Title
Empiricism and Constitutional Torts

Journal
Northwestern Public Law Research Paper No. 25-57 Cardozo Legal Studies Research Paper No. 2025-31

Authors
Schwartz, Joanna
Reinart, Alex
Pfander, James Pfander

Publication Date
2025-07-01

ANNUAL REVIEWS

Annual Review of Law and Social Science

Empiricism and Constitutional Torts

Joanna C. Schwartz,[1] Alexander Reinert,[2] and James E. Pfander[3]

[1]School of Law, University of California, Los Angeles, California, USA; email: schwartz@law.ucla.edu

[2]Center for Rights and Justice, Benjamin N. Cardozo School of Law, Yeshiva University, New York, NY, USA

[3]Pritzker School of Law, Northwestern University, Evanston, Illinois, USA

Annu. Rev. Law Soc. Sci. 2025. 21:379–96

First published as a Review in Advance on July 8, 2025

The *Annual Review of Law and Social Science* is online at lawsocsci.annualreviews.org

https://doi.org/10.1146/annurev-lawsocsci-061824-074804

Keywords

Section 1983, *Monell* doctrine, *Bivens* doctrine, qualified immunity, empirical legal studies

Abstract

The Supreme Court has deliberately framed the law of constitutional torts as a balance between assuring redress for victims, deterring misconduct, and maintaining effective government services. Yet as the Supreme Court has shaped the contours of litigation against state and local actors (under 42 USC § 1983) and federal actors (under the *Bivens* doctrine), it has studiously ignored a growing body of empirical scholarship examining the ways law interacts with the behavior of police officers and other government actors. This review documents the Supreme Court's reliance on what could be charitably described as judicial intuition and its indifference to empirical evidence about such central questions as the volume and success of constitutional tort claims, the efficacy of qualified immunity, and the way the rules of tort liability shape the conduct of government officials.

1. INTRODUCTION

This review explores the decades-old and rapidly growing body of empirical research examining Section 1983 and *Bivens* jurisprudence—an area of law often referred to as constitutional torts—and the Supreme Court's long-standing, studious indifference to that research. The Supreme Court's decisions that first recognized the ability to sue government officers and local governments under Section 1983 were grounded primarily in the text, context, and history of the governing statute, without explicit regard to evidence of the state of policing and government misconduct that prompted advocates' push to recognize and expand the right to sue. Later, the Supreme Court's decisions interpreting the scope of Section 1983 and the power to sue federal officials under *Bivens* were motivated explicitly by an interest in balancing multiple considerations: the individual victim's interest in securing compensation and vindication, the public's interest in deterring future misconduct, and the government's interest in avoiding liability and overdeterrence. In conducting these policy-based inquiries, the Supreme Court typically draws on what one might charitably describe as judicial intuition.

To the extent that the Supreme Court purports to balance compensation, deterrence, and societal goals in its constitutional tort jurisprudence, we argue against its reliance on judicial intuition and encourage reliance instead on empirical legal scholarship. Increasingly sophisticated studies use statistical methods and electronically stored case information to evaluate the way law interacts with the world it governs. Empirical work has cast new light on such pressing questions as how often constitutional tort claims succeed against state (Schwartz 2017) and federal (Reinert 2010) actors, what impact the imposition of liability has on the finances of the officials and the departments affected (Epp 2009; Pfander et al. 2020; Schwartz 2010, 2014, 2016), and how judges' circuit assignments and political commitments shape their decisions in civil rights cases (Nielson & Walker 2015, 2016; Reinert 2023b). Yet, we find that this growing body of empirical work has left little mark on the Supreme Court's constitutional tort jurisprudence. As in other legal contexts ranging from gerrymandering to racial bias in the criminal legal system (Faigman 1991, Klarman 2020, Meares 2002, Meares & Harcourt 2000), the court has engaged in what has been called normative fact-finding: recognizing and integrating evidence that supports the court's doctrinal choices and ignoring evidence that undermines them (Faigman 1991, p. 601). In the latter circumstances, the Supreme Court makes no rigorous attempt to evaluate the impact of its proposed rules on the ground or to consider what insights existing empirical scholarship might offer. Instead, the chief justice has dismissed its relevance as so much sociological "gobbledygook" (Klarman 2020, p. 193).

In this review, we first tell the story of early landmarks such as *Monroe v. Pape* (1961) and *Monell v. Department of Social Services* (1978)—decisions governing modern urban policing and constitutional enforcement that emphasize nineteenth-century legislative history and ignore contemporary empirical evidence. We then examine the rise of constitutional claims against federal officials—known as *Bivens* actions—and their dramatic constriction to assuage concerns about supposed dangers that have little basis in available evidence. We next show how fact-free judicial intuition about *Bivens* claims spilled over into Section 1983 litigation via an expansion of the doctrine of qualified immunity, where the Supreme Court stubbornly refuses to consider empirical research that undercuts justifications for the defense, even as it periodically strengthens its power. We conclude with a call for the Supreme Court to consider empirical evidence as it engages in policy design through its constitutional tort jurisprudence. We would make that call whatever the basis for the Supreme Court's decisions. But, given that the Supreme Court's Section 1983 and *Bivens* decisions explicitly aim to balance the costs and benefits of such claims in the real world, its indifference to empirical insights is perplexing—all the more so because available evidence squarely contradicts its intuitions.

2. *MONROE* AND *MONELL*

Ever since Oliver Wendell Holmes Jr. proclaimed that both logic and experience breathed life into law (Holmes 1923), the realist turn in legal theory has encouraged attention to social facts as a supplement to the formal logic of legal reasoning. Yet, in the early development of the constitutional law of police misconduct under 42 USC § 1983, in cases such as *Monroe v. Pape* (1961) and *Monell v. Department of Social Services* (1978), the Supreme Court offered little by way of social fact to support or inform two dramatic extensions of government accountability.

2.1. Race and Urban Policing in *Monroe v. Pape*

We begin with *Monroe v. Pape* (1961), in which the Supreme Court held that Section 1983 made a Chicago police officer, Frank Pape, subject to monetary liability in federal court for an unconstitutional invasion of the Monroe family's home and persons. Past decisions (and dissenting justices) viewed such claims as private torts, actionable only in state court (absent diversity). The Supreme Court's recognition that Section 1983 is one vehicle for such claims has had monumental implications for police accountability litigation, fueling a striking increase in federal civil rights litigation and transforming the legal framework within which police officers operate by imposing enforceable constitutional restrictions against excessive force, false arrest, unjust discrimination, and unlawful searches (Epp 2009, Shapo 1965).

For all its significance in shaping civil rights litigation, *Monroe* lacks any serious engagement with the social or empirical facts of urban policing that underlay the case. If the justices were aware that Frank Pape, the defendant, was a white Chicago police officer with a storied history of brutal police practices (Gilles 2008), the majority opinion by Justice Douglas does not say. If it were relevant that the Monroe family was Black, or that the Chicago police had been regularly brutalizing Black residents and holding them for hours or days without access to a lawyer, one would not know that from the majority opinion (ACLU 1959, President's Committee on Civil Rights 1947, Smith 1949). If it had come to doubt the ability of state courts, applying private tort law, to provide effective oversight of racialized policing, the Supreme Court kept those doubts to itself.

