

Against Doctrinal Convergence in Constitutional Remedies

Thomas K.S. Fu*

The Supreme Court has increasingly moved towards a single, uniform legal standard in the area of constitutional remedies. The boundaries between the legal tests used to determine the availability of relief in the post-conviction habeas, constitutional tort, and exclusionary rule contexts have steadily been eroding. There is a natural tendency to think about these kinds of moves towards trans-substantive doctrinal uniformity as positive developments: just as in the sciences, grand unifying theories in law have an aura of elegance about them. In many ways, this aura is well deserved. Treating like things alike is one of the fundamental metrics by which we evaluate the fairness and legitimacy of a legal system. But doctrinal uniformity also comes with a cost. Replacing narrow, piecemeal legal doctrines with broad, unifying regimes necessarily entails a sacrifice of nuance. And it's not obvious, in the abstract, whether wide-ranging doctrinal coherence is preferable to a more flexible, ad hoc approach.

This Note argues that in the particular area of constitutional remedies, the Supreme Court's recent trend towards uniformity is ill-advised. Although there are important commonalities across constitutional remedies, and useful insights that can be gained by conceptualizing them similarly, their purposes are better served by maintaining clear divisions between their legal frameworks. Significant differences in the roles played and problems addressed by each counsel in favor of doctrinal separateness. This is particularly true when it comes to how the availability of constitutional remedies interacts with the problem of "new law"—how to think about government action that is ultimately held to be unconstitutional, but whose legality was unclear at the time it was taken. This Note then applies this general critique to the specific case of the Court's current approach to qualified immunity. In particular, it argues that the Court's recent jurisprudence regarding what is required to "clearly establish" a constitutional right too closely mimics the standard of clearly established law required for post-conviction habeas relief under the Antiterrorism and Effective Death Penalty Act of 1996, and fails to adequately balance the competing objectives unique to the constitutional torts context. By refocusing

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the discussion on qualified immunity's particular role within the larger constitutional remedial scheme, this Note suggests some ways to bring the doctrine back in line with those purposes.

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INTRODUCTION

[E]very right, when withheld, must have a remedy, and every injury its proper redress

—Chief Justice Marshall, *Marbury v. Madison*¹

If one thing is clear about modern constitutional remedies law, it is that, at least as a descriptive matter, Chief Justice Marshall is wrong.² It is certainly not the case that every right, even every constitutional right, must have a corresponding remedy. In fact, there exists a whole host of reasons why a remedy may be denied. Procedural doctrines such as Article III and prudential standing (as well as the closely associated concepts of ripeness and mootness),³

1. 5 U.S. (1 Cranch) 137, 163 (1803) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *109) (internal quotation marks omitted).

2. Chief Justice Marshall is not often wrong, so when he is, it's worth taking note.

3. See, e.g., *Allen v. Wright*, 468 U.S. 737, 739-40, 744-45 (1984) (dismissing black parents' challenge to an IRS determination that racially discriminatory schools were entitled to tax-exempt status for lack of standing); *DeFunis v. Odegaard*, 416 U.S. 312, 314-16, 319-20 (1974) (dismissing student's constitutional challenge to law school admission policy on

the political question doctrine,⁴ and congressional control over federal court jurisdiction⁵ all work to limit the judiciary's capacity to provide remedies for violations of rights.

Substantive remedial doctrines themselves have also been crafted to impose their own limitations on the ability of a victim to seek relief.⁶ A prisoner who has been imprisoned unconstitutionally by a state criminal justice system, for instance, is only entitled to federal, post-conviction habeas relief (e.g., vacation of her conviction)⁷ if her conviction involved a violation of a constitutional right that was clearly established by Supreme Court precedent.⁸ Similarly, a victim of police brutality (a violation of his Fourth Amendment right against unreasonable seizures) who sues the police under § 1983 can only recover if the police acted in a "plainly incompetent" manner or "knowingly violate[d] the law."⁹ And a criminal defendant who has evidence obtained from her pursuant to an unreasonable (and therefore unconstitutional) search by the government will only be able to have that evidence excluded at her trial if the police effecting the unconstitutional search failed to act in good faith.¹⁰

While unremedied constitutional violations have a tendency to provoke negative reactions, particularly when the victims are sympathetic (such as a death-row prisoner claiming actual innocence or a peaceful protestor accosted by a violent police force), they are not necessarily "bad" outcomes. To be sure, they certainly come with costs—costs disproportionately borne by victims of constitutional deprivations, as well as fairness costs which can detract from the legal system's legitimacy as a whole—but there is more going on here. Just as countervailing considerations regarding separation of powers and the institutional competency of the judiciary sometimes act to preclude relief for rights violations in the standing and political question contexts,¹¹ so too do

mootness grounds); *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 159, 160-62 (1967) (dismissing manufacturers' suit seeking an injunction of FDA regulations for lack of ripeness).

4. See, e.g., *Nixon v. United States*, 506 U.S. 224, 226 (1993) (holding that the adequacy of the Senate's impeachment procedures was a nonjusticiable political question).

5. See, e.g., *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449 (1850) ("Courts created by statute can have no jurisdiction but such as the statute confers.").

6. See *infra* Part I.

7. RICHARD H. FALLON, JR. ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 1217 (6th ed. 2009) ("Ordinarily the only remedy awarded is release from custody, but the remedy is tailored to the nature of the constitutional violation.").

8. See 28 U.S.C. § 2254(d)(1) (2012).

9. 42 U.S.C. § 1983 (2011); *Messerschmidt v. Millender*, 132 S. Ct. 1235, 1244-45 (2012) (quoting *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2085 (2011)).

10. See, e.g., *Davis v. United States*, 131 S. Ct. 2419, 2427-28 (2011).

11. *Nixon v. United States*, 506 U.S. 224, 228 (1993) ("A controversy is nonjusticiable—i.e., involves a political question—where there is 'a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it . . .'" (ellipses in original) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962))); *Allen v. Wright*, 468 U.S. 737, 752

contrary concerns sometimes counsel against providing remedies in the constitutional remedies context.¹² The key question is how to balance these competing policy motivations.

Of course, the particular concerns at issue are highly context dependent: the post-conviction habeas regime, for instance, involves weighing the benefits of providing state prisoners the opportunity to challenge the constitutionality of their convictions against the federalism costs of federal courts' intrusion into the functioning of state criminal justice systems;¹³ the availability of money damages in suits pursuant to § 1983 or *Bivens v. Six Unknown Named Agents*,¹⁴ necessarily brings with it concerns of overdeterrence of lawful government conduct; and the restitutionary motivation underlying the exclusionary rule is in tension with the competing notion that the "criminal [should not] go free because the constable has blundered."¹⁵ Unsurprisingly, the legal rules that have been developed to govern each of these areas have sought to balance the respective policy concerns of each. Because the competing motivations differ across the post-conviction habeas, constitutional tort, and exclusionary contexts, (perhaps unsurprisingly) the governing legal doctrines have also differed.¹⁶

Recently, however, there has been a trend towards doctrinal convergence in constitutional remedies doctrines. The legal rules governing post-conviction habeas, § 1983 and *Bivens* suits, and the exclusionary rule have been growing increasingly similar, with the Court occasionally citing cases from one area in its opinions in another.¹⁷ This Note examines this trend and argues that while there are good reasons for treating these doctrines as related, the key differences underlying the various doctrines' purposes and motivations counsels in favor of maintaining a well-defined separation between them. Part I

(1984) ("[T]he law of [Article] III standing is built on a single basic idea—the idea of separation of powers.").

12. See *infra* Part I.

13. Post-conviction habeas affects federal prisoners too, although doctrinally and practically, habeas is less important for federal prisoners than for state prisoners. Doctrinally, post-conviction habeas review of federal convictions does not implicate the same federalism concerns as review of state convictions, see *infra* Part III.B, and accordingly federal prisoners face less onerous hurdles in post-conviction habeas proceedings than state prisoners do. Compare 28 U.S.C. § 2254 (2012), with *id.* § 2255. On a practical level, federal prisoners file far fewer habeas petitions than state prisoners. See OFFICE OF JUDGES PROGRAM, STATISTICS DIV., ADMIN. OFFICE OF THE U.S. COURTS, STATISTICAL TABLES FOR THE FEDERAL JUDICIARY DEC. 31 2012, at tbl.C-3 (2013), available at <http://www.uscourts.gov/uscourts/Statistics/StatisticalTablesForTheFederalJudiciary/2012/december/C03Dec12.pdf>.

14. 403 U.S. 388 (1971).

15. *People v. Defore*, 150 N.E. 585, 587 (N.Y. 1926) (Cardozo, J.).

16. See *infra* Part I.

17. See, e.g., *United States v. Leon*, 468 U.S. 897, 922 (1984) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 815-19 (1982)); see also Jennifer E. Laurin, *Trawling for Herring: Lessons in Doctrinal Borrowing and Convergence*, 111 COLUM. L. REV. 670, 699-724 (2011).

begins by briefly reviewing the convergence of constitutional remedies doctrines in Supreme Court case law. Part II then examines the similarities between the doctrines to explain why there has been a move towards trans-substantive uniformity in this area and argues that there are good reasons for conceptualizing these doctrines similarly. Part III argues that despite the similarities identified in Part II, there are nevertheless important differences underlying the doctrines that counsel in favor of maintaining conceptual separateness; constitutional remedies should be treated as related, not identical. Finally, Part IV illustrates the effect of adopting this approach by contrasting the purposes of § 1983 and *Bivens* actions with the purposes of both post-conviction habeas relief and the exclusionary rule, to suggest new ways to think about some of the open questions in qualified immunity doctrine with a particular focus on the question posed by *Reichle v. Howards*: what is required for a right to be “clearly established” for purposes of qualified immunity.¹⁸

I. THE CONVERGENCE OF THE CONSTITUTIONAL REMEDIES DOCTRINES

Though reasonable minds can differ about what doctrines are encompassed within “the constitutional remedies doctrines,” as I use the term here I mean post-conviction habeas relief for state prisoners, money damages under § 1983 and *Bivens*, and the exclusionary rule for the Fourth Amendment. I fully recognize that this excludes the tax refund cases,¹⁹ which Richard Fallon and Daniel Meltzer view as an important part of constitutional remedies²⁰—a point on which I agree. Nevertheless, my point here is not that *all* constitutional remedies doctrines have undergone a doctrinal convergence, but that an important subset of them has. In this Part, I walk through the basic doctrinal contours of that subset and explain how it has converged in recent Supreme Court jurisprudence.

A. Post-Conviction Habeas

The writ of habeas corpus, as it exists today, permits both state and federal prisoners to challenge the constitutionality of their convictions in federal court.²¹ Because the questions of doctrine and policy are far richer for state prisoners’ access to the writ of habeas corpus, that is where I direct the focus of this Note. And it’s worth remarking at the outset just how extraordinary the writ of habeas corpus is for state prisoners. Originally, habeas relief in federal court was only available to federal prisoners, and even when it was available, it

18. 132 S. Ct. 2088, 2093 (2012).

19. See, e.g., *Am. Trucking Ass’n v. Smith*, 496 U.S. 167 (1990); cf. *Ward v. Bd. of Cnty. Comm’rs*, 253 U.S. 17 (1920).

20. Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1753 (1991).

