting § 1983, not to make a freewheeling policy choice."[10] Thus, some of the Justices seem to believe, or at least claim to believe, that 1871 tort law determines the answers to modern constitutional tort issues.[11]

But it is unclear how far Baude means to go as a descriptive matter in claiming that the Court in fact follows 1871 tort law. At various places in his article he seems to make different claims—that either the Court *mainly* follows 1871 tort law in deciding § 1983 cases or that it *sometimes* follows 1871 tort law or that *the better reasoned cases do* follow 1871 tort law or that *in the past, before it took a wrong turn*, the Court followed 1871 tort law. At the very least, Baude assumes that the Court's rhetoric about how to interpret § 1983 should be taken at face value.

In whichever way the point is framed, Baude is wrong on this descriptive claim. Whether the Court follows 1871 tort law is an empirical question that can be answered by examining the Court's practice, and the Court's practice has been to extol the importance of 1871 tort law while basing its holdings on modern constitutional tort policy. Part II shows that, whether or not the 42nd Congress meant for § 1983 to be treated as a common law statute, most of the case law does this, emphatically including the Court's cases on qualified immunity.

In short, questions concerning the "lawfulness" and contours of qualified immunity doctrine should not and never have been answered simply by looking to the common law as it stood in 1871.

I.
STATUTORY INTERPRETATION AS APPLIED TO § 1983: SECTION 1983 IS A COMMON LAW STATUTE

Professor Baude's argument about the proper interpretation and application of § 1983 is based on the premise that § 1983 is a "normal" statute to which the normal rules of interpretation apply. In this Part, we explain the central flaw in this argument: Section 1983 is a common law statute, so Professor Baude's normal rules do not apply.

A. Situating Baude's Argument

Methodological disputes about the proper approach to interpreting and applying statutes are legion. Textualists, purposivists, intentionalists, pragmatists, what can be called living statutists of all stripes, and more have filled untold pages of law review articles, books, and judicial opinions with fierce and endless arguments about how to interpret and apply statutes that are unclear

10. Malley v. Briggs, 475 U.S. 335, 342 (1986); *see also Tower*, 467 U.S. at 922–23.

11. *See, e.g.*, Smith v. Wade, 461 U.S. 30 (1983) (the majority and principal dissenting opinions both examine nineteenth century tort law on the standard for punitive damages, though Justice Brennan's majority opinion also considers modern tort law); *see also* Ziglar v. Abbasi, 137 S. Ct. 1843, 1872 (2017) (Thomas, J., concurring) (suggesting that the Court should "shift the focus of [its] inquiry to whether immunity existed at common law").

in difficult cases. Baude is a partisan of these debates, having written extensively and thoughtfully in the field. He adopts a contestable but careful, defensible, and mainly uncontroversial approach to interpreting statutes, one that lies mostly in the originalist-textualist corner of the interpretive debates.

As an originalist, Baude believes that statutes' meanings and proper applications are generally fixed at the time of enactment. Leaning towards textualism, he maintains that the text as it would most naturally have been understood at the time of enactment controls on questions of statutory interpretation. This stands in contrast to originalist-intentionalists, for example, who believe that while the meaning of a statute is fixed at enactment, the actual or recreated intent of the legislature is the primary interpretive touchstone. Perhaps most different from Baude's approach to statutory interpretation is that of living statutists, who believe that the meaning and proper application of a statute may change over time for a variety of reasons, many of which are still debated today.

Baude's general orientation in the field of statutory interpretation as an originalist-textualist serves as the foundation of his argument that § 1983, properly interpreted, does not allow for the modern doctrine of qualified immunity.[12] His argument proceeds logically from his originalist-textualist priors: because § 1983 was enacted in 1871, any questions as to its meaning and application should be resolved by consulting sources and assumptions present in 1871. Baude thus proposes looking exclusively to common law defenses and their justifications to understand what unstated defenses should fill the gaps in the text of § 1983. Finding the modern defense of qualified immunity to have no meaningful parallel in the common law of 1871, Baude concludes that it has no basis in the law.

There are three possible bases for disputing Baude's argument on this point. First and most broadly, one could argue that the originalist orientation is the wrong frame for interpreting statutes. For the purposes of this article, we maintain an agnostic stance on this point. That is, although we do not fully endorse Baude's views on this score, we will not take issue with his general approach to statutory interpretation, and we assume *arguendo* that it is correct.

Second and most narrowly, one could argue that Baude's historical analysis is wrong and that the modern doctrine of qualified immunity has legitimate roots in 1871 common law.[13] Consequently, even those adopting Baude's originalist

12. Like most originalists (textualists and intentionalists alike), Baude agrees that precedent matters in at least some contexts, even where precedent departs from original meaning. In particular, in considering the proper remedy for the Court's errors in crafting the modern doctrine of qualified immunity, Baude does not argue that the Court should simply discard decades of precedent. Rather, he suggests that because of the impacts of precedents (wrongly decided in his opinion), the Court should be less aggressive in doggedly policing, enforcing, and expanding qualified immunity doctrine than it has been and perhaps roll it back slowly over time.

13. In fact, there is reason to believe that when the 42nd Congress enacted §1983 in 1871, officers were typically protected from liability under common law. *See* Richard H. Fallon, Jr. & Daniel

approach to interpretation would find that § 1983 is compatible with the modern doctrine writ large. We take no position on this point either.

Instead, we focus on a third problem with Baude's analysis. Even if we accept his general originalist approach to statutory interpretation, we suggest that it simply does not apply—at least not without serious modification—to § 1983. There is a class of statutes, known as common law statutes, to which even the most committed originalists agree that the standard rules of statutory interpretation do not apply—including rules that freeze the relevant sources in the time of statutory enactment. Indeed, for example in antitrust law, which offers a primary example of common law a statute, "courts do not even *try* to find guidance in the relevant statutory texts and other textualism-approved sources of meaning."[14]

A common law statute is one that reflects "congressional recognition of the continuing common law powers of courts to develop the law within a general framework established by Congress and subject to intervention by Congress where appropriate."[15] Unlike with "normal" statutes, when it comes to common law statutes, many of the normal rules of statutory interpretation fall away: textualism has no meaning, originalism is beside the point, judicial consideration of relevant policy interests is welcome, the assumption that legislatures rather than courts correct judicial errors through a bicameral legislative process is rejected, and judicial precedents themselves are to be flexibly applied, updated, or jettisoned as circumstances and developed wisdom warrant.

One may surely argue that this common law methodology is undesirable and that the modern conception of legislative supremacy is normatively preferable. But when it comes to common law statutes, this is how it works in practice. Baude himself concedes that his approach to statutory interpretation does not apply to common law statutes, but he also incorrectly assumes that § 1983 is not one of them. In fact, § 1983 is a prototypical common law statute.

B. Understanding the Characteristics and Justifications of Common Law Statutes Through the Paradigmatic Example: the Sherman Act

There is no universally agreed-upon and readily-identifiable group of common law statutes. However, there is broad consensus that such a class of statutes exists, that statutes within this class share certain distinguishing

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J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1783–84 (1991) (describing "the broad scope of official discretion generally recognized by the Supreme Court during the early nineteenth century" and noting that "by the time of the Civil War, doctrines of discretion and official immunity had blossomed into the precursors of modern doctrines of official immunity.").

14. Margaret H. Lemos, *Interpretive Methodology and Delegations to Courts: Are "Common Law Statutes" Different?*, *in* INTELLECTUAL PROPERTY AND THE COMMON LAW 97 (Shyamkrishna Balganesh ed., 2013).

15. Graeme B. Dinwoodie, *The Common Law and Trade Marks in an Age of Statutes*, *in* THE COMMON LAW OF INTELLECTUAL PROPERTY: ESSAYS IN HONOUR OF PROFESSOR DAVID VAVER 331 (Bently, Ng & D'Agostino eds., 2010).

characteristics, and that the normal rules of statutory interpretation do not apply to statutes within the class. Unlike "normal" statutes, common law statutes should not be interpreted solely as a product of the time of their enactment or according to strict rules of statutory interpretation. Instead, they should be viewed as delegations to courts to continue to develop the law and fill in statutory gaps through the free-wheeling and policy-driven manner familiar from the common law tradition.[16]

What qualifies a statute as a common law statute, and *why* are they treated differently from normal statutes? Scholars and courts generally identify two shared features of common law statutes, each of which suggests complementary justifications for treating them differently from "normal" statutes: (1) common law statutes are written broadly, in "sweeping, general terms,"[17] and (2) they are enacted against a rich common law tradition that they incorporate.[18] To these we add a third defining feature: They are *old*.

The prototypical common law statute, the landmark Sherman Act of 1890,[19] reflects each of these features. First, it is written in "sweeping, general terms".[20] Indeed, the primary substantive provision of the Sherman Act baldly declares that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."[21] This simple phrase begs interpretation and gap-filling, yet none of the operative terms was defined or cabined in the Act's original text.