Instead, the Supreme Court devoted most of its opinion to the history of civil rights legislation during the Reconstruction era when Section 1983 was enacted. The remainder discussed the facts of the case and the legal doctrine that would shape its conclusion that Pape acted under color of state law for purposes of triggering liability under Section 1983. Eight years before *Monroe*, the Supreme Court expanded lower federal court oversight of racism in state criminal legal systems in *Brown v. Allen* (1953). One year later, *Brown v. Board of Education* (1954) declared race-based school segregation unconstitutional and cited multiple studies to support its conclusion about the harms of segregation (Faigman 1991). Yet the *Monroe* court said nothing to indicate that its decision sought to expand the ability of lower federal courts to end the de facto racial caste system that animated urban policing. Indeed, by concluding that Section 1983 could not be used to sue the City of Chicago for constitutional violations by its officers, the Supreme Court in *Monroe* lessened the ability of Section 1983 to serve any such role (Epp 2009).

2.2. Effective Remediation and Entity Liability in *Monell*

Similarly profound changes in the system of accountability were announced in the 1978 decision in *Monell*, overturning the *Monroe* decision to the extent it had refused to permit suit against a city or county government under Section 1983. In *Monell*, the City of New York administered a policy requiring city employees to leave their jobs at an early stage of their pregnancy. Agreeing that the policy violated equal protection, the Supreme Court revisited the issue of governmental liability and provided a framework for municipal liability that persists today. Under *Monell*, cities and counties are subjected to liability for their own unconstitutional practices or formal policies but are not to be held vicariously liable for constitutional violations committed by their officers on the job.

Monell's majority opinion, by Justice Brennan, devoted most of its pages to a review of the legislative history of Section 1983. Left out of the Supreme Court's opinion was any overt consideration of two social facts that may have loomed large in its calculus. In 1972, Congress had extended Title VII to prohibit workplace discrimination by public employers, including local governments, and expressly subjected such employers to liability for backpay [Equal Employment Opportunity Act of 1972, Pub. Law No. 92–261, § 2, 86 Stat. 103, 111 (1972)]. But Title VII did not apply to the women who had sued New York City in *Monell* because New York had altered its pregnancy leave policy before the expansion of Title VII took effect [*Monell v. Department of Social Services* (1978)]. Given Congress's decision to impose entity liability on local governments, the *Monroe* decision, denying damages liability against local governments, may have appeared out of touch.[1]

Apart from this change in the legislative landscape, the Supreme Court in *Monell* may have been influenced by evidence of the sheer inadequacy of effective remediation for unconstitutional municipal policies and practices under the *Monroe* framework. In suits for injunctive and declaratory relief, governments sued either in their own name or through their responsible officers could change their policy to come into compliance with the law and seek dismissal of the suit on mootness grounds; that in fact had happened in *Monell v. Department of Social Services* (1978), leaving only a claim for backpay. But as a contractual, as opposed to a tort-based, remedy, backpay liability runs against the employing entity rather than the entity's officer who administers the firm's employment policies (Baude et al. 2025). Suits under *Monroe* to impose personal liability on responsible local officials for backpay thus were essentially off the table [*Monell v. Department of Social Services* (1978), p. 690, note 55].

Other critics have faulted formally legalistic decisions like those in *Monroe* and *Monell* for their failure to identify the practical considerations that contributed to the Supreme Court's decisions (Cohen 1935, Pound 1910). We would add that it is difficult to test empirical assumptions that contribute to the Supreme Court's decisions but remain unarticulated. Perhaps even more problematic, though, are fact-free assumptions that are repeated so often that their fiction is obscured by a veneer of verisimilitude. A variety of such baseless narratives emerged about constitutional tort litigation in the aftermath of *Monroe* and *Monell*: that both decisions fostered an explosion of frivolous federal court litigation that prevented officers from doing their jobs effectively (Eisenberg 1982). But even as the Supreme Court appeared to chart a course for civil rights litigation that was based, sometimes explicitly, in an acceptance of these accounts, it paid little attention to whether they were grounded in reality.

3. *BIVENS*

While the Supreme Court was beginning to develop the contours of Section 1983 litigation in the years between *Monroe* and *Monell*, it also was shaping a parallel regime for civil rights claims against federal officers via *Bivens* doctrine—a common-law doctrine that authorizes constitutional tort claims against federal officials. In contrast to the *Monroe* and *Monell* Courts' relative silence

[1]Although the court's decision in *Monell v. Department of Social Services* (1978) did not address the recent expansion of Title VII, it noted other contemporary congressional action at odds with the *Monroe* Court's rejection of entity liability, including the authorization of constitutional litigation against another kind of local entity—school boards—and legislation allowing for attorneys' fees to be collected against local governments.

as to real-world dynamics informing and implicated by their decisions, *Bivens* jurisprudence has been marked by frequent assumptions about the realities of litigation—assumptions that do not withstand empirical scrutiny.

In *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics* (1971), the Supreme Court first held that federal employees may be sued in their personal capacity for damages for violations of the Constitution. The litigation grew out of an early-morning raid of the home of Webster Bivens and his family by the Federal Bureau of Narcotics, precursor to the Drug Enforcement Administration [*Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics* (1971)]. Mr. Bivens sued the officers involved, seeking damages for what he claimed were violations of his Fourth Amendment rights. At the time, the Supreme Court had never held that the Constitution was enforceable against federal officials. Under *Monroe*, a Section 1983 suit would have authorized a damages action had Mr. Bivens been the target of the New York Police Department, but no counterpart authorized remedies for unconstitutional conduct by federal officials.

The Supreme Court filled the gap with its 1971 decision. Its explanation was brief and simple: Damages were the "ordinary remedy for an invasion of personal interests in liberty"; there were no "special factors counseling hesitation in the absence of affirmative action by Congress," nor was there "another remedy, equally effective in the view of Congress" [*Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics* (1971), pp. 395–97].

Early on, the Supreme Court described *Bivens* as broadly establishing that "victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right" [*Carlson v. Green* (1980), p. 18]. Treating *Bivens* like a common-law version of Section 1983, the Supreme Court "extended" the *Bivens*-type remedy to Fifth Amendment due process claims for employment discrimination [*Davis v. Passman* (1979)] and Eighth Amendment claims for deprivation of necessary medical care [*Carlson v. Green* (1980)]. Lower courts during the 1970s, taking their cue from the Supreme Court, did much the same, assuming that *Bivens* remedies applied to all manner of constitutional claims [*Paton v. La Prade* (1975), *States Marine Lines, Inc. v. Shultz* (1974)].