21. See 28 U.S.C. §§ 2254-2255 (2012).

only extended to attacks on the convicting court's jurisdiction.²² Over time, the writ not only expanded to include state prisoners within its protections, it also grew in scope to permit collateral attack on the constitutional merits of convictions as well.²³ Now it permits federal district courts to exercise something akin to appellate review over state courts of last resort.²⁴

Because of the expansive power associated with post-conviction habeas relief, the writ has been nothing less than controversial.²⁵ While habeas relief during the Warren Court era extended to "all constitutional issues that the Supreme Court could have considered on direct review of a state criminal conviction," both Congress and the Court have since acted to limit the availability of habeas review.²⁶

The most important of these limitations for purposes of this Note are those imposed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA),²⁷ which states that a federal court may only grant a habeas petition if the state court proceedings "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."²⁸ The Court has explained the effect of AEDPA as follows:

[T]he writ may issue only if one of the following two conditions is satisfied— . . . [1] the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts . . . [2] if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.²⁹

22. Act of Feb. 5, 1867, 14 Stat. 385, 385-87; *see also Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 202-03 (1830).

23. *Compare Brown v. Allen*, 344 U.S. 443 (1953), *with Watkins*, 28 U.S. (3 Pet.) 193. For a brief overview of the history of the writ of habeas corpus in America, *see generally* FALLON, JR. ET AL., *supra* note 7, at 1220-310.

24. *See* FALLON, JR. ET AL., *supra* note 7, at 1228-30. *But see Brown*, 344 U.S. at 510 (opinion of Frankfurter, J.) ("The fact that Congress has authorized district courts to be the organ of the higher law rather than a Court of Appeals, or exclusively this Court, does not mean that it allows a lower court to overrule a higher court. It merely expresses the choice of Congress how the superior authority of federal law should be asserted.").

25. Recently, for instance, the writ formed a substantial part of the controversy regarding the treatment of detainees at Guantanamo Bay. *See Boumediene v. Bush*, 553 U.S. 723 (2008); *see also Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

26. FALLON, JR. ET AL., *supra* note 7, at 1214.

27. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of the U.S. Code).

28. 28 U.S.C. § 2254(d) (2012).

29. *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000).

In a later case, the Court has clarified that, for purposes of AEDPA, unreasonable application of the correct legal rule to a set of facts is a standard that requires more deference than review for clear error.³⁰

B. The Exclusionary Rule

In *Mapp v. Ohio*, the Supreme Court held that the Constitution places an obligation upon both state and federal courts to exclude evidence obtained in violation of the Fourth Amendment.³¹ Such a ruling was necessary, the Court argued “to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.”³² Accordingly, the Court held that “the exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments.”³³

It is clear, however, that the second statement need not follow logically from the first: The exclusionary rule’s necessity for deterrence does not require that it be an essential part of the Fourth Amendment itself. Instead, it only requires that evidence be excluded when doing so would have a deterrent effect. And indeed, this is how the Court eventually resolved the issue in *United States v. Leon*, when it was presented with the question of whether the Fourth Amendment required suppression of evidence obtained in reasonable reliance on a search warrant that was found after the fact to be invalid.³⁴ So long as the officer’s reliance on the warrant was objectively reasonable, the evidence may be admitted at trial—the beginning of the so-called good faith exception.³⁵

Importantly, when the good faith exception was first announced, it was justified in part on the grounds that it made no sense to “[p]enaliz[e] the officer for the magistrate’s error, rather than his own.”³⁶ And it was assumed that unreasonable unconstitutional action on the part of the police would still trigger exclusion.³⁷ Both of these rationales were later undermined in *Herring v. United States*, in which the Court held that the “claim that police negligence automatically triggers suppression cannot be squared with the principles

30. *Lockyer v. Andrade*, 538 U.S. 63, 75-76 (2003).

31. 367 U.S. 643, 655 (1961) (“Since the Fourth Amendment’s right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government.”).

32. *Id.* at 656 (quoting *Elkins v. United States*, 364 U.S. 206, 217 (1960)) (internal quotation marks omitted).

33. *Id.* at 657.

34. 468 U.S. 897, 900 (1984).

35. *Id.* at 922-23.

36. *Id.* at 921.

37. *See id.* at 919 (citing *United States v. Peltier*, 422 U.S. 531, 539 (1975)).

underlying the exclusionary rule.”³⁸ Two years later, the Court stated the exclusionary rule, as it exists today, as follows:

When the police exhibit “deliberate,” “reckless,” or “grossly negligent” disregard for Fourth Amendment rights, the deterrent value of exclusion is strong and tends to outweigh the resulting costs. But when the police act with an objectively “reasonable good-faith belief” that their conduct is lawful, or when their conduct involves only simple, “isolated” negligence, the “deterrence rationale loses much of its force,” and exclusion cannot “pay its way.”³⁹

Most interesting for our present purposes, the Court cited *Harlow v. Fitzgerald*,⁴⁰ a qualified immunity case, in support of its decision. While the Court had previously stated that “the motive with which the officer conducts an illegal search may have some relevance in determining the propriety of applying the exclusionary rule,”⁴¹ the Court definitively rejected this view in *Leon*, largely by analogy to *Harlow*.⁴² Although it recognized that qualified immunity and the exclusionary rule “are not perfectly analogous,” the Court nevertheless felt that the two doctrines shared enough in common that it made sense to confine the good faith inquiry “to the objectively ascertainable question of whether a reasonably well trained officer would have known that the search was illegal despite the magistrate’s authorization,” just as *Harlow* had “eliminated the subjective component of the qualified immunity” inquiry.⁴³

C. Section 1983 and *Bivens* Suits

Perhaps the clearest counterexample to Chief Justice Marshall’s famous dictum that “every right, when withheld, must have a remedy, and every injury its proper redress” is the Court’s treatment of implied constitutional causes of action. The basic rule is quite simple: in general, constitutional rights do not carry with them implied causes of action.⁴⁴ This means that unless Congress affirmatively provides for a cause of action for constitutional deprivations (e.g., discrimination on the basis of religion), the victim is left without a remedy. There are, of course, exceptions to this rule—for instance, *Bivens v. Six Unknown Named Agents* held that the Fourth Amendment does contain an implied right of action to sue for money damages⁴⁵—but as a general matter, the Court has been relatively restrictive with regards to finding implied

38. *Herring v. United States*, 555 U.S. 135, 147 (2009).

39. *Davis v. United States*, 131 S. Ct. 2419, 2427-28 (2011) (internal quotation marks omitted). Note the similarity between the formulation of this version of the exclusionary rule and the current formulation of the qualified immunity doctrine. See *infra* Part I.C.

40. 457 U.S. 800 (1982).

41. *Scott v. United States*, 436 U.S. 128, 139 n.13 (1978).

42. *Leon*, 468 U.S. at 922 & n.23.

43. *Id.*

44. See FALLON, JR. ET AL., *supra* note 7, at 718-42; *infra* note 70.

45. 403 U.S. 388 (1971).

constitutional rights of action. Section 1983 of Title 42 of the U.S. Code fills this gap, granting a cause of action to victims deprived of their constitutional⁴⁶ rights by any person acting under color of law of “any State or Territory or the District of Columbia.”⁴⁷

Section 1983 and *Bivens* notwithstanding, however, the Supreme Court’s qualified immunity doctrine shields government officials from suits alleging violations of constitutional or statutory rights that were not “clearly established” at the time of the allegedly tortious conduct.⁴⁸ Thus, even if a court agrees that a government official did violate a plaintiff’s constitutional rights, Supreme Court precedent requires the court to dismiss the plaintiff’s suit if the violated right would not have been known to a reasonable officer.⁴⁹ This much is clear.

The Court has been less helpful, however, in explaining what exactly it expects a reasonable officer to know. When it first set out the modern qualified immunity doctrine in *Harlow v. Fitzgerald*, the Court specifically reserved the question of how “‘the state of the law’ [that should be known to a reasonable officer] should be ‘evaluated by reference to the opinions of [the Supreme] Court, of the Courts of Appeals, or of the local District Court.’”⁵⁰ The circuit courts, reading this language as giving *them* the responsibility to determine what sources constitute “the state of the law,” have crafted their own doctrines for determining what authorities may clearly establish a constitutional right. Because the courts of appeals have assumed that binding circuit precedent may serve to “clearly establish” a right, these rules are largely directed to the question of when out-of-circuit, district court, or even state court precedent may suffice.⁵¹

46. Section 1983 actually covers any deprivation of federal rights, whether constitutional or statutory, 42 U.S.C. § 1983 (2011) (granting a cause of action for “deprivation of any rights, privileges, or immunities secured by the Constitution and laws”), but the constitutional component is all that is relevant for purposes of this Note.

47. § 1983. Note that § 1983, by its terms, only applies to states, territories, and Washington, D.C., and not to the federal government, hence the continuing relevance of *Bivens*.

48. See *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Prior to *Harlow*, the Court’s qualified immunity doctrine involved a two-pronged test with both an objective and a subjective component. *Id.* at 815; see also *Wood v. Strickland*, 420 U.S. 308, 321-22 (1975) (“A compensatory award will be appropriate only if the [government official] has acted with such an impermissible motivation or with such disregard of the [plaintiff’s] clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith.”). *Harlow* rejected this approach, however, and instituted a wholly objective test for qualified immunity. See 457 U.S. at 818 (“We therefore hold that government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”).

49. See *Harlow*, 457 U.S. at 818.

50. *Id.* at 818 n.32 (quoting *Procunier v. Navarette*, 434 U.S. 555, 565 (1978)).

51. See, e.g., *Howards v. McLaughlin*, 634 F.3d 1131, 1141 (10th Cir. 2011) (“A plaintiff may meet his or her burden by pointing to ‘a Supreme Court or Tenth Circuit

Justice Thomas's recent opinion for the Court in *Reichle v. Howards*,⁵² however, casts doubt on this practice by suggesting that even directly on-point circuit court precedent may be insufficient to clearly establish a constitutional right for purposes of qualified immunity.⁵³ This Term, in *Stanton v. Sims*, the Court further called this practice into question by summarily reversing a Ninth Circuit denial of qualified immunity in a case that involved a question over which "federal and state courts nationwide are sharply divided."⁵⁴

Although the Court has been extremely active in the area of qualified immunity over the last twelve years,⁵⁵ such a radical departure from a widely

opinion on point, or [by showing] that his or her proposition is supported by the weight of authority from other courts." (alteration in original) (quoting *Armijo ex rel. Chavez v. Wagon Mound Pub. Schs.*, 159 F.3d 1253, 1260 (10th Cir. 1998)); *Kopec v. Tate*, 361 F.3d 772, 777-78 (3d Cir. 2004) (finding a clearly established right to be free from excessive handcuffing based on Ninth Circuit precedent despite the fact that "neither the Supreme Court nor [the Third Circuit] had addressed the question"); *Drummond ex rel. Drummond v. City of Anaheim*, 343 F.3d 1052, 1060-61 (9th Cir. 2003) ("[I]n the absence of binding precedent, a court should look to whatever decisional law is available to ascertain whether the law is clearly established for qualified immunity purposes, including decisions of state courts, other circuits, and district courts." (alteration in original) (quoting *Malik v. Brown*, 71 F.3d 724, 727 (9th Cir. 1995)) (internal quotation marks omitted)); *Virgili v. Gilbert*, 272 F.3d 391, 393 (6th Cir. 2001) ("Our review of the Supreme Court's decisions and of our own precedent leads us to conclude that, in the ordinary instance, to find a clearly established constitutional right, a district court must find binding precedent by the Supreme Court, its court of appeals or itself." (quoting *Ohio Civil Serv. Emps. Ass'n v. Seiter*, 858 F.2d 1171, 1177 (6th Cir. 1988)) (internal quotation marks omitted)).