Read literally, this sweeping provision could outlaw every private contract.[22] Given the implausibility of such a reading, courts have "long held that the operative question is whether the conduct at issue restrained trade *unreasonably*."[23] Adding in this "reasonableness" provision is itself an act of judicial policymaking, for it appears nowhere in the text. More to the point, this

16. Lemos, *supra* note 14, at 91; *see also* William N. Eskridge, *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1052 (1989) ("The Court's invocation of common law principles to fill in gaps within fairly detailed statutes such as FELA is a regular occurrence, but the meta-rule is even more critical for several older, generally worded federal statutes that Congress has substantially left to the courts to develop. These 'common law statutes' include Section 1983 and several of the other civil rights measures enacted after the Civil War, the Sherman Act of 1890, the anti-fraud provisions of the securities laws, and Section 301 of the Taft-Hartley Act of 1947.").

17. Guardians Assoc. v. Civil Serv. Comm'n, 463 U.S. 582, 641 n.12 (1983) (Stevens, J., dissenting).

18. *Id.*

19. Lemos, *supra* note 14, at 89; *see also Guardians Assoc.*, 463 U.S. at 642 n.12 (Stevens, J., dissenting) ("Congress phrased some older statutes in sweeping, general terms, expecting the federal courts to interpret them by developing legal rules on a case-by-case basis in the common law tradition. One clear example of such a statute is the Sherman Act.").

20. *Guardians Assoc.*, 463 U.S. at 642 n.12 (Stevens, J., dissenting).

21. 15 U.S.C. § 1.

22. Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 688 (1978) ("[R]ead literally, § 1 would outlaw the entire body of private contract law.").

23. Lemos, *supra* note 14, at 92.

standard "plainly invites [yet further] judicial policymaking," since it demands "elaboration to clarify its contents"—with none of that elaboration coming from the text of the statute itself.[24]

Based on the sweeping and general nature of common law statutes, judges and scholars maintain that they are to be treated differently from "normal" statutes because they are written so broadly that courts must fill in the gaps. This justification can be framed either pragmatically or through a process of originalist interpretation. From a purely pragmatic standpoint, even putting aside what a common law statute's drafters may have intended or understood, judicial policymaking in the common law style is necessary because in the absence of further legislative guidance, there is simply no other option than for courts to fill in the gaps.

Alternatively, from an originalist perspective, the theory is that the legislature *must* have meant for courts to have ultimate authority to continue to develop and adapt the statute over time. Otherwise, they would have provided specific guidance for judges to use in interpreting and developing the statute. For this reason, some scholars have noted a close parallel between common law statutes and enabling statutes that delegate interpretive powers to agencies, suggesting that both are required due to an act of legislative volition—the affirmative *choice* to delegate policymaking authority.[25] As one leading antitrust scholar explains, as a common law statute, "the Sherman Act can be regarded as 'enabling' legislation—an invitation to the federal courts to learn how businesses and markets work and formulate a set of rules that will make them work in socially efficient ways."[26] As such, it and other common law statutes, like enabling legislation, leave substantially greater space for judges to develop the law than do "normal" statutes.

Common law statutes share the second characteristic that they are enacted against a common law tradition. This is also typified by the Sherman Act because it was written against and implicitly incorporated the rich background of common law antitrust doctrine as it stood at the time. That is, the Sherman Act was not the first source of law to outlaw monopolistic and unfair trade practices, but most of the earlier sources of law were not legislative. Instead, they were found in the pages of judicial opinions. Although the Sherman Act adopted these doctrines, rather than reify them in time, it implicitly empowered judges to continue to develop through the common law process.

Justice Scalia, the celebrated avatar of originalist-textualism on the Supreme Court and thus not one to look favorably on loose judicial interpretation

24. *Id.*

25. *Id.*

26. HERBERT HOVENKAMP, ECONOMICS AND FEDERAL ANTITRUST LAW 52 (student ed. 1985).

of statutory texts,[27] touched on this characteristic of common law statutes in *Business Electronics Corp. v. Sharp Electronics Corp.*[28] Writing for the Court, he explained that the Sherman Act "adopted the term 'restraint of trade' along with its dynamic potential. It invokes the common law itself, and not merely the static content that the common law had assigned to the term in 1890."[29] In other words, the term "restraint of trade" has a common law meaning, and its common law roots and the process of its elaboration traveled with the term when it became statutorified.

This characteristic of common law statutes suggests another normative justification for treating them differently from "normal" statutes. Judges have expertise in the substance of the common law and in the process of its development. Delegating to them the authority to define, apply, and further develop a body of law that has long and thick roots in the corpus of common law may therefore make good sense and may in fact reflect the actual intent of the legislators who enacted such statutes.

The third descriptive characteristic of common law statutes is that they are old. Most common law statutes, like the Sherman Act, date to the nineteenth century. Others date to the first half of the twentieth century. This characteristic is not wholly independent of the other two previously mentioned characteristics. More modern statutes are rarely written in broad strokes; instead they are highly detailed. And they do not typically build directly on common law but rather upon prior statutory law. This reflects the more modern trend in American lawmaking, which has moved us away from our common law tradition through what one commentator has called an "orgy of statute making."[30] Judicial and scholarly pronouncements that propose to demarcate a strict line between legislative policymaking and judicial interpretation are a byproduct of the trend away from common law development of the law and toward statutorification. In the age of common law statutes, that line was hardly clear. This suggests that legislators themselves did not intend or understand that putting something into a statute would result in disempowering the courts from gap-filling and elaborating on the law in the common law tradition.

C. Other Common Law Statutes

The Sherman Act may be the most well-known common law statute, but it is hardly the only one. In this section, we briefly review two others that further exemplify the shared characteristics of common law statutes and identify some additional features.

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27. *See, e.g.*, Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 857 (1990) ("A rule of law . . . has thus been transformed into a rule of discretion, giving judges power to expand or contract the effect of legislative action. We should turn this frog back to a prince as soon as possible.").

28. 485 U.S. 717 (1988).

29. *Id.* at 732.

30. GRANT GILMORE, THE AGES OF AMERICAN LAW 95 (1977).

1. The Lanham Act

Like the Sherman Act, the foundational trademark law statute, the Lanham Act,[31] has all of the features of a common law statute.

First, Congress wrote the Lanham Act's substantive provisions[32] in broad and general terms, consisting of a few vague phrases: "'exclusive right to use,' 'use which is likely to cause confusion,' and 'false designation of origin.'"[33] Second, courts, rather than the legislature, created and refined trademark law; the Lanham Act merely incorporates these common law rules as if by hyperlink.[34] Thus, the brief, general substantive provisions in the Act simply adopt "the complete common law development" and incorporate "the complex body of rules developed by common law courts over several centuries."[35]

Further, the Lanham Act, which Congress enacted in 1946, is old. To be sure, the Lanham Act is of more recent vintage than most common law statutes, which date to the nineteenth century. Its passage, however, predates the modern obsession with statutorification and the strict dichotomy between legislative and judicial policymaking.

Moreover, the degree to which the Lanham Act so clearly incorporates the pre-existing body of common law and delegates to judges the power and responsibility to continue to develop the law are evidence of congressional understanding or intent. Indeed, the Lanham Act includes an explicit provision delegating the power to develop the law to courts.[36] Nineteenth-century common law statutes may not have required such a provision precisely because the predominance of common law at the time made courts natural policymakers. By the middle of the twentieth century, the statutorification process had begun, though it had not yet reached its present-day apogee, in which many view judicial policymaking very skeptically.

2. Contributory vs. Comparative Negligence Under California Statutes

First-year law students are well familiar with the distinction in tort law between contributory and comparative negligence standards. Under the contributory negligence standard, a tort victim is barred from recovery if her own

31. 15 U.S.C. § 1051 *et seq*.

32. We use the term "substantive provisions" to distinguish these from those provisions of the statute that create a new administrative regime for trademarks. Those provisions of the Lanham Act are far more detailed than are its substantive provisions and of course leave far less room for judicial innovation or a common law approach. *See* Pierre N. Leval, *Trademark: Champion of Free Speech*, 27 COLUM J.L. & ARTS 187, 198 (2004) (distinguishing the administrative provisions from substantive ones).

33. *Id.* (citations omitted).

34. *See id.* at 199.

35. *Id.* at 198.

36. *Id.* (describing 15 U.S.C. § 1115(a)).

negligence contributed to her harm.[37] This standard reigned throughout the common law world until the more modern comparative negligence standard replaced it.[38] Under comparative negligence, a tort victim may recover even if her negligence contributed to her harm, but her damages are offset by the degree to which the harm was attributable to her negligence.[39] In other words, liability is apportioned by fault. Thus, under a comparative negligence standard, a victim who was 49% at fault for the harm she suffered can recover 51% of damages from the tortfeasor.[40]

States moved from the contributory to the comparative standard at different times, some purely through legislative means and others through the traditional common law process.[41] California's adoption of the comparative negligence standard is especially noteworthy. In 1872, the California legislature adopted its Civil Code to organize and clarify the body of civil law that courts had previously developed through the common law.[42] At the time of codification, California followed the contributory negligence standard, and California courts subsequently held that the language of the Civil Code and its drafters' intent was to incorporate the common law's contributory negligence standard then in effect.[43]

However, in the 1975 case *Li v. Yellow Cab*, the California Supreme Court reversed itself and adopted a pure comparative negligence standard, notwithstanding the Civil Code's incorporation of the contributory negligence standard and the subsequent decades of precedent that affirmed it.[44] The court frankly acknowledged its reversal and addressed the oddity of judicial policymaking where the legislature had already spoken.[45] However, the court

37. 3 AMERICAN LAW OF TORTS § 12:3 (2017) ("[I]f the plaintiff can be said to have been at fault in any degree, the plaintiff will be held to be barred of recovery regardless of the fact that the defendant was responsible in a greater degree.").