Yet the Supreme Court came to sour on what Justice Scalia later referred to with derision as the "heady days" of implied rights of action [*Correctional Services Corp. v. Malesko* (2001), p. 75]. The Supreme Court's antipathy toward judge-made law in the *Bivens* context is puzzling given its willingness to unilaterally adjust pleading rules, qualified immunity, and the collateral order doctrine (Crocker 2019, Pfander 2010). Moreover, the Supreme Court was not actually developing *Bivens* doctrine in isolation; as one of us (Pfander & Baltmanis 2009) has argued, Congress's enactment of the Westfall Act in 1988 at least implicitly approved *Bivens* remedies. But the Supreme Court has never accepted that proposition, treating the "extension" of *Bivens* remedies beyond established contexts as a question Congress has never endorsed [*Egbert v. Boule* (2022), *Hernandez v. Mesa* (2020), *Ziglar v. Abbasi* (2017)]. Since 1980, the Supreme Court has relied on concerns that its *Bivens* jurisprudence was developed without congressional approval to reject any "new" *Bivens* actions, and to increasingly confine *Bivens*, *Carlson*, and *Davis* to their facts. More recently, the Supreme Court has suggested that *Bivens*'s fundamental premise—that damages actions are the traditional means of vindicating invasions of personal interests—was flawed and that if the case were decided today, the current Court would not permit such claims to proceed no matter their importance or the viability of remedial alternatives [*Egbert v. Boule* (2022)]. Indeed, the Supreme Court has gone so far as to reject *Bivens*-type remedies in scenarios that, like *Bivens* itself, involve law enforcement misconduct in alleged violation of the Fourth Amendment [*Egbert v. Boule* (2022), *Hernandez v. Mesa* (2020)].

Various factors may explain the Supreme Court's hostility to *Bivens*-type claims.[2] We focus here on two unfounded assumptions that run through the long arc of its rejection of *Bivens*-type claims: that such claims are usually frivolous and that they pose a significant risk of financial liability.

3.1. Assumptions about *Bivens*'s Benefits: The Self-Fulfilling Prophecy

The idea that most *Bivens* claims are meritless—and therefore provide little benefit while imposing significant social costs—stretches back to the 1980s. Both academics and judges repeated an oft-cited statistic that only a handful out of 12,000 claims filed between 1971 and 1985 resulted in a plaintiff's judgment that was upheld on appeal [*Crawford-El v. Britton* (1998), p. 838; Dolan 1980, p. 297; *Laswell v. Brown* (1982), p. 269, note 13; Pillard 1999, p. 66; Rosen 1989, pp. 342–44; *United States v. McKoy* (2004), p. 315]. These figures were repeated without critical examination, feeding a narrative that *Bivens* claims imposed "enormous" costs while offering little of value (Donoghue & Edelstein 1998, p. 452, note 18). They even made their way into the leading Federal Courts casebook (Fallon et al. 1996). No one seemed to appreciate that the figures were based on estimates generated by the Department of Justice (DOJ) (Reinert 2010), even though the DOJ had not instituted measures to accurately track *Bivens* cases over time (Wise 1985, p. 849). Two other studies of *Bivens* litigation during this era told a similar story about the overall weakness of *Bivens* claims. One, without providing any methodological explanation, stated that only a handful out of 1,500 cases filed between 1971 and 1982 resulted in a plaintiff's verdict (Wise 1985, pp. 849–51). The other, a law review note examining 172 reported *Bivens* cases that were available as of 1979, found that only 10 led to a settlement or plaintiff's judgment (Smith 1979).

Taken together, these reports paint a picture of *Bivens* claims as uniquely unsuccessful. The data discussed above suggest that plaintiffs win judgments in *Bivens* actions in between 0.03% and 2% of filed cases,[3] compared with far higher success rates (defined to include both judgments and settlements) in civil cases or constitutional tort litigation brought under Section 1983—an 80% success rate for non-prisoner civil plaintiffs, a 50% success rate for non-prisoner constitutional tort plaintiffs, and a 15% success rate for incarcerated plaintiffs (Eisenberg & Lanvers 2009, pp. 122–25, 133; Eisenberg & Schwab 1987, p. 692; Schlanger 2003, p. 1557; Schwab & Eisenberg 1988, pp. 732–33). As it turns out, however, the assertion that *Bivens* claims are particularly unsuccessful has been thrown into considerable doubt (Reinert 2010). As one of us showed by reviewing the dockets of hundreds of civil rights cases filed against federal defendants over three years in five busy district courts, *Bivens* claims are about as successful as typical civil rights claims (Reinert 2010). Indeed, depending on other variables, the data suggest that *Bivens* cases may be successful in up to 40% of litigated cases (Reinert 2010).

Yet the earlier evidence suggesting that *Bivens* claims are mostly meritless has had an outsized and stubborn impact on the development of *Bivens* jurisprudence—while the later, more comprehensive study showing that *Bivens* actions are as successful as other civil rights claims has gone largely ignored by courts and litigants. The federal government has, on occasion, made use of figures regarding the alleged meritlessness of *Bivens* claims when seeking to limit the reach of the doctrine. In a brief filed in 1995, the Solicitor General of the United States recounted figures purporting to show that the "vast majority" of *Bivens* claims are "unfounded," arguing to the Supreme Court that it must take care to

[2]Part of this account, as we and others have argued, reflects newfound hostility to the implied private right of action (Pfander & Baltmanis 2009, Vladeck 2019).

[3]This range is accounted for by the difference between the DOJ's informal estimate that there were four successful plaintiffs' judgments out of 12,000 filings and Wise's (1985, pp. 850–51) more detailed analysis.

> accomodat[e]. . .the right to redress when constitutional violations occur. . .[against] the impact of meritless inmate claims that are costly to litigate, impose substantial burdens on institutional management and individual defendants, and have the cumulative effect of depriving the public of the ability of government officials to make difficult decisions with the appropriate level of confidence. [Brief for the United States as Amicus Curiae Supporting Reversal, *Kimberlin v. Quinlan* (1995)]

The brief notably provided no specific explanation as to how these data were collected or calculated.

As these figures have become a fixture in the legal landscape, federal courts at all levels have repeated them without any critical examination. For some courts, they provide evidence that *Bivens* remedies pose a "trade-off between the benefits of assuring citizens compensation for unconstitutional acts and the costs of exposing officials to many suits that, though ultimately meritless, can only be proven meritless after great expense in time, stress and money" [*Kimberlin v. Quinlan* (1994), pp. 1525–26]. Most critically, the presumed meritlessness of most *Bivens* causes of action prompted the Supreme Court to adopt the modern version of the qualified immunity defense [*Harlow v. Fitzgerald* (1982)]. We discuss the relationship between qualified immunity and empirical data in greater detail below (infra Section 4)—for now we only pause to observe that the Supreme Court in *Harlow* explicitly tied its assumptions about the typical frivolousness of *Bivens* claims to its decision to strengthen the qualified immunity defense by adopting an objective test that promised to give courts greater latitude to dismiss *Bivens* (and, ultimately, Section 1983 suits) as early as possible [*Harlow v. Fitzgerald* (1982), *Whitacre v. Davey* (1989)]. Because, in the *Harlow* Court's view, "claims frequently run against the innocent as well as the guilty—at a cost not only to the defendant officials, but to society as a whole," the court adopted an "objective reasonableness" standard for qualified immunity. This standard is still with us today in both *Bivens* and Section 1983 actions, because it would best "permit the resolution of many insubstantial claims on summary judgment" [*Harlow v. Fitzgerald* (1982), pp. 814, 818]. In this sense, the Supreme Court's assumptions about the frivolousness of the judge-created *Bivens* suit has spilled over to have a significant impact on the shape of congressionally enacted Section 1983 litigation.