52. 132 S. Ct. 2088 (2012).

53. *Id.* at 2094 ("Assuming *arguendo* that controlling Court of Appeals' authority could be a dispositive source of clearly established law in the circumstances of this case, the Tenth Circuit's cases do not satisfy the 'clearly established' standard here."); *see also* *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2084 (2011) (holding that law was not "clearly established" by a district court decision "call[ing] out [the defendant] by name" (quoting *al-Kidd v. Ashcroft*, 580 F.3d 949, 972-73 (9th Cir. 2009)) (emphasis omitted) (internal quotation marks omitted)). Although some Supreme Court dicta seems to envision binding circuit court authority as being sufficient to clearly establish a right, *see al-Kidd*, 131 S. Ct. at 2084 ("[A district court judge's] *ipse dixit* of a footnoted dictum falls far short of what is necessary absent controlling authority: a robust 'consensus of cases of persuasive authority.'" (quoting *Wilson v. Layne*, 526 U.S. 603, 617 (1999))), the Supreme Court has never directly confronted the question. Moreover, when the Supreme Court has invoked the "consensus of cases of persuasive authority" dicta, it has been to deny, rather than to find, a clearly established right. *See, e.g., id.; Wilson*, 526 U.S. at 617.

54. 134 S. Ct. 3, 5 (2013) (*per curiam*). Though the Court did not rest its holding solely on the fact that there was a division among the courts of appeals, it did nevertheless find that fact relevant:

To summarize the law[:]. . . Two opinions of this Court were equivocal on the lawfulness of [the police entry]; two opinions of the State Court of Appeal affirmatively authorized that entry; the most relevant opinion of the Ninth Circuit was readily distinguishable; two Federal District Courts in the Ninth Circuit had granted qualified immunity in the wake of that opinion; and the federal and state courts of last resort around the Nation were sharply divided.

Id. at 7.

55. *See, e.g.,* *Messerschmidt v. Millender*, 132 S. Ct. 1235 (2012); *al-Kidd*, 131 S. Ct.

held and longstanding assumption about the doctrine's operation is still surprising—at least at first blush. The Court's suggestion, if taken seriously, would dramatically shrink the scope of "clearly established" rights—effectively replacing the (relatively) permissive qualified immunity standard with the severely restrictive standard for post-conviction habeas relief under AEDPA—and would consequently effect a dramatic reduction in the number of successful suits against government officials for constitutional violations.

* * *

Justice Thomas's *Reichle* dicta, however, and the Supreme Court's steady expansion of qualified immunity's protections more generally, are unsurprising when considered in light of recent trends in the Supreme Court's treatment of constitutional remedies doctrines more generally. Just as the Court in *Leon* looked to qualified immunity for guidance in crafting a rule limiting the scope of the exclusionary rule, so too has the Court looked to post-conviction habeas rules for guidance in limiting the scope of government officials' liability under *Bivens* and § 1983. The Supreme Court has not only adopted a similar conceptual framework for thinking about the purposes and operations of each of these doctrines, but it has also gradually collapsed the respective tests used by each doctrine to deal with the problem of "new law"⁵⁶—the question of what relief to grant, or whether to grant relief at all, when a government official's rights-violating conduct was undertaken at a time when the law was sufficiently unsettled or uncertain such that reasonable minds could have disagreed as to the conduct's constitutionality.⁵⁷ Thus, far from being an outlier, *Reichle* and *Stanton* are emblematic of the Court's move towards doctrinal unification of these three originally distinct areas of law.

II. THE COMMON PURPOSES OF THE CONSTITUTIONAL REMEDIES DOCTRINES

The constitutional remedies doctrines and their "new law" exceptions—the good faith exception to the exclusionary rule, qualified immunity, and the

2074; *Pearson v. Callahan*, 555 U.S. 223 (2009); *Brosseau v. Haugen*, 543 U.S. 194 (2004) (per curiam); *Saucier v. Katz*, 533 U.S. 194 (2001), *overruled by Pearson*, 555 U.S. 223.

56. I borrow the term "new law" from Fallon & Meltzer, *supra* note 20, at 1736-37. Fallon and Meltzer originally used the term to refer to qualified immunity, post-conviction habeas, and tax refund litigation. *See id.* at 1737. I use it here to refer to qualified immunity, post-conviction habeas under AEDPA (note: AEDPA had not been enacted at the time that Fallon & Meltzer, *supra*, was published), and the good faith exception to the exclusionary rule. Though AEDPA, qualified immunity, and the good faith exception do not necessarily implicate "new law" in the same way that the retroactivity problem identified in *Teague v. Lane*, 489 U.S. 288, 300 (1989), does, they nevertheless do implicate a new law problem: how should we structure a constitutional remedies regime to deal with government action taken in the face of uncertain law (which may be created as new law in the case at issue).

57. For the exclusionary rule, § 1983 and *Bivens* liability, and post-conviction habeas relief under AEDPA, the relevant "new law" doctrines are the good faith exception, qualified immunity, and § 2254(d)(1), respectively.

stringent requirements for post-conviction habeas relief under AEDPA—reflect the results of attempts by Congress and the Court to grapple with the question of how to analyze governmental action, found to violate the Constitution, that was undertaken in light of uncertain or unsettled constitutional law. Although these doctrines have their origins in very different substantive areas, over the last three decades the Court has undertaken an unmistakable trend towards adopting a single, trans-substantive “new law” rule applicable to all three.⁵⁸

Such a move is not without justification. In addition to the general virtues of coherence and elegance that tend to be furthered by trans-substantive rules,⁵⁹ there are good reasons to think that these doctrines in particular should be conceptualized similarly.⁶⁰ All three serve as remedies for constitutional violations, and in doing so all three seek to balance the same competing goals: providing individual redress to victims of constitutional violations, incentivizing conformity with the Constitution, and avoiding unnecessary chilling of legitimate governmental action.⁶¹ That is, all three doctrines seek to address the same general problem and thus deserve to at least be thought of in relationship to each other.

A. Providing Individual Redress to Victims

The notion that individuals should be able to seek redress for violations of their constitutional rights is deeply rooted in our nation’s traditions.⁶² Just as an individual may seek a remedy in the courts for a violation of her rights under tort, contract, or property law,⁶³ so too, our intuition tells us, should she be able to seek redress for violations of her rights under the Constitution. Indeed,

58. See, e.g., *Reichle v. Howards*, 132 S. Ct. 2088, 2094 (2012); *United States v. Leon*, 468 U.S. 897, 922 (1984) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 815-19 (1982)); see also *Laurin*, *supra* note 17, at 673-74 (arguing that, since the Court adopted the good faith exception to the exclusionary rule in *Leon*, it has borrowed substantially from qualified immunity doctrine). Compare *Lockyer v. Andrade*, 538 U.S. 63, 75-76 (2003) (holding that, under AEDPA, post-conviction habeas relief requires an “application [of clearly established Supreme Court precedent] that is objectively unreasonable”—a standard that requires more than clear error on the part of the state court), with *al-Kidd*, 131 S. Ct. at 2085 (“Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments” and “protects all but the plainly incompetent or those who knowingly violate the law.” (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)) (internal quotation marks omitted)).

59. Cf. Geoffrey C. Hazard, Jr., *Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 2237, 2247 (1989) (“[W]e should not ignore or disparage the virtues of a trans-substantive concept of procedure.”).

60. See, e.g., Fallon & Meltzer, *supra* note 20 (treating qualified immunity and post-conviction habeas relief as analytically similar).

61. See *infra* Part II.A-C.

62. See *infra* notes 66-68 and accompanying text.

63. See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1282-83 (1976) (describing the traditional defining features of a civil adjudication).

because constitutional rights are, by their nature, more essential to our society than tort, contract, or property rights,⁶⁴ we may even have a sense that there is a stronger imperative to provide individual redress when those rights are violated.⁶⁵

To see that this intuition is deeply entrenched in our nation's traditions, one need look no further than Chief Justice Marshall's landmark opinion in *Marbury v. Madison*.⁶⁶ Quoting Blackstone, Chief Justice Marshall embraced a full-throated endorsement of the principle that "every right, when withheld, must have a remedy, and every injury its proper redress,"⁶⁷—a principle that would later come to be termed "the *Marbury* principle."⁶⁸

And indeed, in practice, it is often the case that the exclusionary rule, § 1983 liability (or *Bivens* liability,⁶⁹ depending on the context),⁷⁰ and post-

64. See Pamela S. Karlan, Note, *Discriminatory Purpose and Mens Rea: The Tortured Argument of Invidious Intent*, 93 YALE L.J. 111, 114 (1983) ("[C]onstitutional law recognize[s] that certain rights are so essential to our society that they cannot be relinquished by those entitled to them or be acquired by other parties.").

65. One could carry this argument even further: precisely because constitutional rights are inalienable, courts should be extra solicitous when crafting remedies for their violation. Specifically, one could argue that because violations of constitutional rights involve harms not only to the victim's monetary well-being, but also a harm to the inherent value of the constitutional right, a harm to the value of the right as a public good, an expressive harm, a moral harm by breaching a deontological prohibition, and third-party harms, see Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 372 (2000), courts should be wary of myopically focusing their inquiry only on the monetary harm and in doing so converting the constitutional violation into a mere transactional cost for the perpetrator, cf. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1126 (1972). Though this argument has some persuasive force, it has largely been rejected by the Court, which has severely curtailed lower courts' ability to award injunctive relief, see *City of L.A. v. Lyons*, 461 U.S. 95, 112 (1983) (denying claim for injunctive relief based on lack of Article III jurisdiction because "recognition of the need for a proper balance between state and federal authority counsels restraint in the issuance of injunctions against state officers engaged in the administration of the States' criminal laws in the absence of irreparable injury which is both great and immediate"), or money damages relief for non-common-law-type harms, see *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 305-10 (1986). Instead, the Court has attempted to address this problem by focusing on systematic deterrence of constitutional violations. See *infra* Part II.B.

66. 5 U.S. (1 Cranch) 137 (1803).

67. *Id.* at 163 (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *109) (internal quotation marks omitted).

68. See Fallon & Meltzer, *supra* note 20, at 1751, 1779.

69. See *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 397 (1971) (finding a cause of action for Fourth Amendment violations implied by the Fourth Amendment itself).

70. Because § 1983 only applies, by its terms, to a person who acts under the color of the law of "any State or Territory or the District of Columbia," 42 U.S.C. § 1983 (2011), it does not provide a cause of action against federal officials. *Bivens* and its progeny nevertheless allow plaintiffs to bring suit against government officials for some constitutional violations based on causes of action implied directly from the Constitution itself. In particular, a plaintiff may sue directly under the Fourth, see *Bivens*, 403 U.S. at 397, Fifth, see *Davis v. Passman*, 442 U.S. 228, 243-44 (1979), or Eighth, see *Carlson v. Green*,

conviction habeas relief provide the individual plaintiff with some form of remedy for the constitutional violation that she has suffered. A plaintiff whose constitutional rights are violated by a government official can sue under § 1983 and recover money damages.⁷¹ A criminal defendant from whom evidence is obtained in violation of the Fourth Amendment may have that evidence excluded at her trial by invoking the exclusionary rule.⁷² And a prisoner detained by a state pursuant to an unconstitutional conviction may be freed by a federal court by petitioning for a writ of habeas corpus.⁷³

446 U.S. 14, 19 (1980), Amendments. The Court has taken care recently, however, to specifically point out that it has not extended *Bivens* any further. See, e.g., *Reichle v. Howards*, 132 S. Ct. 2088, 2093 n.4 (2012) (noting that the Court has not extended *Bivens* to First Amendment claims); *Mt. Healthy Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 278 (1977) (noting that the question whether a plaintiff may, “by analogy to . . . *Bivens*, . . . imply a cause of action directly from the Fourteenth Amendment which would not be subject to the limitations contained in § 1983, is one which has never been decided by [the] Court”), *superseded on other grounds by statute as stated in* *Rivera v. United States*, 924 F.2d 948, 954 n.7 (9th Cir. 1991). But see FALLON, JR. ET AL., *supra* note 7, at 854 (arguing that *Ex parte Young*, 209 U.S. 123 (1908), recognized “that the Fourteenth Amendment creates a federal right of action for equitable relief”).