38. *Id.* § 13:3 ("[T]he overwhelming majority of states have replaced the common-law contributory negligence rule by true comparative fault rules.").

39. *Id.* § 13:7 ("All comparative fault systems in operation in the United States today involve some method of dividing damages between the plaintiff and defendant when the plaintiff has been contributorily negligent.").

40. There are different operative versions of the comparative negligence standard in different jurisdictions. *See generally id.* (describing the "pure" version of comparative fault, under which a plaintiff can recover no matter his amount of fault, and the different systems of "modified" comparative fault).

41. *See id.* § 13:3 (stating that the overwhelming majority of states have adopted comparative fault through either judicial fiat or by statute).

42. *See* Li v. Yellow Cab Co., 532 P.2d 1226, 1233–34 (1975) (noting that "popular knowledge of basic legal concepts comported well with the individualistic attitudes of the early west").

43. *See* Izhak Englard, Li v. Yellow Cab Co.*—A Belated and Inglorious Centennial of the California Civil Code*, 65 CALIF. L. REV. 4 (1977) (discussing the harsh contributory negligence rule in place in 1872).

44. *See Li*, 532 P.2d at 1235 (ruling for the plaintiff in a case where the court was asked "to brush aside all of the misguided decisions which have concluded otherwise up to the present day").

45. *See id.* at 1233 (noting the superficial appeal of the argument that any change must come from the legislature).

reasoned that the legislature had not intended to strip the courts of continued policymaking powers, and the court considered the question using the traditional tools of the common law process: considering fairness, policy interests, and the relevant legal trends among sister states.[46]

In other words, the California Supreme Court treated the statute—or at least this provision—as a common law statute. And the court did so for good reason: The legislature drafted the provision in broad enough terms to *allow* for a comparative negligence reading; the legislature *intended or understood* that courts could continue to update the law; and the statute dates from the nineteenth century, before the obsessive—and arguably justified—movement against judicial policymaking came into vogue.

For reasons we can only speculate, the court in *Li* did not explicitly refer to the Civil Code as a whole or this particular provision as a common law statute. Reading *Li* through this lens, however, is the only way to justify the court's policymaking role. If the court in *Li* is to be criticized, it is because it got the substantive policy analysis wrong or because the provision in question cannot reasonably be read as a common law provision. But to argue that the court *did not* in fact read it in this way is to fail to engage in the court's analysis on its own (albeit unstated) terms.[47] Accordingly, *Li*'s holding underscores that officially affixing the label "common law statute" is of little importance. What matters is that the statute has a claim to being a common law statute and that the court in fact treated it in this manner.

D. Section 1983 is a Common Law Statute

Section 1983 fits each of the characteristics of common law statutes to a T. It is written broadly; it is built on a rich common law tradition; and it is of the right vintage, having been enacted in 1871.

The substance of § 1983 provides, in toto:

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

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46. *Id.* at 1239–44 (discussing several reasons for adopting a comparative negligence regime after determining that the legislature intended to leave the statute open to further judicial development).

47. *See* Marion W. Benfield Jr. & Peter A. Alces, *Reinventing the Wheel*, 35 WM. & MARY L. REV. 1405, 1443–44, 1444 n.145 (1994) (using California courts' willingness to change the California Code's rules as an example of treating statutes as if they are common law statutes and citing the discussion of *Li* in Grant Gilmore, *Putting Senator Davies in Context*, 4 VT. L. REV. 233, 242–44 (1979), to illustrate the point).

First, this language is nothing if not "sweeping," "general," and "broad." None of the relevant terms—"color of any statute," "Constitution and laws," "proper proceeding," and more—are defined. Moreover, what shall violators be "liable" *for*? What damages are available and appropriate? And what defenses are available to defendants? All of these gaps are left for courts to fill.[48] Further, there is little guidance in the legislative history as to what these terms mean because little of the recorded history focuses on this provision at all.[49]

Second, § 1983 quite clearly builds on a prior body of common law. It is essentially a tort statute. It creates a new class of possible defendants who are subject to suits for damages and thereby incorporates by reference that *most* prototypical body of common law: tort law. Indeed, to an even greater degree than the Sherman Act, it makes sense that § 1983 would delegate lawmaking to the courts, just as courts have done all along in the torts arena. After all, while § 1983 creates a new kind of substantive right (the right to damages from government actors), it simply throws open the courthouse doors for a new set of cases that parallel the old kinds of cases that courts have always handled through the common law process. Why would anyone think that the statute's few words served to adopt and reify the corpus of tort law as it stood in 1871 with respect to this new category of defendants, while the rest of tort law continued to develop in the common law fashion?

Third, the statute is old. It is a product of the nineteenth century, fitting neatly into the age of common law statutes. Frankly, it is difficult to see why its drafters would have intended, understood, or expected the operation of § 1983 to be meaningfully different from that of the Sherman Act and other common law statutes.

The timeframe in which § 1983's language was initially enacted is *especially* telling on this point. At that time—long before *Erie v. Tompkins* purported to do away with the concept of federal common law[50]—the operative principle was that a federal common law developed by federal courts, separate from the common law of each individual state, did exist.[51] Against this background and only five years prior to the enactment of § 1983, Congress enacted the Civil Rights Act of 1866, which included a provision now codified as 42 U.S.C. § 1988 (a). This section provides, in relevant part, that in the event federal law is "deficient in the provisions necessary to furnish suitable remedies, . . . the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such . . . cause is

48. Eskridge, *supra* note 16, at 1052 ("[T]he statute itself tells us almost nothing about the exact contours of liability, damages, defenses, and so forth; the legislative history closes only a few of the gaps.").

49. Michael Wells, *The Past and the Future of Constitutional Torts: From Statutory Interpretation to Common Law Rules*, 19 CONN. L. REV. 53, 65–68 (1986) (discussing the dearth of legislative history surrounding what became § 1983).

50. *See* 304 U.S. 64, 78–79 (1938).

51. Swift v. Tyson, 41 U.S. 1, 18–19 (1842).

held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause."[52] Professor Seth Kreimer has persuasively argued that this language, though hardly a model of clarity,[53] is meant to direct courts to continue fill in the gaps in civil rights legislation by applying and continuing to develop the corpus of federal common law, with modifications and within limitations imposed by state statutes and constitutions.[54] That is, where those state statutes and constitutions are silent, the federal courts are to develop federal common law to fill the gaps.

This suggests two critical points about the nature of § 1983, enacted shortly after and within the same general context of § 1988: (1) Congress understood at the time that federal courts regularly engaged in common law lawmaking, and (2) it had already instructed federal courts to apply this common law method to any civil rights legislation.[55] In other words, Congress well understood what the common law method was and in fact *meant* to extend this common law method to legislation like § 1983. Thus, a civil rights statute enacted during this period must reasonably be understood as a common law statute because Congress at the time in fact said so. It is true that the Supreme Court has never explicitly adopted this view, favoring instead the rhetoric cited by Baude and discussed in Part II. But the point here is that § 1983 *should* be understood as a common law statute, regardless of whether the Court has done so.

Given these characteristics, it is no surprise that scholars have long taken it as obvious that § 1983 qualifies as a common law statute. For example, Bill Eskridge—among the leading scholars of statutory interpretation of the generation—has identified it as the *best* example of a common law statute.[56] Cass Sunstein wrote that because § 1983 "is silent on many important questions, including available defenses, burdens of pleading and persuasion, and exhaustion requirements[,] . . . the statute delegates power to make common law," implicitly identifying it as a common law statute.[57] According to Jack Beermann, courts must "look to common law principles, found in the general provisions of Reconstruction-era *and current common law*, along with textual and policy analysis, to fill in the details of civil rights actions."[58] He further

52. 42 U.S.C. § 1988(a).

53. *See* Seth F. Kreimer, *The Source of Law in Civil Rights Actions: Some Old Light on Section 1988*, 133 U. PA. L. REV. 601, 615 (1985) (noting that "[t]he tortuous syntax of the statute, read in light of its opaque legislative history, leaves substantial room for interpretation.")

54. *See id.* at 628–33.

55. *See* Jennifer A. Coleman, *42 U.S.C. Section 1988: A Congressionally-Mandated Approach to the Construction of Section 1983*, 19 IND. L. REV. 665, 667-–68 (1986).

56. Eskridge, *supra* note 16, at 1052 ("The Section 1983 cases illustrate this precept [i.e., the operation of common law statutes] best.").

57. Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 421–22 (1989).