Moreover, with every step the Supreme Court has taken toward limiting the substantive reach of *Bivens* claims by refusing to "extend" such claims to "new contexts," the narrative that *Bivens* claims are overwhelmingly unsuccessful becomes a self-fulfilling prophecy. If *Bivens*-type claims are essentially nonstarters based on the Supreme Court's most recent implied cause of action jurisprudence, then putative *Bivens* claims will almost always fail.

3.2. Assumptions about *Bivens* Costs: Motivated Thinking

It is perhaps ironic that at the same time that courts and commentators have assumed that *Bivens* claims are usually frivolous, they also have assumed that such claims pose a significant risk of financial liability to individual defendants. Because *Bivens*—like Section 1983 liability—imposes a personal liability, the Supreme Court in particular has routinely indulged the assumption that individual defendants face financial ruin from *Bivens* judgments. And this assumption has motivated the Supreme Court when it has both limited the reach of *Bivens* claims as a matter of substance and imposed barriers to success as a matter of procedure. As with the assumptions about *Bivens* claims' overall success, however, these assumptions have proven ill-founded.

The Supreme Court's decision in *Harlow v. Fitzgerald* (1982, p. 814) again plays a central role, adverting to the "cost" to individual defendants that stem from meritless claims. These assumptions begat not only the turn to an objective qualified immunity defense but also the Supreme Court's growing resistance to recognizing any new *Bivens*-type claims at all. In 1983, the Supreme Court declined to recognize a *Bivens* claim for First Amendment retaliation in part because it feared that "the added risk of personal liability" would deter agency officials from "imposing discipline" in appropriate cases [*Bush v. Lucas* (1983), p. 389]. And in 1988, the Supreme Court refused to recognize a *Bivens* claim for procedural due process violations because "[t]he prospect of personal liability for official acts...would undoubtedly lead to new difficulties and expense in recruiting administrators for the programs Congress has established" [*Schweiker v. Chilicky* (1988), p. 425]. Declining to find a *Bivens* remedy for discrimination in the military in 1983, the Supreme Court predicted that the "special nature of military life ... would be undermined by a judicially created remedy exposing officers to personal liability at the hands of those they are charged to command" [*Chappell v. Wallace* (1983), p. 304]. More recently, in a case involving the Executive's response to September 11, the Supreme Court worried that "[i]f *Bivens* liability were to be imposed, high officers who face personal liability for damages might refrain from taking urgent and lawful action in a time of crisis" [*Ziglar v. Abbasi* (2017), p. 145].

In litigation, the federal government has encouraged this concern with the threat to individual officers posed by *Bivens* liability. Since the 1980s, the DOJ has maintained in and out of court that individual *Bivens* defendants are rarely indemnified, leading to the claim that the lack of indemnity exposes individual defendants to "ruinous personal liability" [Brief for Pet'rs, *Schweiker v. Chilicky* (1987)]. The government has traded on such claims in numerous filings before the Supreme Court [Brief for Pet'rs Hasty and Sherman, *Ziglar v. Abbasi* (2016); Replacement Brief for John Ashcroft et al., *Arar v. Ashcroft* (2008); Reply Brief for Pet'rs, *Schweiker v. Chilicky* (1988)]. As we have explained in separate work (Pfander et al. 2020), this narrative appears to be a strategy to frame for judges the significant consequences to individual defendants facing *Bivens* liability (Mason 2002). And the narrative has made its way into lower court briefs concerning admissible evidence, stays of proceedings, personal jurisdiction, and the need to limit any potential extension of *Bivens* remedies (Pfander et al. 2020). Thus, the account that *Bivens* remedies are costly to individuals sits side by side with the contention that *Bivens* claims are generally meritless. Although both assumptions have played a leading role in stunting the development of *Bivens* litigation, neither has an empirical foundation. Indeed, we have shown in an extensive study of litigated *Bivens* cases and patterns of indemnification that individual *Bivens* defendants almost never pay any amount to settle cases or satisfy judgments (Pfander et al. 2020). Based on our study spanning 10 years of activity, individual defendants contributed to settlements or judgments in fewer than 5% of cases, and the total amount they contributed amounted to less than 1% of the total paid out in those successful cases.

Notwithstanding the empirical evidence concerning *Bivens*'s costs and benefits, pervasive untested assumptions persist. Although we cannot trace the current hostility to *Bivens* actions directly to these unfounded assumptions, we find it at least plausible that perceptions about the high cost and minimal benefits offered by *Bivens*-type remedies have influenced the dialogue about their viability as a means of civil rights enforcement. And we see direct evidence that these assumptions have driven the expansion of qualified immunity doctrine in both *Bivens* and Section 1983 litigation.

4. QUALIFIED IMMUNITY

Empirical assumptions have influenced development of not only the judge-made universe of *Bivens* claims but also the legislatively sourced Section 1983 cause of action. Nowhere is this more evident than in the court's qualified immunity doctrine, applicable to both types of claims. In *Pierson v. Ray* (1967, p. 557), the Supreme Court described qualified immunity as a protection for officers acting in "good faith." Then, in *Harlow v. Fitzgerald* (1982, p. 818), the Supreme Court made the qualified immunity standard objective, dependent on whether an officer violated "clearly established law." Although *Harlow* was a *Bivens* case, it had a significant spillover effect in Section 1983 litigation.

In the years that followed, the Supreme Court further strengthened qualified immunity, mostly in the Section 1983 context, by instructing lower courts that they should deny officers qualified immunity only if a prior court decision found factually similar conduct to be unconstitutional [*Anderson v. Creighton* (1987), *Brosseau v. Haugen* (2004), *White v. Pauly* (2017)]. The Supreme Court then narrowed the available universe of such court decisions when it ruled, in 2009, that lower courts when granting qualified immunity need not pass on the constitutionality of the underlying conduct [*Pearson v. Callahan* (2009)]. It is not just the substance of the qualified immunity doctrine that stems from this empirical judgment but also the process. Discovery is postponed until qualified immunity is resolved to better "weed out" meritless suits [*Siegert v. Gilley* (1991), p. 232]; defendants who fail to convince a trial court to dismiss a case on qualified immunity may appeal immediately, notwithstanding the final judgment rule, because of the imperative to dismiss insubstantial suits promptly [*Behrens v. Pelletier* (1996), *Mitchell v. Forsyth* (1985)]; and the Supreme Court has admonished lower courts to be alert for "artful pleading" to protect defendants from "frivolous lawsuits" [*Butz v. Economou* (1978), pp. 507–8].

Over the doctrine's near 60-year existence, the Supreme Court has justified qualified immunity—and its increasingly stringent substantive and procedural barriers—in substantial part by concerns about the harms of making it too easy to sue government officials. The Supreme Court's qualified immunity decisions are peppered with confident statements about the need for qualified immunity to protect officers and society as a whole. Yet its decisions fail to offer empirical evidence to support these assertions and steadfastly ignore available evidence that undermines these claims.