71. § 1983 (“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, 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. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.”).

72. Although the Court had initially conceived of the exclusionary rule as a constitutionally mandatory individual remedy for a Fourth Amendment violation, see *Mapp v. Ohio*, 367 U.S. 643, 655-56 (1961) (“[I]n extending the substantive protections of due process to all constitutionally unreasonable searches . . . it was logically and constitutionally necessary that the exclusion doctrine—an essential part of the right to privacy—be also insisted upon as an essential ingredient of the right . . .”) (emphasis added), it has since repudiated that view, see *United States v. Calandra*, 414 U.S. 338, 347 (1974) (“The purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim . . .”). The Court’s express disclaimer notwithstanding, it is clear that there is at least *some* element of individual redress present in the current exclusionary rule. Phrased differently, although one of the purposes of the exclusionary rule is deterrence of unconstitutional actions, see *infra* Part II.B, the exclusionary rule cannot be justified on the grounds of deterrence alone. “[I]f deterrence is the key,” such that the sole purpose of the exclusionary rule would be “to make the government pay, in some way, for its past misdeeds, in order to discourage future ones,” then “why should that payment flow to the guilty?” Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 797 (1994).

73. See 28 U.S.C. § 2241 (2012); cf. U.S. CONST. art. I, § 9.

B. Incentivizing Constitutional Behavior

In addition to providing redress to individuals, the constitutional remedies doctrines each also create a deterrence structure designed to incentivize constitutional behavior on the part of the government.⁷⁴ That these doctrines are concerned with trying to curb constitutional infractions by government officials is, at least in part, a reflection of the fact that constitutional rights are more essential to our society than property, tort, or contract rights. That is, because violations of constitutional rights “frustrate[] more than the expectations of the parties involved in a particular case,”⁷⁵ the remedial system designed to secure them must do more than provide retrospective compensation; it must prospectively prevent the violations.⁷⁶

While awarding individual relief to victims of constitutional violations certainly *can* serve a deterrent role, such an ad hoc remedial system, without consideration of systematic deterrent effects, is unlikely to be particularly effective at prospectively preventing violations. Indeed, a remedial regime that provides only case-by-case remedies runs the risk of transforming the constitutional safeguards from (in the language of Calabresi and Melamed) a property rule to a liability one.⁷⁷ One potential approach to the shortcoming of individual relief would be to insist that courts be empowered with broad equitable discretion to issue sweeping, prospective injunctive relief. Such a solution, however, is subject to attack as a form of judicial aggrandizement and activism and can be difficult to square with the original intent of the Framers as well as the text of the Constitution.⁷⁸ Accordingly, the Court has not adopted this approach.⁷⁹ Instead, it has opted for a more targeted remedial scheme

74. See Fallon & Meltzer, *supra* note 20, at 1778-79 (“Within our constitutional tradition, . . . the *Marbury* dictum reflects just one of two principles supporting remedies for constitutional violations. Another principle, whose focus is more structural, demands a system of constitutional remedies adequate to keep government generally within the bounds of law.”).

75. Karlan, *supra* note 64, at 113.

76. See *supra* note 65. Calabresi and Melamed provide a useful framework for thinking about this problem. In their view, rights are secured either by liability rules or property rules. Calabresi & Melamed, *supra* note 65. A right secured by a liability rule may be infringed by anyone willing to pay an objectively determined value for doing so. *Id.* at 1092. A classic example of this is Justice Holmes’s view of breach of contract: “The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it,—and nothing else.” Oliver W. Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897). A right secured by a property rule, by contrast, may only be removed from its owner in a voluntary transaction agreed to by the right holder. Calabresi & Melamed, *supra* note 65, at 1092. Constitutional rights fall in this latter category.

77. See Calabresi & Melamed, *supra* note 65.

78. See, e.g., Amar, *supra* note 72, at 793 n.135 (criticizing the exclusionary rule as being inconsistent with the text and original meaning of the Fourth Amendment).

79. Cf. *City of L.A. v. Lyons*, 461 U.S. 95 (1983) (curtailing the ability of courts to order injunctive relief through a more stringent application of standing doctrine).

designed to systematically deter unconstitutional conduct by government officials.

In such a scheme, the focus is on the perpetrator (or potential perpetrator) of the constitutional violation rather than the victim of the violation. That is, the operative question is how to construct a remedial system with sufficient deterrence such that government officials conform their behavior to the Constitution—a question in which consideration of the victim is noticeably absent—rather than how to construct a remedial system with sufficient compensation for the victim to make him whole. Because of the focus of a deterrent scheme is on the perpetrator, it is sometimes the case that an individual may be denied relief for the particular harm she has suffered so long as other deterrent mechanisms remain in place.⁸⁰

In this respect the constitutional remedies doctrines function similarly to the criminal law, in which the victim formally has little to no role.⁸¹ And, just as in the criminal law, deterrence in the constitutional context can be thought of as coming in two flavors: specific deterrence (deterrence aimed at getting a perpetrator of a constitutional rights violation to abandon her unconstitutional behavior in the future) and general deterrence (deterrence aimed at preventing *other* potential perpetrators from engaging in constitutional violations).⁸²

C. Avoiding Deterrence of Legitimate Governmental Action

Ensuring individual redress for all victims of constitutional violations and incentivizing the government to stay within constitutional bounds are not the only aims of the constitutional remedies doctrines. If they were, Congress or the courts would have established a legal rule giving force to the *Marbury* principle, for instance, by establishing a regime of strict liability for constitutional violations and enabling courts to fashion any legal or equitable remedy that they deem necessary to fully compensate the victim and deter further violations.⁸³ Or they might have gone even further—awarding relief any

80. Fallon & Meltzer, *supra* note 20, at 1779 (“The *Marbury* principle that calls for individually effective remediation can sometimes be outweighed; the principle requiring an overall system of remedies that is effective in maintaining a regime of lawful government is more unyielding in its own terms, but can tolerate the denial of particular remedies, and sometimes of individual redress.”). The Court has recognized precisely this principle in its cases concerning the scope of constitutionally implied rights of action, refusing to extend *Bivens* to circumstances where the extension “would not advance *Bivens*’ core purpose of deterring individual officers from engaging in unconstitutional wrongdoing.” *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001).

81. See Karlan, *supra* note 64, at 112-16 (comparing criminal and constitutional law).

82. For a more detailed contrast of specific and general deterrence, see generally JEREMY BENTHAM, *Principles of Penal Law*, in 1 THE WORKS OF JEREMY BENTHAM 365, 396 (John Bowring ed., 1962).

83. Even this kind of strict liability rule may not fully satisfy the *Marbury* principle. Standing doctrine, for instance, can prevent Article III courts from awarding certain remedies, even in constitutional cases, see *Lyons*, 461 U.S. at 105, or from hearing some

time a reasonable person could conclude that the official's conduct deprived the victim of a constitutional right. Such a rule could both give individual recourse to victims of constitutional deprivations and provide a deterrence mechanism that would create strong incentives for officers to conform their behavior to the Constitution. Such a rule, however, would also violate another principle that constrains the constitutional remedies doctrines—the principle that constitutional actions should be neither deterred nor punished.

That this principle should constrain constitutional remedial schemes is hardly controversial; deterring or punishing lawful government action incurs a number of social and individual costs. A government official deterred from engaging in constitutional behavior, for instance, is necessarily constrained in the execution of her lawful—and socially beneficial—duties. A government official punished by a court for violating the Constitution may also be subject personally to significant stigmatic harm—from being labeled a violator of our society's most essential rights⁸⁴—and potentially money damages, depending on the type of violation. In addition to, and as a consequence of, these costs, there are also risks that over-deterrence of constitutional violations could distract officials from their governmental duties and drive able individuals away from public service.⁸⁵

Even where a constitutional remedial system only punishes or deters behavior that is found by a court to be unconstitutional, such costs can and do still exist. Consider, for instance, a government official who acts in reliance on binding precedent holding that some particular conduct is constitutional. If a reviewing court decides to retreat from precedent and to now hold that conduct unconstitutional, then it would be accurate to say that that official violated the Constitution. Holding that official responsible for her behavior, however, would have the effect of requiring that official to conform her conduct not only to the Constitution as currently interpreted by the relevant courts, but also to any future interpretations that the courts may give within some relevant timeframe.⁸⁶ Accordingly, that officer will have an incentive to give a wide berth to constitutional boundaries and will likely refrain from even some constitutional actions (and more to the point, even some *socially beneficial* constitutional actions) out of fear that courts may later find those actions to be unconstitutional.

This same scheme can impose personal stigmatic costs in a problematic manner as well. That is, even when the label “constitutional rights violator” may, strictly speaking, be accurately applied, the significance of such a label cautions against applying it lightly. In particular, this stigmatic harm should

constitutional cases altogether, *see* *Allen v. Wright*, 468 U.S. 737, 753, 755 (1984).

84. *See* Karlan, *supra* note 64, at 113.

85. *See* *Harlow v. Fitzgerald*, 457 U.S. 800, 816 (1982).

86. For actions under § 1983, for instance, the relevant timeframe would be the statute of limitations. For post-conviction habeas relief, it would be the time limit on filing habeas petitions.

make us at least think twice before applying the “constitutional rights violator” label when the defendant-officer acted in good faith. Just as in the criminal law, where (in part) the stigma of criminal sanctions militates against imposing punishment except in circumstances where both a sufficiently evil *mens rea* and *actus reus* are present, so too in the constitutional context some solicitude is merited before imposing punishment and labeling an individual as a violator of our society’s most essential rules.⁸⁷

The “new law” exceptions in particular are the primary mechanism by which courts guard against these effects. Indeed, in justifying the “new Law” exceptions, the Court frequently cites concerns about over-detering unconstitutional behavior⁸⁸ or imposing additional constraints on government officials that are unlikely to have a deterrent effect.⁸⁹

III. ARGUMENTS IN FAVOR OF DOCTRINAL HETEROGENEITY

That the constitutional remedies doctrines and their “new Law” exceptions seek to balance the same three competing goals suggests only that they should be conceptualized similarly, not that they should function identically. Indeed, there is no reason to expect that these doctrines, which each developed to address different problems in different contexts, would strike the same balance between individual redress, deterrence of unlawful behavior, and protection of legitimate activities. To the contrary, when the constitutional remedies doctrines are thought of in relation to one another, crucial differences between them become apparent. Because these differences are so essential to the

87. See Karlan, *supra* note 64, at 113-14. This is, of course, not to say that the label “constitutional rights violator” is never merited in circumstances where the officer acted in good faith. Just as criminal liability sometimes attaches with a mental state less than the ordinary recklessness standard, *see, e.g.*, MODEL PENAL CODE § 210.4 (permitting criminal liability for negligent homicide), with some offenses even triggered by strict liability, *see, e.g.*, MODEL PENAL CODE §§ 213.3, 213.6 (establishing a strict liability offense for sexual relations with a minor under age sixteen if the actor is four years older than the minor, or if the minor is under ten), so too may it be appropriate for constitutional liability to attach without regard to the defendant’s mental state.