58. Jack M. Beermann, *Common Law Elements of the Section 1983 Action*, 72 CHI.-KENT L. REV. 695, 700 (1997) (emphasis added).

explains that the Court has theorized that "the enacting Congress did not intend to freeze the evolution of the civil rights actions and require federal courts to perpetuate outdated, abandoned, common law doctrines."[59] Justice Stevens appears to have also conceived of § 1983 in this manner, having compared it to the Sherman Act.[60]

In considering possible objections to his argument, Professor Baude briefly touches on our argument, writing that "[m]aybe Section 1983 could be reconceived as a common-law statute analogous to the Sherman Antitrust Act."[61] Unfortunately, he dismisses the objection in a single sentence: "The Court has so far denied a similar kind of adapting role in creating immunities under Section 1983."[62] As we show in the next section, this defense is mistaken on its own terms, for the Court does indeed treat § 1983, including the creation of immunities, as a matter for common law-like development. But it is also beside the point because it mistakenly responds to a normative argument (§ 1983 *is* a common law statute) with a descriptive claim (the Court *has not recognized* it as a common law statute). Even if the descriptive claim is correct, it misses the normative objection entirely.

Baude is likely correct that the Court has never explicitly referred to § 1983 as a common law statute. But that hardly means that it is not one. For the reasons we have just laid out, § 1983 shares all the qualities of a common law statute and therefore *should be* interpreted as one—just as leading scholars have long assumed. In short, it looks like a common law statute, walks like a common law statute, and quacks like a common law statute. What other conclusion is there to draw?

II.
THE DIFFERENCE BETWEEN WHAT THE COURT SAYS AND WHAT IT DOES: THE SUPREME COURT HAS ALWAYS TREATED § 1983 AS A COMMON LAW STATUTE

Section 1983 was enacted shortly after the Civil War. Its general purpose was to enforce the recently-enacted Fourteenth Amendment. The occasion for its enactment was the rise of violent Southern resistance to Reconstruction, especially by the Ku Klux Klan, and the passivity of local officials in quelling Ku Klux Klan terrorism. The text of § 1983 does not address many of the issues raised in § 1983 litigation.[63] Nor does the legislative history, which is mainly

59. *Id.* at 701. Indeed, Beermann has written extensively on the Court's treatment of and justifications for reading §1983 as a common law statute. *See generally* Jack M. Beermann, *A Critical Approach to Section 1983 with Special Attention to Sources of Law*, 42 STAN. L. REV. 51 (1989).

60. *See* Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 641 n.12 (1983) (Stevens, J., dissenting).

61. Baude, *supra* note 1, at 78.

62. *Id.*

63. For a rare instance in which the Court relied, in part, on the text in resolving a § 1893 issue, *see* Monell v. Dep't of Soc. Servs. of City of New York, 436 U.S. 658, 691–92 (1978) (rejecting respondeat superior liability for governments on the ground that the statutory language "shall subject, or

concerned with documenting the problems that justified Congressional intervention.[64] Still, the Court has resisted the view that it fills in the large gaps in the statute by making federal common law rules. The Court has repeatedly insisted that its task is to interpret the statute.[65] Since answers can rarely be found in the text, structure, and legislative history, the Court looks instead to 1871 common law doctrine, especially tort law.[66]

In *Monroe v. Pape*,[67] the first § 1983 case of the modern era, the Court said that the statute "should be read against the background of tort liability that makes a man responsible for the natural consequences of his acts."[68] In *Monroe*, the Court did not specify which common law epoch to use.

But, following the logic of statutory interpretation, the Court has sometimes chosen common law from the year 1871. Thus, "[o]ne important assumption underlying the Court's decisions in this area is that members of the 42nd Congress were familiar with common-law principles, including defenses previously recognized in ordinary tort litigation, and that they likely intended these common-law principles to obtain, absent specific provisions to the contrary."[69] On its face, this assumption seems to justify Baude's view that the doctrine on qualified immunity, to the extent it departs from 1871 law, is "inconsistent with conventional principles of statutory interpretation."[70]

In this part of the article we show that the "conventional statutory interpretation" approach to § 1983 does not fit the Court's actual practice. Professor Baude is misled by the Court's rhetoric, which is better viewed as window dressing for results reached on policy grounds. Despite its frequent insistence that it merely interprets the statute, and despite its references to nineteenth century tort law, the Court does not ordinarily adjudicate § 1983

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cause to be subjected," in the context of the statute, "cannot be easily read to impose liability vicariously on governing bodies solely on the basis of the existence of an employer-employee relationship with a tortfeasor.").

64. On occasion the Court does resolve issues by reference to legislative history. *See, e.g.*, Patsy v. Board of Regents, 457 U.S. 496 (1982) (holding that plaintiff is not required to exhaust administrative remedies); Monell v. Dep't of Soc. Servs. of City of New York, 436 U.S. 658, 64–89 (1978) (ruling that local governments may be sued under the statute); Monroe v. Pape, 365 U.S. 167, 171–87 (1961) (finding that officers act "under color of" state law even when state law does not authorize their conduct).

65. *See, e.g.*, Bogan v. Scott-Harris, 523 U.S. 44, 49 (1998); Tower v. Glover, 467 U.S. 914, 920 (1984); Pulliam v. Allen, 466 U.S. 522, 529 (1984); Kalina v. Fletcher, 522 U.S. 118, 123 (1997); Briscoe v. LaHue, 460 U.S. 325, 330–33 (1983); Newport v. Fact Concerts, 453 U.S. 247, 258–59 (1981); Carey v. Piphus, 435 U.S. 247, 255–56 (1978); Pierson v. Ray, 386 U.S. 547, 555–56 (1967).

66. *See* JOHN C. JEFFRIES, ET AL., CIVIL RIGHTS ACTIONS: ENFORCING THE CONSTITUTION 160–61 (3rd ed. 2013) (noting the "relentless historicity of § 1983 opinions").

67. 365 U.S. 167 (1961).

68. 365 U.S. at 187.

69. Rehberg v. Paulk, 132 S.Ct. 1497, 1502 (2012) (quoting *Briscoe v. LaHue*, 460 U.S. 325, 330 (1983) (quoting *Newport v. Fact Concerts*, 453 U.S. 247, 258 (1981))). *See also* Pulliam v. Allen, 466 U.S. 522, 529 (1984) ("The starting point in our own analysis is the common law."); Pierson v. Ray, 386 U.S. 547 (1967) (quoting *Monroe*'s "background of tort liability" as the basis for recognizing qualified immunity for police officers).

70. Baude, *supra* note 1.

issues by applying conventional principles of statutory interpretation of the kind Baude favors. In particular, it does not allow nineteenth century tort law to control its decisions.[71] Because hard questions are invariably decided based on modern constitutional tort policy, the Court's dominant approach is virtually the opposite of its rhetoric. It usually makes federal common law rules, though it never refers to "federal common law" in the opinions. The discussion of these points is divided into two sections. Some of the cases cite 1871 tort law and others do not. Section A discusses the former set, and section B the latter.

A. Areas in Which the Court Cites 1871 Tort Law

In some opinions the Court claims that it is bound by 1871 tort law, and it sometimes cites nineteenth century case law. It does not ever use the vocabulary of "federal common law" as authority for its decisions. Nonetheless, its holdings and the rationales that actually decide cases are more convincingly explained as federal common law than statutory interpretation. Several Supreme Court opinions on § 1983 issues begin the analysis with a denial that the Court makes law in this area. For example, in *Tower v. Glover* the Court asserted that "[w]e do not have a license to establish immunities from § 1983 actions in the interests of what we judge to be sound public policy."[72] In *Owen v. City of Independence*,[73] the Court said that "the question of the scope of a municipality's immunity from liability under § 1983 is essentially one of statutory construction."[74] *Tenney v. Brandhove*[75] derived absolute legislative immunity from pre-nineteenth century British practice. And *Stump v. Sparkman*[76] justified absolute judicial immunity by citing *Bradley v. Fisher*,[77] an absolute immunity case decided in 1872, just one year after the statute was enacted.

1. Absolute Immunity

But there is a difference between what the Court says in some of its opinions and the reasons that do the work of resolving most of the hard questions. Cases in which the Court delves into 1871 tort law typically include a discussion of modern tort policy as well. Absolute immunity furnishes the strongest cases for Baude's view. In *Tenney v. Brandhove*, for example, several centuries of history support the proposition that the 1871 Congress acted against a

71. *See* JEFFRIES, ET AL., supra note 66, at 161 ("Often the policy justifications for deciding an issue one way or the other are slighted or ignored or refracted through the historical prism of what the framers 'must have thought.' As a result, students of § 1983 are often left to uncover the underlying policies for themselves and to reach their own conclusions on the wisdom of the Court's judgments substantially unaided by judicial explication.").

72. 467 U.S. 914, 922–23 (1984).

73. 445 U.S. 622, (III) (1980).

74. 445 U.S. at 635.

75. 341 U.S. 367 (1951).

76. 435 U.S. 349 (1978).