4.1. The Litigation Explosion Myth

The Supreme Court's creation of qualified immunity in 1967, six years after deciding *Monroe v. Pape*, should be considered against the backdrop of concerns that *Monroe* prompted a litigation explosion. In the years after *Monroe*, there was an increase in Section 1983 suits, with almost 4,000 suits filed in 1970 and more than 12,000 filed in 1977 (Eisenberg & Schwab 1987). Commentators extrapolated from these figures that courts and government officials were overwhelmed by Section 1983 cases, and an interest in easing this burden on courts and government officials is understood to have prompted several limitations, including qualified immunity, on the ability to bring such claims (Eisenberg 1982). In response to these concerns, researchers examined whether the increase in Section 1983 cases in the 1970s and 1980s was actually burdening courts and governments—and found good reason to conclude it was not.

In 1979, the *Yale Law Journal* published a study examining two questions relevant to the burdens of Section 1983 suits on courts and government: the frequency with which these suits were successful, and the impact of those successful suits on the defendant officers and police departments (Davis et al. 1979). After reviewing 149 Section 1983 cases filed in Connecticut; interviewing judges, lawyers, and police officials; and surveying jurors, the researchers concluded that the suits in their sample "did not compensate plaintiffs for violations of their constitutional rights or deter police officers from engaging in proscribed behavior" (Davis et al. 1979, p. 814). Juror bias was partially to blame: "The jurors disfavored plaintiffs who were nonwhite or nonmiddle-class, or who had previous brushes with the law" (p. 814). And, even when plaintiffs won at trial, "the individual defendants and the police departments were insulated from the financial burden consequent to a Section 1983 suit" (p. 814).

In 1982, Eisenberg published a study reviewing the litigation of every Section 1983 case filed in 1975 and 1976 in the Central District of California. To assess the burden imposed by these cases, Eisenberg (1982, p. 484) tracked the number of cases that went to trial, the number of hearings, the success rate of the cases, and the amount paid to plaintiffs and found that "Section 1983 cases are not overwhelming the courts; trivial claims, involving little if any federal policy, do not dominate district court dockets, and courts are not, at the behest of state prisoners, eagerly overseeing minute details of prison life."

In a subsequent study of Section 1983 and *Bivens* actions relying on Administrative Office data, Eisenberg & Schwab (1987, p. 686) found that civil rights filings actually declined as a fraction of the civil docket between 1975 and 1984. Eisenberg & Schwab (1987, p. 671) found that civil rights cases constituted approximately 4% of the docket in the Central District of California and judges were assigned approximately one constitutional tort case per month—figures "smaller than the dire warnings and common perceptions suggest." Eisenberg's later studies, sometimes with coauthors, offered additional evidence that constitutional tort litigation was not overwhelming the federal courts, in large part because they rarely proceeded to trial (Eisenberg 1991, Eisenberg & Clermont 2014). Several studies beginning in the 1970s focused specifically on litigation filed by incarcerated people—an area of particular focus for commentators concerned about a litigation explosion that prompted enactment of the Prison Litigation Reform Act in 1996—and found fears overblown in this context as well (Bailey 1975; Schlanger 2003, 2015; Turner 1979).

In a 2015 review of several studies, Eisenberg (2015, p. 22) concluded that the number of constitutional tort cases filed "suffered a long-term decline after 2004." Eisenberg recognized the challenges of drawing firm conclusions from these data. He wrote,

> It may be that the number of actionable constitutional deprivations by police and other government officials has declined. Equally plausible is that constitutional tort plaintiffs finally became discouraged to some degree by decades of low settlement rates, low trial win rates, appellate level setbacks, and Supreme Court groups of five justices who have been unsympathetic to civil rights plaintiffs. (Eisenberg 2015, p. 22)

Either way, these data suggest that the litigation explosion myth was, itself, overblown.

4.2. The Threat of Financial Burdens on Officers

The Supreme Court has repeatedly justified the need for qualified immunity to protect officers from financial liability. When the Supreme Court created qualified immunity in 1967, in *Pierson v. Ray*, it explained that common law protections for officers from liability for false arrest when they have acted in good faith and with probable cause should apply to Section 1983 claims because "[a] policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause and being mulcted in damages if he does" [*Pierson v. Ray* (1967), p. 555]. Then, in 1982, in *Harlow v. Fitzgerald*, when the Supreme Court dramatically expanded the reach of qualified immunity by turning it from a subjective standard (dependent on an officer's good faith) to an objective standard (dependent on whether an officer violated "clearly established law"), it explained that "public officers require [some form of immunity protection] to shield them from undue interference with their duties and from potentially disabling threats of liability" [*Harlow v. Fitzgerald* (1982) p. 806]. Later, in *Forrester v. White* (1988, p. 223), the Supreme Court reported that "[s]pecial problems arise. . .when government officials are exposed to liability for damages. . . . the threat of liability can create perverse incentives that operate to *inhibit* officials in the proper performance of their duties."

Despite concerns about "potentially disabling threats of liability," researchers have long found that officers rarely pay settlements and judgments from their own pockets (Davis et al. 1979, Eisenberg & Schwab 1987). In 2014, one of us studied 81 law enforcement agencies across the country and found that 99.98% of the dollars awarded to plaintiffs in police misconduct cases were paid by cities or insurers, not officers (Schwartz 2014). Officers' insulation from the costs of litigation comes not from qualified immunity, as the Supreme Court's decisions suggest, but from state and local indemnification provisions that authorize or require local governments to provide their officers with legal representation and to pay settlements and judgments on their behalf (Nielson & Walker 2020, Schwartz 2014).

In 1987, rejecting an argument that qualified immunity was unnecessary because federal and state officers were reimbursed for litigation expenses, Justice Scalia wrote that there was no evidence these programs "make reimbursement sufficiently certain and generally available to justify reconsideration of the balance struck in *Harlow* and subsequent cases" [*Anderson v. Creighton* (1987), p. 641, note 3]. There is now such evidence—yet it has gone unnoticed by the Supreme Court in its decisions trumpeting the importance of qualified immunity as a shield from financial liability.

4.3. The Need for Notice

The Supreme Court has also defended qualified immunity as necessary to ensure that officers are held liable only when they had fair notice that their conduct was unconstitutional. The fair notice justification was first articulated in *Harlow v. Fitzgerald* (1982, p. 818), when the Supreme Court explained that qualified immunity shields government officials "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." Five years later, in *Anderson v. Creighton* (1987, p. 646), the Supreme Court explained that qualified immunity's protections are "intended to provide government officials with the ability 'reasonably [to] anticipate when their conduct may give rise to liability for damages.'" The fair notice requirement appears to have prompted the Roberts Court's repeated insistence that qualified immunity can be defeated only if there is a prior court decision establishing unconstitutionality on similar facts. For example, in *Kisela v. Hughes* (2018, p. 105), the Supreme Court cautioned lower courts "not to define clearly established law at a high level of generality" because "[p]recedent involving similar facts can help move a case beyond the otherwise 'hazy border between excessive and acceptable force' and thereby provide an officer notice that a specific use of force is unlawful." And in *District of Columbia v. Wesby* (2018, p. 64), the Supreme Court observed that "officers will often find it difficult to know how the general standard of probable cause applies in 'the precise situation encountered,'" thus necessitating that plaintiffs "identify a case where an officer acting under similar circumstances was held to have violated the Fourth Amendment." If notice is of central importance to the job of policing, however, the granularity that the Supreme Court insists on appears less so. Contrary to the Supreme Court's repeated insistence that prior, similar court decisions are necessary to notify officers about the unconstitutionality of their conduct, a study of police trainings and policy manuals from across California reveals that officers are not actually trained about the facts and holdings of those cases that clearly establish the law (Schwartz 2021).