88. *See, e.g., Harlow*, 457 U.S. at 814 (“[T]here is [a] danger that fear of being sued will ‘dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.’” (last alteration in original) (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949))).

89. *See Teague v. Lane*, 489 U.S. 288, 306 (1989) (“[T]he threat of habeas serves as a necessary additional incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards. In order to perform this deterrence function, . . . the habeas court need only apply the constitutional standards that prevailed at the time the original proceedings took place.”); *United States v. Leon*, 468 U.S. 897, 916 (1984) (“[W]e discern no basis, and are offered none, for believing that exclusion of evidence seized pursuant to a warrant will have a significant deterrent effect on the issuing judge or magistrate.”); *Stone v. Powell*, 428 U.S. 465, 493-94 (1976) (refusing to allow prisoners to petition for habeas based on a Fourth Amendment violation since any deterrent effect would be outweighed by the social costs of such a policy).

purposes of each remedial scheme, they ultimately counsel in favor of maintaining separateness in the legal tests used to operationalize each doctrine. In particular, the varying degrees to which the exclusionary rule, § 1983 and *Bivens* liability, and post-conviction habeas relief implicate horizontal and vertical separation of powers concerns—concerns that go to the core of our constitutional system—mitigates in favor of separate doctrinal tests that can reflect and account for these differences.

A. Horizontal Separation of Powers Concerns

Perhaps the most obvious difference between the constitutional remedies doctrines—and the difference with the most significant implications as to the proper role of each—is their respective origins: the exclusionary rule,⁹⁰ the privilege of habeas corpus,⁹¹ and *Bivens* liability⁹² with their roots in the Constitution; and § 1983 liability⁹³ and AEDPA's restrictions on post-

90. See, e.g., *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (noting Court's history of applying Fourth Amendment exclusion of evidence to federal officers). Some have argued, however, that the exclusionary rule is better understood not as a constitutionally mandatory remedy, but as a kind of "constitutional common law." See Henry P. Monaghan, *The Supreme Court 1974 Term, Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 2-4 (1975); see also Walter E. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1540-43 (1972). This view has not been adopted by the Supreme Court. See *United States v. Calandra*, 414 U.S. 338, 347 (1974); see also Thomas S. Schrock & Robert C. Welsh, *Reconsidering the Constitutional Common Law*, 91 HARV. L. REV. 1117, 1118-24 (1978).

91. See U.S. CONST. art. I, § 9 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

92. See *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 392-97 (1971).

93. An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other Purposes, Pub. L. No. 42-22, 17 Stat. 13 (1871) (codified as amended at 42 U.S.C. § 1983 (2011)). While the Court has held that remedies for some constitutional torts are constitutionally mandatory, it is clear that a remedial scheme as broad as § 1983 goes far beyond the bare minimum required by the Constitution—that is, without § 1983 there would be no private cause of action for most constitutional violations. See, e.g., *Webster v. Doe*, 486 U.S. 592, 612 (1988) (Scalia, J., dissenting) (excoriating the proposition that "all constitutional violations must be remediable in the courts"). Even aside from the three "new law" exceptions discussed in this Note, there exist a number of constitutional and prudential doctrines that simply prevent the courts from addressing constitutional questions. The Constitution, for instance, provides that "[e]ach House shall be the Judge of the Elections, Returns and Qualifications of its own Members," U.S. CONST. art. I, § 5, and that "for any Speech or Debate in either House, [the Senators and Representatives] shall not be questioned in any other Place," U.S. CONST. art. I, § 6, thereby prohibiting the courts from addressing violations that occur in either of these contexts (for instance, whether a congressional election has been stolen), see *Webster*, 486 U.S. at 612. Similarly, the political question, see, e.g., *Coleman v. Miller*, 307 U.S. 433, 453-56 (1939), sovereign immunity, and equitable discretion doctrines all create circumstances under which the courts are unable to provide redress for constitutional claims.

conviction habeas relief,⁹⁴ with their origins in statutory law. This difference in doctrinal origins reflects more than just an academic distinction between these doctrines; rather, it bears on a fundamental question of horizontal separation of powers: who has the authority to make decisions regarding the design of a particular constitutional remedy regime?

Constitutionally mandatory remedies, as a general matter, tend to be the most inflexible remedial rules in that they are required by the Constitution and necessary for its function. Accordingly, they cannot be eliminated (either functionally or formally) by an act of Congress⁹⁵—rather, because these rules come purely from an elaboration of “what the law is,” that is, what the Constitution requires, they are purely within the province of the Court.⁹⁶ At the same time, because constitutionally required remedies are so inflexible, and because of the lack of democratic check on them, their proper role is that of a backstop—the outer boundaries of legislative authority necessary to keep our constitutional system functioning—rather than providing the best, fairest, or most reasonable remedial scheme.⁹⁷ Nevertheless, the question of constitutional outer bounds will often be a functional, rather than a formal, one, and will require the Court to make policy-type judgments about the effects it expects from a particular rule.

Statutory schemes, by contrast, may and should reflect Congress’s judgment as to what constitutes the optimal remedial system. While jurists may disagree methodologically over how, in a given case, to interpret what exactly Congress’s judgment is, there seems to be relatively universal agreement (at least among the current Justices) that whatever Congress’s intent is, so long as it remains within some fairly permissive bounds, it should control.⁹⁸ Thus, as

94. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of the U.S. Code).

95. See *Boumediene v. Bush*, 553 U.S. 723, 733 (2008) (holding that the Military Commissions Act of 2006 violated the Suspension Clause, U.S. CONST. art I, § 9, because it functionally deprived executive detainees of the writ of habeas corpus).

96. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

97. Cf. Brief for the Respondents at 1, *DaimlerChrysler AG v. Bauman*, 113 S. Ct. 1995 (2013) (No. 11-965) (citing *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2853 (2011)), available at <http://sblog.s3.amazonaws.com/wp-content/uploads/2013/08/11-965-bs.pdf> (noting that the Due Process Clause only places the “outer boundaries” on state tribunals’ authority to set personal jurisdiction rules and does not impose the rule that “strikes th[e] Court as the most fair or best policy”). There is an exception to this general principle, however, for the class of rules that have their origins in federal or constitutional common law. Such rules, in contrast to ordinary constitutional rules, do reflect the Court’s judgment about what is most sensible or fair or reasonable. Cf. John Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1030 (1974) (“[T]he Constitution demands something that works—presumably at a reasonable social cost. The content of the particular remedial or prophylactic rule is thus a pragmatic decision rather than a constitutional fiat.”). For a critique of constitutional common law, see generally Schrock & Welsh, *supra* note 90.

98. Compare STEPHEN BREYER, *MAKING OUR DEMOCRACY WORK: A JUDGE’S VIEW* (2011), with ANTONIN SCALIA & BRYAN GARNER, *READING LAW: THE INTERPRETATION OF*

compared to constitutionally required remedies, statutory remedies are far more flexible; that is, they may be substantially more aggressive, arbitrary, or half-baked than constitutional ones.⁹⁹ Additionally, because statutory remedial schemes are optional, decisions as to their metes and bounds are committed entirely to Congress. Of course, in interpreting Congress's instructions, courts' own views of what is sensible, fair, or reasonable may creep into the analysis,¹⁰⁰ but from a separation of powers perspective, the power to define and craft non-mandatory remedial schemes lies (for good or ill) with Congress and not the courts.¹⁰¹

B. Vertical Separation of Powers Concerns

Just as the constitutional remedies doctrines each implicate horizontal separation of powers concerns to varying degrees, so too does each implicate vertical separation of powers concerns, that is, the division of sovereignty between the federal and state governments. While none of the constitutional remedies doctrines *violate* constitutional federalism requirements,¹⁰² they each implicate federalism *norms* to varying degrees. The exclusionary rule, for instance, creates a mandatory obligation on state court judges to enforce the Fourth Amendment's strictures against state law enforcement officers;¹⁰³ § 1983 creates an obligation on state law enforcement officers to follow the federal constitution and on state courts to hear claims against state officers for

LEGAL TEXTS (2012). *But see* William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987).

99. In general, statutes that do not target a protected class are subject only to rational basis review. In its traditional articulation, this requires only that Congress could have had some rational basis for passing the statute at issue. *See, e.g., Williamson v. Lee Optical*, 348 U.S. 483, 491 (1955); *Ry. Express Agency v. New York*, 336 U.S. 106, 110 (1949).

100. *Cf. Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 527 (1989) (Scalia, J., concurring) ("We are confronted here with a statute which, if interpreted literally, produces an absurd, and perhaps unconstitutional, result. Our task is to give some alternative meaning to the word 'defendant' in Federal Rule of Evidence 609(a)(1) that avoids this consequence . . .").

101. *Cf. ROBERT H. BORK, THE TEMPTING OF AMERICA* 6 (1990) ("There is a story that . . . Justice Holmes and Judge Learned Hand, had lunch together and afterward, as Holmes began to drive off in his carriage, Hand, in a sudden onset of enthusiasm, ran after him, crying, 'Do justice, sir, do justice.' Holmes stopped the carriage and reproved Hand: 'That is not my job. It is my job to apply the law.'").

102. Indeed, so long as the federal government operates within the scope of its enumerated powers, constitutional federalism requirements are more or less satisfied. *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 555 (1985) (holding that the Tenth Amendment need not provide independent restriction on the federal government's power because "the national political process systematically protects States from the risk of having their functions . . . handicapped by Commerce Clause regulation"). *But see Printz v. United States*, 521 U.S. 898, 925-26 (1997) (giving effect to the Tenth Amendment in the anti-commandeering context); *New York v. United States*, 505 U.S. 144, 149, 156-57 (1992) (same).

103. *See Mapp v. Ohio*, 367 U.S. 643, 657, 660 (1961).

constitutional violations;¹⁰⁴ and post-conviction habeas relief permits federal district courts—the lowest courts on the Article III totem pole—to review decisions of state courts of last resort.¹⁰⁵

As the Court, over the last century, has walked back the affirmative federalism obligations and limitations that the Constitution imposes on the federal government,¹⁰⁶ federalism norms—the Court’s general sense that federalism principles, even if not strictly required, should still be given solicitude—have taken on an increasingly important role.¹⁰⁷ Though federalism norms do not themselves rise to the significance of a constitutional requirement, the Court has demonstrated that, because of the critical role that federalism plays in our constitutional system,¹⁰⁸ it is willing to give relatively substantial weight to federalism norms in interpreting statutes and fashioning constitutional rules.¹⁰⁹ That is, all other things being equal, the Court will interpret ambiguous statutes (or even non-ambiguous statutes) to avoid intruding on state prerogatives,¹¹⁰ and it will craft constitutional rules that respect the traditional power balance between the state and federal governments.¹¹¹

Although each of the constitutional remedies doctrines involves some degree of federal intrusion on state prerogatives, the federalism intrusion from federal review of state court convictions via post-conviction habeas corpus is different in kind, not just degree, from the intrusions resulting from the other constitutional remedies doctrines. While the exclusionary rule and § 1983 liability each impose federal burdens on the states—obliging both state executive officials and judges to follow federal constitutional law and imposing penalties on them if they do not—such burdens are an ordinary and necessary

104. See An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other Purposes, Pub. L. No. 42-22, 17 Stat. 13 (1871) (codified as amended at 42 U.S.C. § 1983 (2011)).