77. 80 U.S. 335, 351 (1872).

background of absolute legislative immunity, such that Baude's rule of statutory interpretation would justify applying that rule.[78] In *Bogan v. Scott-Harris*,[79] the Court took the same approach to local legislator immunity. It found that "[t]he common law at the time § 1983 was enacted deemed local legislators to be absolutely immune for their legislative activities."[80] Judicial immunity also provides some support for Baude's thesis. *Bradley v. Fischer*,[81] decided just one year after enactment of § 1983, is the most prominent nineteenth century case holding that judges are absolutely immune from civil liability in certain circumstances. The judge would be liable only for actions in "clear absence of all jurisdiction."[82] Relying on *Bradley*, the Court ruled in *Stump v. Sparkman* that judges would not be liable just because an action was taken "in error, or was done maliciously, or was in excess of his authority."[83]

Apart from these basic rules for legislative and judicial immunity,[84] the rest of the Court's absolute immunity cases are to one extent or another at odds with Baude's thesis. Consider, for example, *Imbler v. Pachtman*,[85] the Court's leading case on absolute prosecutorial immunity. Baude seems to think that *Imbler* helps him. He sets out a quotation from *Filarsky v. Delia*, in which the Court characterizes *Imbler* as a historically-based ruling.[86] But that characterization does not withstand scrutiny. In *Imbler*, the Court examined the common law and found that "[t]he common law immunity of a prosecutor is based on the same considerations that underlie the common-law immunities of judges and grand jurors,"[87] but it did not look to 1871 common law. Indeed, the earliest prosecutorial immunity case was *Griffith v. Slinkard*,[88] decided in 1896. *Griffith* illustrated a longstanding common law rule, but it simply cannot count as evidence of the background against which the 1871 Congress enacted § 1983. Instead, "the Court in *Imbler* drew guidance both from the first American cases addressing the availability of malicious prosecution actions against public prosecutors and, perhaps more importantly, from the policy considerations underlying the firmly established common-law rules providing absolute immunity for judges and jurors."[89]

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78. Tenney v. Brandhove, 341 U.S. 367, 372–76 (1951).

79. 523 U.S. 44 (1998).

80. 523 U.S. at 49.

81. 80 U.S. 335 (1871).

82. 80 U.S. at 351.

83. 435 U.S. 349, 356 (1978).

84. Even in the judicial immunity context, the Court has not remained faithful to 1871. *See Pulliam v. Allen*, 466 U.S. 522 (1984) (holding that judges are not absolutely immune from injunctive relief, despite the absence of injunctive relief against judges in nineteenth century practice).

85. 424 U.S. 409 (1976).

86. *See* Baude, *supra* note 1, at 54.

87. 424 U.S. at 422–23.

88. 146 Ind. 117, 44 N.E. 1001 (1896). In Imbler v. Pachtman, 424 U.S. 409, 421 (1976), the Court's first "§ 1983 absolute immunity for prosecutors" case, it cited *Griffith* and described it as "[t]he first American case to address the prosecutor's amenability to suit."

89. Kalina v. Fletcher, 522 U.S. 118, 124 n. 11 (1997).

Imbler did not stress history, even post-1871 history.[90] It emphasized that the decisive factors are the policies that support immunity. Prosecutorial immunity was justified because "the same considerations of public policy that underlie the common-law rule likewise countenance immunity under § 1983." Thus, the *Imbler* opinion was largely concerned with policies. These included first, the danger that the threat of suits for damages would unduly influence the prosecutor, and second, the concern that to ward off such suits, appellate courts may be reluctant to find errors in the prosecutor's conduct of the criminal trial. That reluctance would affect appellate review of prosecutorial decisions.[91]

The Court in *Imbler* understood that it would be unwise to put too much weight on history in justifying absolute prosecutorial immunity. The Court recognized that, on the prosecutorial immunity issue, it was not appropriate to treat 1896 and 1871 as part of the same era, such that an 1896 case can serve as evidence of 1871 tort law.[92] In 1871, "it was common for criminal cases to be prosecuted by private parties."[93] That practice changed over time, a development that helps explain the absolute immunity holding in *Griffith*.[94] By the logic of Baude's principle that 1871 tort law controls immunity, this nineteenth century development would call for rejection of absolute immunity for prosecutors. It may be true that, as a matter of policy, "the same considerations that underlie the common-law immunities of judges apply to prosecutors" so that common law reasoning would justify the extension. But Baude's "law of interpretation" rejects that kind of common law reasoning. Under his rules, immunity is fixed at 1871. The 42nd Congress, acting in1871, simply would not have equated prosecutors with judges.

2. The Functional Approach

Baude's static approach to statutory interpretation not only looks to 1871 to determine which *officials* may assert immunity but also implies that the *set of activities* for which absolute immunity is available would likewise depend on 1871 law. The Court's practice is otherwise. In determining the scope of judicial and prosecutorial immunity, the Court has not looked to 1871. Rather than examining history, it has adopted a policy-based "functional" approach to determine the scope of absolute immunity. For example, in *Forrester v. White*[95] part of the defendant-judge's job was to supervise probation officers. The judge was sued for demoting and dismissing a probation officer on account of her gender. The issue was whether he could assert absolute immunity in that context.

90. On at least one occasion the Court virtually ignored history, even as window dressing, in ruling on prosecutorial immunity. *See* Van de Kamp v. Goldstein, 555 U.S. 335 (2009) (holding that prosecutors are absolutely immune from liability based on their lax supervision of subordinates).

91. 424 U.S. at (III B).

92. *See* 424 U.S. at 421, 423–29.

93. Rehberg v. Paulk, 132 S.Ct. at 1503. *See also* Filarsky v. Delia, 132 S.Ct. 1657, 1662–65.

94. *See* Rehberg v. Paulk, 132 S.Ct. at 1504.

95. 484 U.S. 219 (1988).

The Court did not look to history for an answer to this question. It applied what it calls a "functional approach," under which the judge would receive immunity only for judicial functions and not for administrative functions. Managing underlings was an administrative function, not a judicial one.[96] The rationale for focusing on function was that the underlying policy behind all official immunity was avoiding "perverse incentives,"[97] and that policy was strong enough to justify absolute immunity only when judges engaged in adjudication and closely-related activities. Thus, "[if] judges were personally liable for erroneous decisions, the resulting avalanche of suits . . . would provide powerful incentives for judges to avoid rendering decisions likely to provoke such suits," which would "manifestly detract from independent and impartial adjudication."[98] By contrast, when judges made employment decisions, the incentive was no different from that of "other public officials who hire and fire subordinates."[99] The Supreme Court's modern judicial immunity cases often turn on the resolution of this policy issue.[100]

Besides applying the functional approach to judging, the Court uses it to distinguish those activities of prosecutors that fall into the absolute immunity category, such as bringing prosecutions, conducting prosecutions,[101] and training staff,[102] from those that do not, such as advising police officers[103] and talking to the media.[104] In *Van de Camp v. Goldstein*,[105] for example, the Court held that absolute immunity applied to the function of training and supervising staff prosecutors without once referring to 1871 or any other historical materials. Concurring in *Kalina v. Fletcher*,[106] Justice Scalia acknowledged the gap between the "statutory interpretation via 1871 tort law" approach and the functional approach: "I write separately because it would be a shame if our opinions did not reflect the awareness that our 'functional' approach to 42 U.S.C. § 1983 immunity questions has produced some curious inversions of the

96. *See* 484 U.S. at 229.
97. 484 U.S. at 223.
98. 484 U.S. at 226–27.
99. 484 U.S. at 229–30.
100. *See* Mireles v. Waco, 502 U.S. 9 (1991) (holding that a judge's act in directing police officers to bring a lawyer into the courtroom is a judicial function because "it is a function normally performed by a judge and [the parties] dealt with the judge in his judicial capacity"); Supreme Court of Virginia v. Consumers' Union, 446 U.S. 719 (1980) (holding that promulgation of a bar disciplinary code is a legislative, not judicial function, and enforcement of the code is a prosecutorial, not a judicial function). Stump v. Sparkman, 435 U.S. 349, 363 n. 12 (1978) is closer to the *Bradley* fact pattern (holding that a judge did not act in the absence of all jurisdiction when he ordered the sterilization of a fifteen-year-old girl without her knowledge in an *ex parte* proceeding).
101. Imbler v. Pachtman, 424 U.S. 409 (1976).
102. Van de Camp v. Goldstein, 555 U.S. 335 (2009).
103. Burns v. Reed, 500 U.S. 478 (1901).
104. Buckley v. Fitzsimmons, 509 U.S. 259 (1992).
105. 555 U.S. 335 (2009).
106. 522 U.S. 118 (1997).

common law as it existed in 1871, when § 1983 was enacted."[107] Thus, *Kalina* held that a prosecutor was not entitled to absolute immunity under the functional approach for testifying to facts in support of a search warrant, even though "the common law . . . recognized an absolute immunity for statements made in the course of a judicial proceeding and relevant to the matter being tried."[108] The Court's functional approach turns out to be the opposite of Baude's thesis. Under the logic of Baude's approach, the "law of interpretation" requires deference to 1871 tort law. It appears that the functional approach to absolute immunity is as "unlawful" as he claims qualified immunity to be.