4.4. The Costs and Burdens of Litigation and Trial

The Supreme Court has also justified qualified immunity as necessary to protect officers from the burdens of discovery and trial in "insubstantial" cases. In *Harlow v. Fitzgerald* (1982, p. 817), the Supreme Court explained that constitutional tort litigation "may entail broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues" and that "[i]nquiries of this kind can be peculiarly disruptive of effective government." The Supreme Court's concerns along these lines have only grown stronger with time. Although the Supreme Court wrote in 1997 that "the risk of 'distraction' alone cannot be sufficient grounds for an immunity" [*Richardson v. McKnight* (1997), p. 411], it explained in 2009, in *Pearson v. Callahan* (2009, p. 231), that "the 'driving force' behind creation of the qualified immunity doctrine was a desire to ensure that 'insubstantial claims' against government officials [will] be resolved prior to discovery."

Yet qualified immunity in practice rarely is the reason that cases resolve before discovery and trial. A study of almost 1,200 cases in 5 federal districts found just 7 (0.06%) were dismissed on qualified immunity grounds before discovery, and 38 (3.2%) were dismissed on qualified immunity grounds before trial (Schwartz 2017). Qualified immunity often cannot shield officers from discovery and trial because its reach is limited—it does not apply to municipal liability claims, claims for injunctive relief, or state law claims, and qualified immunity should not be granted at summary judgment when there is a material factual dispute (Schwartz 2017). Moreover, other procedural barriers at each step of the litigation process are available to weed out "insubstantial" claims, and are the cause of far more dismissals than is qualified immunity (Schwartz 2017). Indeed, available evidence suggests that qualified immunity may actually increase the costs and burdens of litigation because qualified immunity motions are time consuming to brief and because interlocutory appeals of qualified immunity denials can add years to a case (Schwartz 2017, Reinert 2023b, Tiezzi et al. 2024).

Qualified immunity may reduce the costs and burdens of constitutional tort litigation in another way: by discouraging lawyers from taking such cases altogether. Two of us have examined this question the impact of qualified immunity on attorneys' case selection decisions in Section 1983 (Schwartz 2020a) and *Bivens* (Reinert 2011) cases. These qualitative studies suggest that concerns about the challenges of defending against qualified immunity both discourage lawyers from accepting some cases and may discourage some lawyers from bringing civil rights cases altogether—but do not necessarily weed out the "insubstantial" cases, as the *Harlow* Court hoped.

4.5. The Dangers of Overdeterrence

Finally, the Supreme Court has justified qualified immunity as necessary to protect against overdeterrence. Without qualified immunity, the *Harlow* Court feared, damages actions may "deter[ ]. . .able citizens from acceptance of public office" and "dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties" [*Harlow v. Fitzgerald* (1982), p. 814]. For these reasons, the Supreme Court has explained, qualified immunity is important both for officers and for "society as a whole" [*Harlow v. Fitzgerald* (1982), p. 814; *White v. Pauly* (2017), p. 551]. Once again, the Supreme Court offers confident claims about the deterrent power of legal liability without interrogating long-standing research endeavoring to assess this very question.

Available research tells a more complex story about the deterrent effects of the threat of liability. Responding to survey questions in the abstract, officers will report that the threat of civil liability has a deterrent effect (Kappeler 2006, Michalski & Rushin 2018). Yet multiple studies have found that law enforcement officers infrequently think about the threat of liability when doing their jobs (Archbold & Maguire 2002; Kappeler 2006; Schwartz 2018, pp. 1811–12). In recent years, and particularly following the murder of George Floyd, surveyed officers have continued to express concerns about legal liability (Rossler & Scheer 2024). Yet Grunwald (2024) found, after reviewing officer separations in 6,800 law enforcement agencies across 15 states, that the increase in separations "was smaller, later, less sudden, and possibly less pervasive than the retention-crisis narrative suggests."

4.6. Causes for Concern about Qualified Immunity

Empirical research has not only tested the proffered justifications for qualified immunity doctrine but also raised concerns about the doctrine's application that the Supreme Court should consider if it is attempting, in good faith, to balance interests in vindicating individual rights and interests in avoiding overdeterrence and other social harms. For example, studies by Nielson & Walker (2015, 2016) and Reinert (2023b) have shown substantial variation in qualified immunity grant rates that are correlated to both the circuit and the political party of the president who appointed the judge. In other words, qualified immunity grants may depend less on whether the claim is "insubstantial" [*Harlow v. Fitzgerald* (1982), p. 808] and more on the political persuasion and location of the judge hearing the case. Along similar lines, research has shown that there is significant variation between circuits in how the burden of proof as to qualified immunity, nominally an affirmative defense, is assigned at trial (Reinert 2018). In addition, research has shown that the Supreme Court's 2009 decision in *Pearson v. Callahan*, allowing courts to grant qualified immunity without ruling on the constitutionality of the officers' conduct, has unsurprisingly reduced the number of constitutional decisions—particularly in excessive force cases (Obasogie & Zaret 2022)—and, thus, has fostered greater uncertainty in the law that governs police conduct (Hughes 2009, Leong 2009, Sobolski & Steinberg 2010).

At the same time, the available empirical data have raised questions about the extreme focus that advocates for a more muscular civil rights enforcement regime have placed on the qualified immunity doctrine. Many scholars (including us) have identified qualified immunity as a significant barrier to relief in both *Bivens* and Section 1983 claims (Fallon 2019, Reinhardt 2015). Indeed, given the attention paid to qualified immunity in recent years, one might conclude that qualified immunity is the most significant barrier to success for otherwise valid constitutional claims. Like assumptions about the costs and benefits of civil rights claims, the assumption about the importance of qualified immunity is fundamentally an empirical one. But as two of us have demonstrated in separate empirical work, qualified immunity plays a formal role in very few litigated cases (Reinert 2011, Schwartz 2017).

Recognizing the nuanced role that qualified immunity plays in litigated cases is important for at least three reasons. First, it opens up a dialogue about civil rights enforcement that can consider the many other formal and informal mechanisms that operate as limitations. Access to counsel, pleading doctrine, limitations on entity liability, information asymmetry, specific statutory barriers imposed in prison conditions litigation—all of these and more play significant roles in limiting the ability to enforce constitutional rights (Davidson 2022, Schwartz 2023a, Smith 2021). But the assumption that qualified immunity has played an overriding role in the failure of *Bivens* (and Section 1983) claims has led advocates and some academics to focus on one intervention over others.