105. See *Brown v. Allen*, 344 U.S. 443, 510 (1953) (opinion of Frankfurter, J.); see also FALLON, JR. ET AL., *supra* note 7, at 1224 (noting that “Justice Frankfurter’s opinion reflects the way that *Brown v. Allen* has been understood by subsequent cases”).

106. See, e.g., *Wickard v. Filburn*, 317 U.S. 111, 120-25 (1942); see also *Garcia*, 469 U.S. at 537.

107. See, e.g., *United States v. Windsor*, 133 S. Ct. 2675, 2691-92 (2013) (striking down the federal Defense of Marriage Act (DOMA), Pub. L. No. 104-119, 110 Stat. 2419 (1993) (codified at 1 U.S.C. § 7 & 28 U.S.C. § 1738C (2012)), in part based DOMA’s departure from ordinary federalism norms).

108. See THE FEDERALIST NO. 51 (Madison).

109. See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452, 452-56 (1991).

110. See, e.g., *id.* at 469 (“Because such legislation imposes congressional policy on a State involuntarily, and because it often intrudes on traditional state authority, we should not quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment.” (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 16 (1981))).

111. See *supra* note 107.

consequence of the Supremacy Clause, which itself makes federal constitutional law the law of each state.¹¹²

Post-conviction habeas relief, by contrast, effects an extra level of intrusion on state interests by not only imposing a requirement on state courts to follow the Constitution—an obligation that can be enforced by the Supreme Court's direct review of decisions of state courts of last resort raising federal questions¹¹³—but by allowing a federal court to upset a final state conviction after the direct appeal process.¹¹⁴ The federalism costs of such an arrangement come both directly from the prospect of frustrating states' ability to conduct and implement their own criminal justice systems,¹¹⁵ and also from the departure from the ordinary federal/state power balance.¹¹⁶

Additionally, and perhaps more critically, unlike direct review by the Supreme Court, post-conviction habeas relief allows a federal district court to review the decisions of a state court of last resort.¹¹⁷ While this arrangement does not, strictly speaking, involve a lower court reviewing a higher court,

112. U.S. CONST. art. VI, § 1, cl. 2; *see also* *Testa v. Katt*, 330 U.S. 386 (1947) (holding that state courts have an obligation under the Supremacy Clause to adjudicate and enforce federal law).

Moreover, to the extent that either the exclusionary rule or § 1983 does trench on traditional areas of state control, that both of these doctrines are backed by the Fourteenth Amendment, *see* *An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other Purposes*, Pub. L. No. 42-22, 17 Stat. 13 (1871) (codified as amended at 42 U.S.C. § 1983 (2011)); *Mapp v. Ohio*, 367 U.S. 643, 655 (1961), which explicitly grants the federal government the power to enforce its provisions against the states, obviates these concerns, *see* U.S. CONST. amend. XIV, § 5.

113. 28 U.S.C. § 1257 (2012) (“Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where . . . any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.”).

114. *See* FALLON, JR. ET AL., *supra* note 7, at 1214.

115. *McCleskey v. Zant*, 499 U.S. 467, 491 (1991) (“Finality has special importance in the context of federal attack on state conviction. Reexamination of state convictions on federal habeas ‘frustrate[s] . . . both the States’ sovereign power to punish offenders and their good-faith attempts to honor constitutional rights.” (citation omitted) (quoting *Murray v. Carrier*, 477 U.S. 478, 487 (1986))).

116. *Cf. United States v. Windsor*, 133 S. Ct. 2675, 2692 (2013) (“DOMA, because of its reach and extent, departs from the history and tradition of reliance on state law to define marriage.”). Although the Court stated that “it [wa]s unnecessary to decide whether this federal intrusion on state power is a violation of the Constitution because it disrupts the federal balance,” *id.*, it nevertheless spent substantial space explaining how DOMA departed from the ordinary power balance, *see id.* at 2689-92; *see also id.* at 2705 (Scalia, J., dissenting) (“[The Court’s] opinion starts with seven full pages about the traditional power of States to define domestic relations.”). Indeed, Chief Justice Roberts in dissent was quite clear that, at least in his view, “it [wa]s undeniable that [the Court’s] judgment [wa]s based on federalism.” *Id.* at 2697 (Roberts, C.J., dissenting). Justice Scalia is less charitable in his dissent, saying that the opinion merely “fool[s] many readers . . . into thinking that [it] is a federalism opinion.” *Id.* at 2705 (Scalia, J., dissenting).

117. *See Brown v. Allen*, 344 U.S. 443, 510 (1953) (opinion of Frankfurter, J.).

given the supreme nature of federal law under the Supremacy Clause,¹¹⁸ it does involve a substantial deviation from the ordinary balance of state and federal power. Indeed, post-conviction habeas is the only context in which a federal district court is empowered to exercise what is effectively appellate review of a state high court decision.¹¹⁹ Thus, of the constitutional remedies doctrines, post-conviction habeas review uniquely implicates difficult federalism questions.¹²⁰

IV. IMPLICATIONS FOR QUALIFIED IMMUNITY

The differences in the purposes of the constitutional remedies doctrines are useful for more than simply demonstrating that the good faith exception, qualified immunity, and post-conviction habeas under AEDPA should be treated differently as a general, abstract matter; they can also inform the ongoing discussion surrounding the unresolved questions of qualified immunity doctrine by suggesting particular ways in which the legal tests implementing each doctrine should vary. That is, by considering the constitutional remedial schemes together as related, but separate, ideas, one can identify differences in the roles and purposes of the doctrines that one would expect to see reflected in their operationalizing legal tests. This Part identifies two unsettled questions in qualified immunity doctrine where the Supreme Court's recent jurisprudence has failed to account for key doctrinal differences, and it suggests answers based on the role of qualified immunity in relation to the other constitutional remedies.

A. Who Can Clearly Establish Constitutional Rights?

In *Reichle*, Justice Thomas comes close to holding that the standard for "clearly established" law in the qualified immunity context is identical to the "clearly established" standard in the habeas context.¹²¹ In particular, he suggests that only Supreme Court precedent may be sufficient to make a right "clearly established" for purposes of qualified immunity.¹²² In obliterating the differences between the post-conviction habeas and qualified immunity standards, however, Justice Thomas's rule would ignore important differences

118. *Id.* at 510-11.

119. *See id.* at 512 ("The uniqueness of habeas corpus in the procedural armory of our law cannot be too often emphasized. It differs from all other remedies in that it is available to bring into question the legality of a person's restraint and to require justification for such detention.").

120. *Coleman v. Thompson*, 501 U.S. 722, 726 (1991) ("This is a case about federalism. It concerns the respect that federal courts owe the States and the States' procedural rules when reviewing the claims of state prisoners in federal habeas corpus.").

121. *See Reichle v. Howards*, 132 S. Ct. 2088, 2094 (2012).

122. *See id.*

between these two doctrines. In particular, it would ignore that none of the rationales for limiting “clearly established” law to Supreme Court precedent in the post-conviction habeas context apply in the qualified immunity context.

1. Thinking Seriously About Separation of Powers

The most obvious reason for looking only to Supreme Court precedent as the exclusive source for “clearly established” law in the post-conviction habeas context is simply that that is exactly what the relevant statute provides; AEDPA states clearly that post-conviction habeas may only be granted when a state court proceeding “resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.”¹²³ Unless AEDPA is unconstitutional (and there is good reason to think that it is not),¹²⁴ the Court is obliged to follow its dictates.

No such congressional mandate exists in the § 1983/qualified immunity context.¹²⁵ Indeed, the text of § 1983 makes no mention of qualified immunity doctrine at all.¹²⁶ Rather, qualified immunity is a judge-made carve-out to constitutional tort liability under both § 1983 and *Bivens*.¹²⁷ To be sure, qualified immunity has long been part of the legal landscape, such that Congress’s failure to eliminate or modify the doctrine by statute can fairly be understood as acquiescence to its existence and application.¹²⁸ That neither the Supreme Court nor any circuit court has expressly limited “clearly established” law to Supreme Court precedent, however, makes it unlikely that Congress “acquiesced” to such a restrictive rule. Moreover, it would be strange if Congress intended to limit the scope of § 1983 to cover only violations of constitutional rights that were “clearly established” by the Supreme Court, but failed to include any language to this effect in the text of the statute. As the

123. 28 U.S.C. § 2254(d)(1) (2012).

124. See, e.g., *Crater v. Galaza*, 491 F.3d 1119, 1129 (9th Cir. 2007) (“Although the Court has not squarely addressed [AEDPA’s] constitutional validity, for the past eleven years the Court has consistently applied AEDPA’s standard of review to appellate habeas petitions. We consider the Court’s longstanding application of the rules set forth in AEDPA to be strong evidence of the Act’s constitutionality.” (citation omitted)); cf. *Felker v. Turpin*, 518 U.S. 651 (1996) (upholding AEDPA’s constitutionality in the face of a Suspension Clause challenge).

125. See 42 U.S.C. § 1983 (2011) (containing no textual provisions requiring a qualified immunity doctrine).

126. An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other Purposes, Pub. L. No. 42-22, 17 Stat. 13 (1871) (codified as amended at 42 U.S.C. § 1983 (2011)).

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

128. Cf. *Flood v. Kuhn*, 407 U.S. 258, 282-84 (1972) (refusing to apply the Sherman Act to professional baseball, even though the Act applied to other professional sports, on the grounds that Congress had acquiesced, through inaction, to a 1922 Supreme Court decision exempting baseball from the antitrust laws).

Court (per Justice Scalia) has explained, Congress does not “hide elephants in mouseholes.”¹²⁹

When a federal court grants a state prisoner’s post-conviction habeas petition, it implicates a number of federalism concerns and costs that are simply not present in the § 1983 context. In particular, while post-conviction habeas involves federal district courts reviewing decisions of state courts of last resort, constitutional tort suits under § 1983 only involve ordinary review of the legality of actions by state officials. AEDPA’s requirement that law be “clearly established” by the Supreme Court can be viewed as a way to mitigate the federalism costs of post-conviction habeas. In particular, by limiting the class of cases in which habeas relief may be granted to those in which a state court violates law that has been “clearly established” by the Supreme Court, AEDPA substantially narrows the scope of intrusion by the district courts.

In this respect AEDPA effectively limits the role of the federal district courts to “cleaning up” those cases that the Supreme Court certainly would have reversed, but lacked the bandwidth to consider, on direct review.¹³⁰ Such a light touch mitigates the federalism costs of post-conviction habeas by limiting federal district court intervention into state criminal justice systems only when the state courts are effectively evincing outright hostility to Supreme Court precedent—that is, when they are in blatant violation of the Supremacy Clause.

There is no need to be similarly solicitous of federalism costs in the context of § 1983 liability. To be sure, § 1983 imposes its own burden on state courts, as it requires them to recognize and adjudicate claims for constitutional torts,¹³¹

129. *Whitman v. Am. Trucking Ass’n*, 531 U.S. 437, 468 (2001).