In addition to injecting modern policy into absolute immunity cases involving prosecutors and judges, the Supreme Court takes the logic of the functional approach a step further. If judges and prosecutors may assert absolute immunity for judicial and prosecutorial functions, then other officers, such a social workers, may assert "quasi-judicial" or "quasi-prosecutorial" immunity for judicial or prosecutorial acts.[109] In *Cleavinger v, Saxner*,[110] for example, the Supreme Court considered the issue of whether prison officials were entitled to absolute immunity when they serve on disciplinary boards. The Court introduced its discussion of the issue with a summary of its approach:

> The Court has said that in general our cases have followed a functional approach to immunity law. Our cases clearly indicate that immunity analysis rests on functional categories, not on the status of the defendant. Absolute immunity flows not from rank or title or location within the Government, but from the responsibilities of the individual official.[111]

The Court went on to hold that the prison officials sued in *Cleavinger* did not have absolute immunity, but only because they "were under obvious pressure to resolve a disciplinary dispute in favor of the institution and their fellow employee. It is the old situational problem of the relationship between the keeper and the kept, a relationship that hardly is conducive to a truly adjudicatory performance."[112]

This reasoning did not at all imply that hearing officers will never receive absolute immunity. On the contrary, a lower court case later followed the Court's reasoning and held that members of a disciplinary committee were entitled to absolute quasi-judicial immunity. The difference from *Cleavinger* was that here the committee was composed of hearing officers with independence from prison supervisors.[113]

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107. Kalina v. Fletcher, 522 U.S. 118, 131–32 (1997) (Scalia, J., concurring).

108. 52 U.S. at 133 (Scalia, J., concurring,)

109. *See* Butz v. Economou, 438 U.S. 478, 511–16 (1978); S. NAHMOD, ET AL., CONSTITUTIONAL TORTS 429–30, 444–45 (2015).

110. 474 U.S. 193, 201–08 (1985).

111. 474 U.S. at 201–02 (citations and internal quotation marks omitted).

112. 474 U.S. at 204.

113. Shelly v. Johnson, 849 F.2d 228 (6th Cir. 1988) (per curiam).

3. The Convenient Congruence Between History and Modern Constitutional Tort Policy

Professor Baude cites *Filarsky v. Delia*[114] in support of his view, or at least for "gestur[ing] at the argument."[115] The issue there was whether a private lawyer, hired by a local government on a part-time basis to undertake an investigation of official wrongdoing, could assert official immunity against liability for constitutional violations he committed during the investigation. The Court examined nineteenth century tort law and found that private actors were often granted immunity in similar circumstances.[116] Baude characterizes the "Court's references to common law" as "concrete and historically fixed."[117] Taken in isolation, they could be read that way. But when the opinion is taken as a whole, it is (at best) only a "gesture" toward Baude's view. The Court prefaced the nineteenth century tort discussion with "[u]nder our precedent, the inquiry begins with the common law as it existed when Congress passed 1983 in 1871."[118] Under Baude's approach, 1871 law is both the beginning and the end. [119] For the Court, the common law, 1871 or modern, is only the beginning.[120] Thus, the Court went on to consider modern tort policy, in particular the "government interest in avoiding 'unwarranted timidity' on the part of those engaged in the public's business,"[121] which is "the most important special

114. 132 S.Ct. 1657 (2012).

115. William Baude, *Is Qualified Immunity Unlawful?* manuscript at 9 (on file with authors).

116. 132 S.Ct. at 1662–65.

117. Baude, *supra* note 1, at 54.

118. 132 S.Ct. at 1662.

119. Baude asserts that the Court has "disavowed" reliance on modern common law principles. Baude, *supra* note 1, at 54.

120. *See* Manuel v. City of Joliet, 137 S.Ct. 911, 920–21 (2017) (noting that "[c]ommon-law principles are meant to guide rather than to control the definition of § 1983 claims"); Rehberg v. Paulk, 132 S.Ct. 1497, 1503 (2012) (noting that "the Court's functional approach is tied to the common law's identification of functions meriting the protection of absolute immunity, but the Court's precedents have not mechanically duplicated the precise scope of the absolute immunity the common law provided to protect those functions."); Kalina v. Fletcher 522 U.S. 118, 124 n.11 (1997) (noting that though there was no absolute prosecutorial immunity in 1871, "the Court in *Imbler* drew guidance both from the first American cases addressing the availability of malicious prosecution actions against public prosecutors, and perhaps more importantly from the policy considerations underlying the firmly established common-law rules providing absolute immunity for judges and juries"); Richardson v. McKnight, 521 U.S. 399, 404 (1997) (noting that "look[ing] both to history and to the purposes that underlie government employee immunity in order to find the answer [to whether employees of a private prison management firm should receive qualified immunity]"); Burns v. Reed, 500 U.S. 478, 493 (1991) (noting that "the precise contours of official immunity need not mirror the immunity at common law") (citation and quotation marks omitted); City of Newport v. Fact Concerts 453 U.S. 247, 258–59 (1981) (noting that "[o]nly after careful inquiry into considerations of both history and policy has the Court construed § 1983 to incorporate a particular defense"); Carey v. Piphus, 435 U.S. 247, 258 (1978) (noting that sometimes common law damages rules will suffice for constitutional torts, but "the interests protected by a particular constitutional right may not also be protected by an analogous branch of the common law . . . In those cases the task will be the harder one of adapting common-law rules of damages to provide fair compensation for injuries caused by the deprivation of a constitutional right.").

121. 132 S.Ct. at 1665.

government immunity-producing concern."[122] The Court found, as it generally does, that "[n]othing about the reasons we have given for recognizing immunity under § 1983 counsels against carrying forward the common law rule."[123]

Filarsky is a typical case. There does not appear to be a single opinion in which the Court has found a conflict between 1871 tort doctrine and modern policy, and yet the Court concluded that 1871 tort doctrine should control the outcome. Consequently, it is not clear that 1871 tort law does *any* of the work of deciding cases, and it certainly does not do *all* of that work. On occasion, the Court simply applied the functional approach without discussing potential conflicts between 1871 doctrine and the functional approach.[124] But the Court has sometimes addressed the need to make a choice and has chosen function over history. In the prosecutorial immunity cases, for example, "the Court's precedents have not mechanically duplicated the precise scope of the absolute immunity that the common law provided to protect those functions."[125] The same theme surfaces in its cases on absolute witness immunity. In *Bricoe v. LaHue*,[126] the Court cited history to support the proposition that trial witnesses, including police officers, are entitled to absolute immunity from defamation. The *Briscoe* opinion, like many others,[127] gives the impression that history determined the outcome. In a later case, however, the Court acknowledged that *Briscoe* took a step beyond 1871 doctrine. It held that "the immunity of a trial witness is broader: In such a case, a trial witness has immunity with respect to *any* claim based on the witness' testimony."[128] After *Briscoe*, the next question was whether a "complaining witness" before a grand jury would get the same immunity. The Court faced that question in *Rehberg v. Paulk*.[129] Citing *Briscoe* and the prosecutorial immunity cases, but without identifying any historical antecedents, the Court held that "[t]he factors that justify absolute immunity for trial witnesses apply with equal force to grand jury witnesses."[130] It is the policy, not the history, that drives the outcome. In *Briscoe* and *Rehberg*, the relevant policy was the need to avoid "unwarranted timidity," which was "the most important special government immunity-producing concern."[131]

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122. *Id*.
123. *Id*.
124. *See, e.g.*, Van de Kamp v. Goldstein, 555 U.S. 335 (2009); Forester v. White, 484 U.S. 219 (1988).
125. Rehberg v. Paulk, 132 S.Ct. 1497, 1503 (2012).
126. 460 U.S. 325 (1983).
127. *See* JEFFRIES, ET AL., *supra* note 66, at 161.
128. Rehberg v. Paulk, 132 S.Ct. 1497, 1505 (2012).
129. 132 S.Ct. 1497 (2012).
130. 132 S.Ct. at 1505.
131. Filarsky v. Delia, 132 S.Ct. 1657, 1665 (2012) (citation and internal quotation marks omitted).

B. Areas in Which the Court Does Not Cite 1871 Tort Law

The cases in section A suggest that 1871 tort law is relevant to some § 1983 issues, though it is rarely determinative. By emphasizing the Court's 1871 rhetoric in a few cases and minimizing the gap between that rhetoric and the Court's actions, Baude allows a small tail to wag a big dog. The minor role played by 1871 tort law is evident in the light of the whole body of § 1983 doctrine. While the Court does sometimes refer to 1871 doctrine, especially in absolute immunity cases, it rarely does so in the context of qualified immunity. This doctrine is not only the target of Baude's article but is also a far more important defense in practice because it is available to officers generally, even when they do not engage in a judicial, prosecutorial, or legislative function. Equally important, the Court does not consistently refer to 1871 tort law in resolving a range of miscellaneous issues, such as issue and claim preclusion, release-dismissal agreements, and deference to pending state proceedings.