Second, that broader dialogue can enrich the conversation about what interventions, separately or in tandem, might better enable civil rights enforcement. For many years, for example, commentators seeking greater enforcement through both *Bivens* and Section 1983 have proposed a switch from the current official liability model to a governmental liability model to avoid the pitfalls created by qualified immunity doctrine (Colbert 1993, Gilles 2001, Newman 1978, Schuck 1983, Schwartz 2023b). Although we have advocated for a hybrid model in other work (Reinert et al. 2021), we think that any such shift to entity-based liability will be effective only if policymakers consider all of the different barriers to success that have emerged in this space. This is not to suggest that focusing on qualified immunity is misguided. That it deserves focus, however, need not exclude consideration and study of other determinants of litigation outcomes.

Third, as the leading policymaker, the Supreme Court should gain a more complete understanding of how various formal and informal limitations on the right to sue interact to shape the efficacy of its system of police and government accountability law. The Supreme Court contends that its constitutional tort jurisprudence seeks to balance interests in assuring redress for victims, deterring misconduct, and maintaining effective government services. To strike that balance, the

Supreme Court must not only consider the extent to which individual doctrines, like qualified immunity, achieve their intended purposes, but also take account of how all the factors—qualified immunity, *Monell*, *Bivens*, standing, class certification, access to counsel, attorneys' fees, indemnification, and others—combine to shape what one of us has called the ecosystem of constitutional enforcement (Schwartz 2020b).

5. CONCLUSION

The arc of judicial decision-making in constitutional torts follows the intellectual history of legal thought. Early decisions, like *Monroe* and *Monell*, focus on a set of historical questions that seem formally legalistic and unconnected to the reality of urban policing. One suspects, just as the realists taught us, that a whole array of unspoken judicial intuitions and priors informed the Supreme Court's decisions. After choosing to impose constitutional limits on the perceived excesses of urban policing, the Supreme Court's later *Bivens* and qualified immunity decisions more directly acknowledge considerations of social policy as the justices balanced the imagined costs and benefits of expanded or narrowed liability rules. But much of this more openly policy-inflected decision-making failed to engage rigorously with available empirical data. As a result, the Supreme Court has built a policy-based institutional structure on a doubtful factual foundation.

The Supreme Court can readily address these factual mistakes. Empirical evidence about our judicial system and its effects on participants has become more abundantly available in recent years, even as gaps in the available evidence persist (Boyd et al. 2020, Clopton & Huq 2024, Hoffman et al. 2007, Kim et al. 2009, Larsen 2012, Miller & Wright 2004). To the extent that empirical research has not answered questions of concern, the Supreme Court could identify those questions and encourage advocates and researchers to answer them. Notably, the modern turn toward historical argument, fueled by the commitments of originalist-minded justices, has triggered a cottage scholarly industry in historical exploration of the origins of Section 1983 and qualified immunity (Baude 2018, Keller 2021, Reinert 2023a). Similar attention by the Supreme Court to the real-world, current-day effects of its constitutional tort doctrine would doubtless fuel production of additional empirical work and advocacy based on that work. In all events, the Supreme Court's refusal to consider evidence that bears on its own acknowledged use of cost-benefit analysis to evaluate constitutional tort claims strikes us as indefensible.

DISCLOSURE STATEMENT

The authors are not aware of any affiliations, memberships, funding, or financial holdings that might be perceived as affecting the objectivity of this review.

LITERATURE CITED

ACLU (American Civil Liberties Union). 1959. *Secret Detention by the Chicago Police*. Free Press

Anderson v. Creighton, 483 US 635 (1987)

Archbold CA, Maguire E. 2002. Studying civil suits against the police: a serendipitous finding of sample selection bias. *Police Q*. 5:222–49

Bailey WS. 1975. The realities of prisoners' cases under 42 USC. 1983: a statistical survey in the Northern District of Illinois. *Loyola Univ. Chicago Law J.* 6:527–59

Baude W. 2018. Is qualified immunity unlawful? *Calif. Law Rev.* 106:45–90

Baude W, Goldsmith J, Manning JF, Pfander JE, Tyler AL. 2025. *Hart and Wechsler's Federal Courts and the Federal System*. Foundation. 8th ed.

Behrens v. Pelletier, 516 US 299 (1996)

Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 US 388 (1971)

Boyd CL, Kim PT, Schlanger M. 2020. Mapping the iceberg: the impact of data sources on the study of district courts. *J. Empir. Legal Stud.* 17:466–92
Brief for Pet'rs Hasty and Sherman, *Ziglar v. Abbasi*, No. 15-1363, 20176 WL 6873021, at *3, *20, *21, *28 (US Nov. 2016)
Brief for Pet'rs, *Schweiker v. Chilicky*, No. 86-1781, 1987 WL 880510 (US Dec. 3, 1987)
Brief for the United States as Amicus Curiae Supporting Reversal, *Kimberlin v. Quinlan*, 515 US 321 (1995) (No. 93-2068). **http://www.usdoj.gov/osg/briefs/1993/w932068w.txt**
Brosseau v. Haugen, 543 US 194 (2004)
Brown v. Allen, 344 US 443 (1953)
Brown v. Board of Education, 347 US 483 (1954)
Bush v. Lucas, 462 US 367 (1983)
Butz v. Economou, 438 US 478 (1978)
Carlson v. Green, 446 US 14 (1980)
Chappell v. Wallace, 462 US 296 (1983)
Clopton ZD, Huq AZ. 2024. The necessary and proper stewardship of judicial data. *Stanford Law Rev*. 76:893–970
Cohen FS. 1935. Transcendental nonsense and the functional approach. *Columbia Law Rev*. 35:809–49
Colbert DL. 1993. Bifurcation of civil rights defendants: undermining *Monell* in police brutality cases. *Hastings Law J*. 44:499–578
Correctional Services Corp. v. Malesko, 534 US 61 (2001)
Crawford-El v. Britton, 523 US 574 (1998)
Crocker KM. 2019. Qualified immunity and constitutional structure. *Mich. Law Rev.* 117:1405–62
Davidson A. 2022. Procedural losses and the pyrrhic victory of abolishing qualified immunity. *Wash. Univ. Law Rev.* 99:1459–530
Davis v. Passman, 442 US 228 (1979)
Davis LB, Small JH, Wohlberg DJ. 1979. Suing the police in federal court. *Yale Law J*. 88:810–24
District of Columbia v. Wesby, 583 US 48, 64 (2018)
Dolan MW. 1980. Constitutional torts and the federal tort claims act. *Univ. Richmond Law Rev*. 14:281–309
Donoghue G, Edelstein JI. 1998. Life after *Brown*: the future of state constitutional tort actions in New York. *N.Y. Law Sch. Law Rev.* 42:447–556
Egbert v. Boule, 596 US 482 (2022)
Eisenberg T. 1982. Section 1983: doctrinal foundations and an empirical study. *Cornell Law Rev*. 67:482–556
Eisenberg T. 1991. The relationship between plaintiff success rates before trial and at trial. *J. R. Stat. Soc.* 154:111–16
Eisenberg T. 2015. Four decades of federal civil rights litigation. *J. Empir. Legal Stud.* 12:4–28
Eisenberg T, Clermont KM. 2014. Plaintiphobia in the Supreme Court. *Cornell Law Rev*. 100:193–212
Eisenberg T, Lanvers C. 2009. What is the settlement rate and why should we care? *J. Empir. Legal Stud.* 6:111–46
Eisenberg T, Schwab S. 1987. The reality of constitutional tort litigation. *Cornell Law Rev*. 72:641–95
Epp CR. 2009. *Making Rights Real: Activists, Bureaucrats, and the Creation of the Legalistic State*. University of Chicago Press
Faigman DL. 1991. "Normative constitutional fact-finding": exploring the empirical component of constitutional interpretation. *Univ. Pa. Law Rev.* 139:541–613
Fallon RH Jr. 2019. Bidding farewell to constitutional torts. *Calif. Law Rev.* 107:933–98
Fallon RH Jr., Meltzer D, Shapiro D. 1996, *Hart and Wechsler's The Federal Courts and the Federal System*. West Publishing Co. 4th ed.
Forrester v. White, 484 US 219 (1988)
Gilles ME. 2001. In defense of making government pay: the deterrent effect of constitutional tort remedies. *Ga. Law Rev.* 35:845–80
Gilles ME. 2008. Police, race, and crime in 1950s Chicago: *Monroe v. Pape* as Legal Noir. In *Civil Rights Stories*, ed. ME Gilles, RL Goluboff. Foundation
Grunwald B. 2024. *A large-scale study of the police retention crisis*. Pap. 2024–41, Duke Law School Public Law & Legal Theory Series. **https://ssrn.com/abstract=4871954**