130. The Supreme Court’s shrinking docket is well documented. *See, e.g.*, Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487, 1507-08 (2008); David R. Stras, *The Supreme Court’s Gatekeepers: The Role of Law Clerks in the Certiorari Process*, 85 TEX. L. REV. 947, 964-66 (2007) (book review). In the 1880s, the Court issued almost 300 signed opinions per term. *Id.* at 965. By the 1980s, that number had fallen to approximately 150 opinions per term. Lazarus, *supra*, at 1508. Since 2000, the Court has not issued more than 79 signed opinions in a single term. *Stat Pack, Final, October Term 2011, Summary Reversals*, SCOTUSBLOG (June 30, 2012), http://sblog.s3.amazonaws.com/wp-content/uploads/2012/06/SB_summary_reversals_OT11_final.pdf. Nor has the Court been particularly active via summary reversals, granting an average of fewer than six per term since October Term 2000. *Id.*; *see also Stat Pack for October Term 2012*, SCOTUSBLOG (June 27, 2013), http://scotusblog.com/wp-content/uploads/2013/06/coverpage_OT12.pdf.

131. *See Haywood v. Drown*, 556 U.S. 729, 735 (2009) (“Although § 1983, a Reconstruction-era statute, was passed ‘to interpose the federal courts between the States and the people, as guardians of the people’s federal rights,’ state courts as well as federal courts are entrusted with providing a forum for the vindication of federal rights violated by state or local officials acting under color of state law.” (quoting *Mitchum v. Foster*, 407 U.S. 225, 242 (1972))). While states may escape the obligation to adjudicate claims under § 1983 if they are jurisdictionally incompetent from hearing “analogous” state law claims as well, *id.* at 740-41, *Haywood* suggests that the Court will adopt a relatively broad understanding of what constitutes an “analogous” claim, *see id.* at 732.

but this federalism intrusion is no more than exists with every federal law under the Supremacy Clause.¹³² Nor is this federalism cost addressed by limiting “clearly established” law to Supreme Court precedent. Indeed, by requiring federal courts to *ignore* state court decisions in their determination of whether a constitutional right is clearly established, such a restrictive rule is likely to exacerbate, rather than mitigate, federalism concerns.¹³³

2. Advancing Qualified Immunity’s Purpose

Whereas AEDPA’s “clearly established” requirement was adopted in order to protect federalism norms, the requirement that a civil rights plaintiff demonstrate that her violated right was “clearly established” in order to overcome the bar of qualified immunity was adopted to ensure that an officer has sufficient notice of the legality of her actions before she is subject to liability for them.¹³⁴ In particular, the qualified immunity “clearly established” standard was adopted out of a recognition that, in the absence of clearly established law, subjecting an officer to liability is unlikely to achieve any deterrent objectives, while it is likely to chill legitimate behavior on the part of government officials. While the goal of providing notice to government officials is a legitimate one, it is not advanced by limiting “clearly established” law to Supreme Court precedent.

As an initial matter, it’s worth noting that notice justifications generally are premised, at least in large part, on a legal fiction; it is simply unrealistic to think that either ordinary citizens or state officials are keeping abreast of all relevant developments in the law.¹³⁵ There are, nevertheless, good reasons for

132. *Testa v. Katt*, 330 U.S. 386 (1947) (holding that state courts have an obligation under the Supremacy Clause to adjudicate and enforce federal law).

133. Preventing federal courts from drawing on precedent from the relevant geographic circuit or district courts presents a similar problem. While federalism *per se* does not exist within the structure of the federal judiciary, the structure of the geographic circuits—in particular allowing each to create binding precedent for itself but not for other circuits—creates a structure of localized decisionmaking that is federalism-like. Under a rule limiting “clearly established” law to Supreme Court precedent, the flexibility within the federal judiciary for responsiveness to localized interests and preferences—one of the core federalism-like benefits of the geographic circuit court system—would be diminished. *Cf.* Michael W. McConnell, *Federalism: Evaluating the Founders’ Design*, 54 U. CHI. L. REV. 1484, 1493-94 (1987) (book review).

134. *Compare* *Williams v. Taylor*, 529 U.S. 420, 436 (2000) (noting “AEDPA’s purpose to further the principles of comity, finality, and federalism”), *with* *Pearson v. Callahan*, 555 U.S. 223, 244 (2009) (“[Q]ualified immunity operates to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful.” (quoting *Hope v. Pelzer*, 536 U.S. 730, 739 (2002)) (internal quotation marks omitted)).

135. *See* Elizabeth J. Armstrong, *Perry v. Perry: Retroactive Application of North Carolina General Statutes Section 39-13.6 Under a Vested Rights Analysis*, 65 N.C. L. REV. 1195, 1200-01 (1987); Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 413-14 (1958).

maintaining this legal fiction—the one most often given being the creation of an incentive to learn the relevant law.¹³⁶

While there is obviously good reason to incentivize state officials to keep abreast of constitutional law as announced by the Supreme Court, it's not clear what goals are served by providing no incentive to follow state or lower court precedent. Indeed, failing to provide such an incentive would quickly lead to absurd results. Under existing qualified immunity doctrine, deterrence is achieved, even when a court finds that a state official violated a plaintiff's constitutional right but is nevertheless free from liability because that right was not clearly established, because the court's decision clearly establishes that right going forward—ensuring that subsequent violations do trigger liability.¹³⁷ Under a rule limiting “clearly established” law to Supreme Court precedent, however, an official who is found by a lower federal court or state court to have violated a constitutional right could repeatedly violate that right with impunity because she will always be free from liability in the absence of Supreme Court precedent.

Additionally, to the extent that officials are aware of changes in particular legal doctrines—and in at least some circumstances they are¹³⁸—it's not clear

136. *E.g.*, OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 48 (Boston, Little, Brown & Co. 57th prtg. 1990) (1881) (“It is no doubt true that there are many cases in which the criminal could not have known that he was breaking the law, but to admit [ignorance as an] excuse at all would be to encourage ignorance where the law-maker has determined to make men know and obey, and justice to the individual is rightly outweighed by the larger interests on the other side of the scales.”).

137. This so-called “law elaboration” purpose has been jeopardized in recent years by the Supreme Court’s decision in *Pearson v. Callahan*, 555 U.S. 223 (2009). Since 2001, lower courts considering either a motion to dismiss or motion for summary judgment based on a qualified immunity defense have been required to consider, first, whether the plaintiff has met her burden with respect to demonstrating a violation of a constitutional right, and second, whether that right was clearly established. *Saucier v. Katz*, 533 U.S. 194, 200-01 (2001), *overruled by Pearson*, 555 U.S. 223. In *Pearson*, however, the Supreme Court unanimously reversed, holding that the order in which to consider these two questions should be left to the discretion of the lower courts. 555 U.S. at 236. In doing so, the Court noted that, in cases “in which it is plain that a constitutional right is not clearly established but far from obvious whether in fact there is such a right,” *Saucier*’s mandatory procedure can “sometimes result[] in a substantial expenditure of scarce judicial resources on difficult questions that have no effect on the outcome of the case.” *Id.* at 236-37. Additionally, the Court cited the general principle of constitutional avoidance—that courts should not decide constitutional issues unless such adjudication is unavoidable. *Id.* at 241. Though it recognized that allowing lower courts to dispose of constitutional torts cases without ruling on whether a violation occurred at all might “undermine the development of constitutional precedent,” the Court was not persuaded by this concern. *See id.* at 237 (“[T]here are cases in which the constitutional question is so fact-bound that the decision provides little guidance for future cases.”); *id.* at 237-38 (“A decision on the underlying constitutional question in a § 1983 damages action . . . may have scant value when it appears that the question will soon be decided by a higher court.”); *id.* at 239 (noting that law-elaboration “may create a risk of bad decisionmaking”).

138. *See, e.g.*, MASS. MUN. POLICE TRAINING, LEGAL UPDATE: SEARCHING CELL

that those officials are more likely to be cognizant of Supreme Court decisions as opposed to decisions of the lower federal courts or state courts.¹³⁹ Rather, one might expect that for state officials, state court pronouncements provide the primary source of law. Indeed, just as officers are able to rely on binding lower court precedent to insulate their conduct from the exclusionary rule,¹⁴⁰ so too should officers be required to abide by binding lower court precedent when it comes to § 1983 liability.

Accordingly, contrary to Justice Thomas's suggestion in *Reichle*, the most sensible rule is one that does not limit "clearly established" law to Supreme Court precedent but instead allows lower federal courts and state courts to define the contours of constitutional law for qualified immunity purposes in the absence of on-point Supreme Court precedent.

B. How "Clearly" Must a Right Be Established?

Perhaps the most unsettled question in qualified immunity doctrine is how "clearly established" a right must be in order for a plaintiff to prevail. In doctrinal terms, this question is one of precision: how specifically must prior case law have recognized the particular right at issue in the instant case in order for it to be "clearly established" for purposes of qualified immunity?

While the Court has ostensibly provided guidance in this area, explaining that in light of precedent the "contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right,"¹⁴¹ and has ostensibly maintained this standard since it was first articulated in 1987,¹⁴² there is no doubt that, as a practical matter, the legal landscape in this area has undergone significant changes. In particular, the Court has steadily increased the level of specificity at which a plaintiff must demonstrate that precedent had established a right.¹⁴³

Although the Supreme Court, when it elaborates the standard for qualified

PHONES INCIDENT TO ARREST (2012), available at <http://www.mass.gov/eopss/docs/mptc/cell-phone.pdf> (providing legal guidance for Massachusetts police regarding legal developments in a highly unsettled area of law).

139. *Cf. id.* (citing only state court cases).

140. *Davis v. United States*, 131 S. Ct. 2419, 2431-32 (2011).

141. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

142. *See Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2083 (2011) (quoting *Anderson*, 483 U.S. at 640).

143. *Compare id.* at 2084 ("We have repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality." (citation omitted)), and *Brosseau v. Haugen*, 543 U.S. 194, 200 (2004) (per curiam) (defining the relevant question as whether it violates the Fourth Amendment to "shoot a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight"), with, e.g., *LaLonde v. Cnty. of Riverside*, 204 F.3d 947, 960 (9th Cir. 2000) (treating the relevant question as simply whether "tight handcuffing can constitute excessive force").

immunity, often speaks in terms of a “reasonable person”¹⁴⁴ or the “‘objective legal reasonableness’ of the [official’s] action,”¹⁴⁵—terms that sound in negligence—the Court’s more recent formulations of the doctrine suggest a standard far stricter than ordinary negligence or even recklessness. Indeed, as the Court has explained, qualified immunity “protects all but the plainly incompetent or those who knowingly violate the law”¹⁴⁶—a standard that sounds more in the criminal law’s knowingly or purposefully mental state standards than in tort law’s negligence standard.¹⁴⁷ When the Court first invoked this “plainly incompetent” or “knowingly” language it did so as a justification adopting an objective reasonableness standard for qualified immunity, not as an independent part of the doctrinal test itself.¹⁴⁸ Since then, however, this language has grown teeth, and has been deployed as the standard for determining whether officers’ actions should be shielded by qualified immunity.¹⁴⁹ This jurisprudential trend has effectively ratcheted up the culpability requirement for civil rights claims beyond what is justified by the role and purposes of constitutional tort liability—requiring plaintiffs to show knowledge or purpose on the part of the defendant rather than ordinary negligence or recklessness—and consequently has overly restricted the class of cases in which a plaintiff asserting constitutional violations is likely to prevail.

1. Institutional (In)competence

Unlike the restrictive rule for granting post-conviction habeas relief, which was established by statute in AEDPA,¹⁵⁰ the qualified immunity exception to

144. *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

145. *Wilson v. Layne*, 526 U.S. 603, 614 (1999) (quoting *Anderson*, 483 U.S. at 639).

146. *Messerschmidt v. Millender*, 132 S. Ct. 1235, 1244-45 (2012) (quoting *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2085 (2011)).