1. Qualified Immunity

At one point in his article, Baude seems to argue that *Pierson v. Ray*[132] provides support for his thesis, though he later makes it clear that he disapproves of *Pierson*.[133] In *Pierson*, the Supreme Court's first official immunity case after *Monroe*, the Court held that police officers are entitled to qualified immunity for an arrest that violates the Fourth Amendment, so long as they act with "good faith and with probable cause."[134] The Court relied on both the common law and policy. On the policy side, it said that "[a] policeman's lot is not so unhappy that he must choose between charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does."[135] On the tort front, the Court cited the Restatement (Second) of Torts from 1965, the Harper and James treatise on "The Law of Torts" from 1956, and an Eighth Circuit case from 1950. Whatever the law may have been in 1871, the Court manifestly did not rely on 1871 law. It relied on modern tort law.

In the fifteen years after *Pierson*, the Court decided several more qualified immunity cases, in which it relied on both policy and common law tort principles, without reference to 1871. Baude criticizes these later cases for deviating from *Pierson* by expanding immunity beyond *Pierson* when they only deviate from Baude's approach to interpretation. The next important qualified immunity case after *Pierson* is *Scheuer v. Rhodes*.[136] Here the governor of

132. 386 U.S. 547 (1967).

133. *Compare* Baude, *supra* note 1, at 52–53 (suggesting that the Court paid attention to history in *Pierson* but strayed from the true path in later cases) *with* Baude, *supra* note 1, at 59 (finding fault with *Pierson* on the ground that in 1871 good faith was not a defense but instead "an element of specific torts.")

134. 386 U.S. at 557.

135. 386 U.S. at 555.

136. 416 U.S. 232 (1974).

Illinois and other officials were sued for ordering National Guard troops to shoot at students at a protest against the Vietnam War. As in *Pierson*, the Court discussed both history and policy. The difference between the two cases is that the Court moved from the narrow focus on the common law defenses for the police in *Pierson* to a more general history of official immunity going back to 17th century England[137] and a more abstract statement of the policy in *Schueuer*. Instead of the specific concern with shielding a police officer from an "unhappy" fate, the Court generalized the policy behind immunity:

> Although the development of the general concept of immunity, and the mutations which the underlying rationale has undergone in its application to various positions are not matters of immediate concern here, it is important to note . . . that one policy consideration seems to pervade the analysis: the public interest requires decisions and action to enforce laws for the protection of the public.[138]

The Court also recognized that this pro-immunity policy had to be balanced against the remedial goal of § 1983.[139] It concluded that "a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances."[140] The immunity is available if the officer has "reasonable grounds for the belief . . . coupled with good faith belief." A year later in *Wood v. Strickland*,[141] the Court ruled that school board members could assert qualified immunity. It relied on "[c]ommon law tradition . . . and strong public policy reasons"[142] and described the immunity as having both an "objective" and a "subjective" component.[143] Although common law tradition influenced *Scheuer* and *Wood*, the Court made no effort in either case to link the immunity to 1871 tort law.

A few years later the Court faced the qualified immunity question in the context of a suit brought under the *Bivens* doctrine, which allows damages suits against federal officials for violations of constitutional rights.[144] Unlike § 1983, this federal common law doctrine does not stem from a federal statute, so its contours do not depend at all on legislative intent. In *Butz v. Economou*,[145] the issue was whether the Secretary of Agriculture could assert official immunity. The Court rejected absolute immunity but recognized the same qualified immunity for federal executive officers as that available to state officers in §

137. 416 U.S. at 239 n.4.
138. 416 U.S. at 241.
139. *See* 416 U.S. at 243, 248.
140. 416 U.S. at 247.
141. 420 U.S. 308 (1975).
142. 420 U.S. at 318.
143. *See* 420 U.S. at 321.
144. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).
145. 438 U.S. 478 (1978).

1983 suits. Thus, the Court examined *Pierson*, *Scheuer*, and *Wood*, among other § 1983 cases, with an emphasis on the policies behind the immunity:

> the injustice, particularly in the absence of bad faith, of subjecting to liability an officer . . . who is required to exercise discretion," and "the danger that the threat of such liability would deter his willingness to executive his office with the decisiveness and judgment required by the public good."[146]

These policies led the Court to hold that "there is no basis for according to federal officials a higher degree of immunity when sued for a constitutional infringement as authorized by *Bivens* than is accorded state officials when sued for the identical violation under § 1983."[147] *Pierson*, *Scheuer*, *Wood*, and *Butz* illustrate the interaction between policy considerations and common law tort doctrine in the Court's development of the qualified immunity defense. But none of them rely on a conventional exercise of statutory interpretation, under which the 1871 tort law familiar to the Congress that enacted the statute would be key.

If any doubt remained as to the Court's methodology, it was dispelled by *Harlow v. Fitzgerald*,[148] the leading case on the current qualified immunity rule. In *Harlow*, the Court adopted a rule that officials are immune unless they violate "clearly established" law. That rule appears to have no common law analogue, and the Court did not suggest otherwise. It relied entirely on tort policy, in particular the "avoiding unwarranted timidity" policy.[149] In fact, *Harlow* was not even a § 1983 case. It was a suit against federal officers under an "implied cause of action." Paying no respect at all to the "statutory interpretation" approach to § 1983, the Court ruled that the policy-based *Harlow* rule would apply to § 1983 cases as well. *Harlow* is typical of qualified immunity cases. Though they sometimes refer to modern common law principles, none of them give any weight at all to 1871 tort law.

In *Anderson v. Creighton*,[150] the Court confirmed that modern tort policy would govern qualified immunity. This case involved police entry into plaintiffs' home without a warrant to look for a fugitive. The plaintiffs claimed that the Fourth Amendment right against such a search was clearly established because "officers conducting such searches were strictly liable at English common law if the fugitive was not present." Writing for the Court, Justice Scalia rejected the plaintiffs' contention that the right was clearly established, such that qualified immunity would not be available to the officers. The argument failed because:

> [W]e have never suggested that the precise contours of official immunity can and should be slavishly derived from the often arcane rules of the common law. That notion is plainly contradicted by *Harlow*,

146. 438 U.S. at 497 (quoting *Scheuer*, 416 U.S. at 240).
147. 438 U.S. at 500.
148. 457 U.S. 800, 818 (1982).
149. *See* 438 U.S. at 500. *See also* 457 U.S. at 813–15.
150. 483 U.S. 635 (1987).

> where the Court completely reformulated qualified immunity along principles not at all embodied in the common law.[151]

Anderson is another *Bivens* case and in theory might be distinguished from the qualified immunity issue in § 1983 litigation. But under the Court's doctrine, that feature is beside the point. As noted above, *Harlow* had already ruled that the new rule would apply to both § 1983 and *Bivens* suits.

2. Other § 1983 Issues

Professor Baude's "law of interpretation," if valid, would apply to the whole range of § 1983 issues. Yet he concentrates entirely on official immunity and ignores other areas of § 1983 litigation. In *Owen v. City of Independence*,[152] for example, the Court rejected any immunity for local governments. It took this step even though local governments in 1871 were shielded from liability for their governmental (as opposed to their proprietary) acts and from liability for their discretionary (as opposed to their governmental) functions. *Owen* at least acknowledged the 1871 doctrines before rejecting them. In most contexts, the Court looks solely to modern law, including but not limited to tort doctrine. For example, in *Mt. Healthy City School District Board of Education v. Doyle*,[153] the Court adopted a special rule of causation in § 1983 public employee speech cases. The Court's rule mandates a two-step approach. The initial burden is on the plaintiff to show that protected speech was a substantial factor motivating the adverse action taken against him. Then the burden shifts to the defendant to show that the action would have been taken even if the plaintiff had not engaged in protected speech. The Court made no reference to 1871 tort law. The rule was based on the Court's judgment that "[t]he constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct."[154]

More recently, in *Manuel v. City of Joliet*,[155] the Court held that "the Fourth Amendment [rather than due process] governs a claim for unlawful pretrial detention even beyond the start of legal process."[156] In the circumstances of the case, that holding gave rise to a narrower question, of a kind that may come up in common law tort litigation: At what date does the claim accrue for purposes of the running of the statute of limitations? The Court remanded that question but provided some guidance. In particular, it made no reference to 1871 tort law. Rather:

> In defining the contours and prerequisites of a § 1983 claim, including its rule of accrual, courts are to look first to the common law of torts.

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151. 483 U.S. at 644–45.
152. 445 U.S. 622 (1980).
153. 429 U.S. 274, 285–87 (1976).
154. 429 U.S. at 285–86.
155. 137 S.Ct. 911, 920 (2017).
156. *Id.* at 920.

> Sometimes, that review of common law will lead a court to adopt wholesale the rules that would apply in a suit involving the most analogous tort. But not always. Common-law principles are meant to guide rather than to control the definition of § 1983 claims, serving "more as a source of inspired examples than of prefabricated components." In applying, selecting among, or adjusting common-law approaches, courts must closely attend to the values and purposes of the constitutional right at issue.[157]

Under this approach, modern tort doctrine is relevant to § 1983 issues, as are the constitutional values at stake. But there is no room at all for deference to 1871 doctrine.

Other illustrations come from the whole range of § 1983 issues. In adjudicating damages issues, the Court cited a modern damages treatise by Fowler Harper, Fleming James, and Oscar Gray.[158] With no rebuke from the Supreme Court, lower courts treat § 1983 damages issues as a kind of federal common law.[159] They have applied modern damages principles to the whole range of issues the Supreme Court has not addressed, such as joint liability,[160] consortium,[161] and fear of developing an illness in the future.[162]

The statute authorizes suits for violations of federal "laws" as well as the Constitution.[163] In *Maine v. Thiboutot*,[164] the Court relied on this "plain language,"[165] and on "scanty legislative history,"[166] to hold that § 1983 suits could be brought to enforce federal statutes. A year later, however, it imposed limits on the use of § 1983 to enforce federal statutes without identifying any basis in legislative history or nineteenth century law for doing so.[167] In *Town of Newton v. Rumery*,[168] the Court upheld "release-dismissal" agreements by which a criminal defendant dismisses a § 1983 suit in exchange for dismissal of a prosecution. This type of agreement was challenged on the ground that it violates § 1983 policy. In rejecting the challenge, the Court relied on the modern Restatement of Contracts, without any inquiry into 1871 contract law.[169] In *Allen*

157. *Id.* at 920–21 (internal citations omitted). The Court went on to discuss factors related to the accrual issue in the Fourth Amendment context without resolving the issue. *See id.* at 921–22.

158. *See* Memphis Community School District v. Stachura, 477 U.S. 299, 306–07 (1986); Carey v. Piphus, 435 U.S. 247, 255 (1978).

159. *See generally* Graham v. Satkoski, 51 F.3d 710 (7th Cir. 1995).

160. Cooper v. Casey, 97 F.3d 914, 919 (7th Cir. 1996).

161. Bell v. City of Milwaukee, 746 F.2d 1205, 1250 (7th Cir. 1984).

162. Clark v. Taylor, 710 F.2d 4 (1st Cir. 1983).

163. 42 U.S.C. § 1983.

164. 448 U.S. 1 (1980).

165. 448 U.S. at 6.

166. 448 U.S. at 7.

167. *See* Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers Assoc., 453 U.S. 1, 19 (1981); Pennhurst State Sch. and Hosp. v. Halderman 451, U.S. 1, 28 (1981).

168. 480 U.S. 386 (1987).

169. 480 U.S. at 392, 407 n.2.

v. McCurry,[170] the plaintiff sued police officers for Fourth Amendment violations. The issue was whether a § 1983 plaintiff is precluded from relitigating a Fourth Amendment claim decided against him in an earlier criminal proceeding. The Court applied the modern doctrine of issue preclusion to § 1983 suits, even though it recognized that the nineteenth century "mutuality of estoppel" doctrine would produce a far less preclusive effect.[171] In *Younger v. Harris*,[172] the issue was whether a federal court should dismiss a § 1983 suit in which the plaintiff sought an injunction on federal constitutional grounds against a criminal prosecution at which he could raise the federal issue. Following Baude's "1871 law" approach, the Court might have dismissed the case under the traditional principle of equity that a court should not enjoin a criminal prosecution. Instead, the Court emphasized "an even more vital consideration, the notion of 'comity,' that is, a proper respect for state functions,"[173] which it then deployed to extend the doctrine of deference to some civil and administrative proceedings.[174] When the target of the constitutional challenge is a state tax scheme, the principle of comity blocks § 1983 suits for damages or prospective relief, so long as a state law remedy is available.[175] Citing no history, the Court held that, "in order to recover damages for . . . harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been" nullified in one way or another.[176] The point of these illustrations is that they present a challenge to Baude's thesis: He must maintain either (a) that the Court has taken the wrong path throughout its § 1983 doctrine or (b) that there is some special feature of qualified immunity, which justifies the application of his approach to statutory interpretation in qualified immunity cases even if that approach does not apply to other issues. Baude has defended neither of these positions.

3. Congress's Approval of the Common Law Method

Taken as a whole, § 1983 doctrine is best characterized as a body of federal common law. The Court relies on an array of sources and methods. These include the text of the statute, its legislative history, the broad remedial purposes of the statute, and principles of the law of constitutional remedies. It also relies on "the common law of torts (both modern and as of 1871), with such modification or adaptation as might be necessary to carry out the purpose and policy of the statute."[177] The law in place in 1871 is relevant but has a comparatively minor

170. 449 U.S. 90 (1980).
171. *See* 449 U.S. at 97.
172. 401 U.S. 37 (1971).
173. *Id.* at 41.
174. *See* Sprint Commc'ns v. Jacobs, 134 S.Ct. 584, 591–92 (2013).
175. *See* Nat. Private Truck Council v. Okla. Tax Comm'n, 515 U.S. 582, 588 (1995) (injunctions and declaratory judgments); Fair Assessment in Real Estate v. McNary, 454 U.S. 100 (1981) (damages).
176. Heck v. Humphrey, 512 U.S. 477, 486 (1994).
177. Smith v. Wade, 461 U.S. 30, 34 (1983).

role. Thus, Baude's critique of qualified immunity implies that the "unlawfulness" of the doctrine extends far beyond that doctrine to the whole range of § 1983 questions. But Baude's thesis is problematic even if we accept his premise that "the law of interpretation" governs § 1983 issues.[178] Baude's thesis suggests that Congress is a passive victim of judicial abuse. This is not so. In fact, Congress has evidently approved the Court's methodology. In 1996, Congress reenacted § 1983, adding a clause in response to a Supreme Court ruling.[179] The case was *Pulliam v. Allen*,[180] in which the Court held that judges may be sued for injunctive relief. Congress's response was to add a proviso to the authorization of equitable relief. Injunctions remain generally available, "except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable."[181]

Since the contours of the Court's judge-made doctrine were firmly settled by 1996, the reenactment of the statute with just this one modification provides strong support for the proposition that Congress has accepted, and even endorsed, the Court's approach. There is solid authority for this understanding of statutory reenactments in federal courts law. For example, long ago the Court created an exception to federal diversity jurisdiction for divorce cases.[182] A century later, the Court upheld the exception in *Ankenbrandt v. Richards*,[183] despite the absence of any statutory text. The Court relied on the 1948 revision of the diversity statute.[184] In that revision, Congress replaced earlier language, which had limited federal jurisdiction to "suits of a civil nature at common law or in equity." The new statute omitted that phrase in favor of "all civil actions."[185] The Court explained that, although the new statute made no reference to the Court's domestic relations exception, the new one indicated "Congress' apparent acceptance of [the Court's] construction of the diversity jurisdiction in the years prior to 1948."[186] Just as in 1948 Congress "made substantive changes to the [diversity] statute in other respects," in 1996 it made a substantive change to §

178. *See* William Baude, *Is Qualified Immunity Unlawful?,* 106 CALIF. L. REV. 45, 47, 47 n.5 (2018).

179. *See* JEFFRIES, ET AL., supra note 66, at 60–61.

180. 466 U.S. 522 (1984).

181. Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, § 309, 110 Stat. 3893 (Oct. 19, 1996). Baude acknowledges the existence of this statute but does not examine its implications for his thesis. *See* Baude, *supra* note 1, at 80, 80 n.204. This is not the sole Congressional intervention. In 1979, after the Court had laid the foundations for much of modern § 1983 doctrine, Congress had amended the statute to provide that the District of Columbia can be sued. *See* Act of Dec. 29, 1979, Pub. L. No. 96-170, 93 Stat. 1284.

182. *See Ex parte* Burrus, 136 U.S. 586, 593–94 (1890); *see also* Barber v. Barber, 62 U.S. 582, 584 (1859).

183. 504 U.S. 689, 694–95 (1992).

184. 504 U.S. at 700.

185. *Id.*

186. *Id.*

1983.[187] In *Ankenbrandt*, the Court "presume[d], absent any indication that Congress intended to alter [the domestic relations] exception, that Congress adopted that interpretation when it reenacted the diversity statute."[188] The same presumption should apply to the Court's common law methodology in § 1983 adjudication.

CONCLUSION

There is much to criticize about the Court's § 1983 jurisprudence, including the expansive qualified immunity doctrine it has developed.[189] We share many of Professor Baude's apparent policy preferences, but we think his methodology is wrong. He hopes to remake qualified immunity doctrine by convincing the Court to effectively jettison decades of doctrine and chalking it up to a mistake. We think there is a better way, one that is more likely to be effective and that is truer to § 1983's normative qualities and its history in the courts. Because § 1983 is a common law statute and has implicitly been treated as such by the Court, the Justices themselves hold the ultimate power to reshape it. The challenge is not to convince them that they have fatally misunderstood the common law as it historically stood in 1871 but rather that contemporary policy considerations and the wisdom of experience argue for doctrinal refinement. In other words, the Justices should behave as generations of Justices always have in this area and not turn themselves into historians.

187. *See supra* text following note 181.

188. 504 U.S. at 701 (citation, internal quotation marks, and internal editing omitted).

189. *See*, *e.g.*, John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 VA. L. REV. 207, 250 (2013).