147. The traditional formulation of the negligence test was articulated by Judge Learned Hand in *United States v. Carroll Towing Co.* as whether B (“the burden of adequate precautions”) is less than L (“the gravity of the resulting injury”) multiplied by P (“the probability” of the injury occurring). 159 F.2d 169, 173 (2d Cir. 1947). Nothing in the Court’s qualified immunity precedent requires an examination into anything resembling this calculus. Instead, the Court exclusively focuses its inquiry on whether the constitutionality of the defendant’s actions are beyond question. Rather than negligence, this more closely resembles another legal standard involving the word “reasonable”—beyond a reasonable doubt. See *al-Kidd*, 131 S. Ct. at 2083 (“We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate.”).

148. See *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

149. *Millender*, 132 S. Ct. at 1249 (granting qualified immunity because “[t]he officers’ judgment . . . may have been mistaken, but it was not ‘plainly incompetent’” (quoting *Malley*, 475 U.S. at 341)). Confusingly, although the term “knowingly” suggests a requirement of a particular subjective mental state on the part of the defendant, the Court has been clear that the qualified immunity test is an objective one. *Pearson*, 555 U.S. at 244.

150. Prior to AEDPA, the retroactivity rules for post-conviction habeas relief were

§ 1983 and *Bivens* liability is a creature of common law.¹⁵¹ Unlike the exclusionary rule, however—also a creature of judge-made law, but one which exists in a realm that Congress has declined to legislate in¹⁵²—qualified immunity doctrine necessarily interfaces with statutory law, in particular § 1983, and the Court’s understanding of the scope of the common law rule directly impacts the efficacy of that statutory scheme.

To be sure, common law and statutory rules can and often do coexist peacefully. The Court has recognized as much, having adopted a general rule that “statutes will not be construed in derogation of the common law unless such an intent is clear.”¹⁵³ Thus, where Congress does not clearly preempt the common law, it is assumed that Congress intended the statutory and common law schemes to complement each other.¹⁵⁴ Importantly, this canon of construction is justified as presumption of congressional intent, not as a limit on congressional power. That is, when Congress’s intent is unclear, courts assume that Congress intended to preserve the pre-existing legal framework of the common law; the canon against derogation of the common law is not justified by claiming that common law supersedes statutory law.¹⁵⁵

Although the Court originally claimed that its qualified immunity rules simply reflect an attempt to interpret § 1983 in accordance with common law immunity principles,¹⁵⁶ a close examination of the Court’s jurisprudence demonstrate that the Court has exceeded this limited role. Rather than preserving the state of immunity doctrine existing at the time § 1983 was passed—the relevant common-law rule that Congress would have been legislating against—the Court has instead continued to engage in ongoing development of qualified immunity rules.¹⁵⁷ That is, rather than looking

established by the Court through common law. *See* *Teague v. Lane*, 489 U.S. 288, 303-05 (1989). With AEDPA, however, Congress inserted itself into this area and codified the habeas rules, with modifications, in statute.

151. *See Imbler v. Pachtman*, 424 U.S. 409, 418 (1976).

152. Because the exclusionary rule may be a matter of *constitutional* common law, Congress’s ability to legislate in this area may be limited.

153. *City of Milwaukee v. Illinois*, 451 U.S. 304, 339 n.8 (1981) (Blackmun, J., dissenting) (citation omitted); *see also, e.g., Pasquantino v. United States*, 544 U.S. 349, 359 (2005).

154. *See Milwaukee*, 451 U.S. at 339 n.8.

155. *Pasquantino*, 544 U.S. at 360 (2005) (“This presumption is, however, no bar to a construction that conflicts with a common-law rule if the statute ‘speak[s] directly’ to the question addressed by the common law.” (alteration in original) (quoting *United States v. Texas*, 507 U.S. 529, 534 (1998))).

156. *See Imbler*, 424 U.S. at 418.

157. Indeed, the Court has even itself noted that, in its modern formulation, the qualified immunity doctrine goes beyond the common law:

At common law, in cases where probable cause to arrest was lacking, a complaining witness’ immunity turned on the issue of malice, which was a jury question. Under the *Harlow* standard, on the other hand, an allegation of malice is not sufficient to defeat immunity of the defendant acted in an objectively reasonable manner.

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

backwards and adopting an interpretation of § 1983 that best accords with congressional intent based on the common law that existed at the time, the Court has determined that it retains its common law power to develop immunity doctrine even in the face of congressional action. Most striking, however, this continued elaboration on the part of the Court is no longer even disguised in the language of statutory interpretation of congressional intent; instead, the Court has been quite content to develop qualified immunity doctrine by what is essentially a common law method—deciding what it thinks the most fair or reasonable rule is—and to assume that that rule should govern.¹⁵⁸

In doing so, the Court has accomplished something truly remarkable: it has converted a rule designed to effectuate congressional intent—the canon against derogation of the common law—and converted it into a tool to ignore congressional intent. And indeed, given that Congress’s purposes in enacting § 1983 were: (1) to “override certain kinds of state laws”; (2) to “provide[] a remedy where state law was inadequate”; and (3) “to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice,”¹⁵⁹ one might even argue that the current restrictive formulation of qualified immunity doctrine even actively thwarts congressional intent. The Court is right, of course, that it is unlikely that Congress intended to obliterate all common law immunity defenses and consequently that some form of immunity for government officials should be preserved. But at the same time it is unlikely that Congress intended such an expansive immunity doctrine as the Court has now adopted. By failing to appreciate this, the Court has effectively substituted its own judgment for that of Congress and intruded upon legislative prerogatives.

2. Federalism Concerns

Just as § 1983’s relatively light intrusion on federalism counsels in favor of permitting a broader range of precedent to serve as sources of clearly established law than in the post-conviction habeas context, so too does it counsel in favor of adopting a more permissible standard for how clearly those precedents must establish that an officer’s actions were unconstitutional before a plaintiff can recover.

As explained in Part III.A, federal district court review of state criminal convictions is an unusual intrusion into state prerogatives. In order to mitigate the federalism costs inherent in such an intrusion, Congress has required federal

158. See *supra* note 137 (discussing how, in less than ten years, the Court adopted then rejected a mandatory sequencing of questions that courts must address when considering qualified immunity defenses, all without reference to statutory language or congressional intent).

159. *Monroe v. Pape*, 365 U.S. 167, 173-74 (1961).

courts to afford state courts substantial deference in collateral review.¹⁶⁰ Indeed, as the Supreme Court explained recently, the deference mandated by AEDPA prohibits federal courts from granting post-conviction habeas relief even when the state court's ruling was infected with "clear error."¹⁶¹

While the wisdom of AEDPA's deferential standard is subject to debate, what is clear is that § 1983 liability—which does not incur federalism costs anywhere near as severe as post-conviction habeas—does not require anywhere near as light a touch. Indeed, given the lack of federalism costs, it is hard to justify adopting a rule in the qualified immunity context that is even close to as restrictive as in the post-conviction habeas context; doing so would either devalue the federalism norms invaded by post-conviction habeas (by failing to provide a stricter rule in habeas where federalism is implicated than in qualified immunity where it is not) or unnecessarily hamstringing the ability of civil rights plaintiff to seek redress in the courts (by ratcheting up the standard on qualified immunity to match the standard under AEDPA without advancing any federalism purposes). Accordingly, in light of the relative lack of federalism costs involved in liability under § 1983 or *Bivens*, the qualified immunity standard should be substantially more forgiving to plaintiffs than the post-conviction habeas standard under AEDPA.

3. The Role of Individual Redress

Similarly, differences in the goals between the good faith exception to the Fourth Amendment's exclusionary rule and the qualified immunity carve-out from § 1983 liability suggest that the legal standards applied to each of these "new law" exceptions should also differ.

As the Court has explained, the exclusionary rule is motivated almost entirely by deterrence of unconstitutional conduct by police.¹⁶² Consequently, the good faith exception is justified as a carve-out for circumstances where enforcing the exclusionary rule is unlikely to have an appreciable deterrent

160. See 28 U.S.C. § 2254 (2012).

161. *Lockyer v. Andrade*, 538 U.S. 63, 75-76 (2003).

162. See, e.g., *United States v. Leon*, 468 U.S. 897, 906 (1984) ("The rule thus operates as 'a judicially created remedy design to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.'" (quoting *United States v. Calandra*, 414 U.S. 338, 348 (1974))). In particular, it is intended as a form of general deterrence, with the emphasis being on creating a system in which officers generally are incentivized to abide by the Fourth Amendment, rather than a system of specific deterrence where the emphasis is on ensuring that an individual officer does not reoffend constitutional norms. Cf. *supra* notes 81-82 and accompanying text (discussing specific and general deterrence). While specific deterrence is still advanced by the exclusionary rule, since an officer who has evidence excluded is likely to be dissuaded from reoffending, the primary purpose of the exclusionary rule is to provide deterrence at a system-wide, rather than an individual, level.

effect.¹⁶³ Section 1983 liability, by contrast, is only partially premised on deterrence. Unlike *Bivens* liability, which is a creature of constitutional common law and attaches only when it is necessary to create a deterrent framework sufficient to keep the government within lawful bounds,¹⁶⁴ § 1983 liability is far more expansive as it is designed to provide both individual reparations as well as a deterrent.¹⁶⁵ Indeed, whereas both the exclusionary rule and *Bivens* liability exist only to systematically deter unconstitutional behavior and provide individual redress to the victim of a constitutional violation only as a collateral effect,¹⁶⁶ § 1983 was enacted with the purpose of “provid[ing] a remedy where state law was inadequate” and “provid[ing] a federal remedy where the state remedy, though adequate in theory, was not available in practice.”¹⁶⁷ That is, § 1983 is independently motivated by the purpose of providing individual compensation.

Accordingly, the distinct roles served by these doctrines require that the scope of § 1983 liability be broader than the exclusionary rule and that the “new law” rules employed by each doctrine be tailored to achieve this end. In particular, § 1983 liability requires a more forgiving new law rule—that is, a qualified immunity doctrine with a more plaintiff-friendly standard—than the exclusionary rule’s good faith exception.

CONCLUSION

The purpose of this Note is not to argue that doctrinal convergence is never warranted, nor was it intended to propose definitive answers to all open questions in qualified immunity doctrine. Rather, the purpose of this Note is to demonstrate that doctrinal convergence and trans-substantive uniformity comes with costs—a loss of nuance and flexibility in treating different things differently. By focusing on constitutional remedies doctrines, and in particular on the Supreme Court’s recent qualified immunity jurisprudence, it showed that unthinking borrowing from one area of the law into another can have real costs—in this case, fewer successful civil rights suits.

This Note is also intended to demonstrate that even when doctrinal convergence isn’t appropriate, it may still be worthwhile to conceptualize doctrines similarly. Indeed, when constitutional torts, post-conviction habeas, and the exclusionary rule are thought of together, their differences become most apparent. And, as explained in the latter part of this Note, those differences can often be probative of each doctrine’s proper role and the most sensible legal test to operationalize each doctrine’s purposes.

163. *Leon*, 468 U.S. at 916-17.

164. *See* *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001).

165. *See supra* Part II.A.

166. *See supra* note 80 and accompanying text.

167. *Monroe v. Pape*, 365 U.S. 167, 173 (1961).

At its core, then, this Note stands for the principle that just as important as knowing what a legal doctrine is—the focus of doctrinal convergence—is knowing what that legal doctrine is not. And that can make all the difference.