Harlow v. Fitzgerald, 457 US 800 (1982)

Hernandez v. Mesa, 589 US 93 (2020)

Hoffman DA, Izenman AJ, Lidicker JR. 2007. Docketology, district courts, and doctrine. *Wash. Univ. Law Rev.* 85:681–751

Holmes OW Jr. 1923. *The Common Law*. Little, Brown & Co.

Hughes PW. 2009. Not a failed experiment: *Wilson-Saucier* sequencing and the articulation of constitutional rights. *Univ. Colo. Law Rev.* 80:401–30

Kappeler VE. 2006. *Critical Issues in Police Civil Liability*. Waveland. 4th ed.

Keller SA. 2021. Qualified and absolute immunity at common law. *Stanford Law Rev*. 73:1337–400

Kim PT, Schlanger M, Boyd CL, Martin AD. 2009. How should we study district judge decision-making? *Wash. Univ. J. Law Policy* 29:83–112

Kimberlin v. Quinlan, 17 F.3d 1525 (DC Cir. 1994)

Kisela v. Hughes, 584 US 100 (2018)

Klarman MJ. 2020. Foreword: the degradation of American democracy—and the court. *Harvard Law Rev.* 134:1–264

Larsen AO. 2012. Confronting Supreme Court fact finding. *Va. Law Rev.* 98:1255–312

Laswell v. Brown, 683 F.2d 261 (8th Cir. 1982)

Leong N. 2009. The *Saucier* qualified immunity experiment: an empirical analysis. *Pepperdine Law Rev*. 36:667–714

Mason MH. 2002. You mean I can be sued? An overview of defending federal employees in individual capacity civil suits. *US Attorneys' Bulletin*, July

Meares TL. 2002. Three objections to the use of empiricism in criminal law and procedure—and three answers. *Univ. Ill. Law Rev.* 2002:851–74

Meares TL, Harcourt BE. 2000. Foreword: transparent adjudication and social science research in constitutional criminal procedure. *J. Crim. Law Criminol.* 90:733–98

Michalski R, Rushin S. 2018. Police executive opinions of legal regulation. *Univ. Ill. Law Rev.* 2018:1841–84

Miller ML, Wright RF. 2004. Secret police and the mysterious case of the missing tort claims. *Buffalo Law Rev*. 52:757–91

Mitchell v. Forsyth, 472 US 511 (1985)

Monell v. Department of Social Services, 436 US 658 (1978)

Monroe v. Pape, 365 US 167 (1961)

Newman JO. 1978. Suing the lawbreakers: proposals to strengthen the Section 1983 damage remedy for law enforcers' misconduct. *Yale Law J.* 87:447–67

Nielson AL, Walker CJ. 2015. The new qualified immunity. *South. Calif. Law Rev.* 89:1–66

Nielson AL, Walker CJ. 2016. Strategic immunity. *Emory Law Rev*. 66:55–122

Nielson AL, Walker CJ. 2020. Qualified immunity and federalism. *Georgetown Law J*. 109:229–303

Obasogie OK, Zaret A. 2022. Plainly incompetent: how qualified immunity became an exculpatory doctrine of police excessive force. *Univ. Pa. Law Rev.* 170:407–85

Paton v. La Prade, 524 F.2d 862 (3rd Cir. 1975)

Pearson v. Callahan, 555 US 223 (2009)

Pfander JE. 2010. *Iqbal*, *Bivens*, and the role of judge-made law in constitutional litigation. *Pa. State Law Rev.* 114:1387–417

Pfander JE, Baltmanis D. 2009. Rethinking *Bivens*: legitimacy and constitutional adjudication. *Georgetown Law J.* 98:117–51

Pfander JE, Reinert AA, Schwartz JC. 2020. The myth of personal liability: Who pays when *Bivens* claims succeed. *Stanford Law Rev*. 72:561–640

Pierson v. Ray, 386 US 547 (1967)

Pillard CTL. 1999. Taking fiction seriously: the strange results of public officials' individual liability under *Bivens*. *Georgetown Law J*. 88:65–104

Pound R. 1910. Law in books and law in action. *Am. Law Rev.* 44:12–36

President's Committee on Civil Rights. 1947. *To secure these rights*. Rep., President's Committee on Civil Rights. **https://www.trumanlibrary.gov/library/to-secure-these-rights**

Reinert A, Schwartz JC, Pfander JE. 2021. New federalism and civil rights enforcement. *Northwest. Univ. Law Rev.* 116:737–816
Reinert AA. 2010. Measuring the success of *Bivens* litigation and its consequences for the individual liability model. *Stanford Law Rev*. 62:809–62
Reinert AA. 2011. Does qualified immunity matter? *St. Thomas Law Rev.* 8:477–95
Reinert AA. 2018. Qualified immunity at trial. *Notre Dame Law Rev*. 93:2063–92
Reinert AA. 2023a. Qualified immunity's flawed foundation. *Calif. Law Rev.* 111:201–46
Reinert AA. 2023b. Asymmetric review of qualified immunity appeals. *J. Empir. Legal Stud.* 20:1–85
Reinhardt SR. 2015. The demise of habeas corpus and the rise of qualified immunity: the court's ever increasing limitations on the development and enforcement of constitutional rights and some particularly unfortunate consequences. *Mich. Law Rev.* 113:1219–54
Replacement Brief for John Ashcroft et al., *Arar v. Ashcroft*, No. 06-4216-CV, 2008 WL 8132330 (2d Cir. Oct. 28, 2008)
Reply Brief for Pet'rs, *Schweiker v. Chilicky*, No. 86-1781, 1988 WL 1026249 (US Febr. 12, 1988)
Richardson v. McKnight, 521 US 399 (1997)
Rosen PM. 1989. The *Bivens* constitutional tort: an unfulfilled promise. *N.C. Law Rev*. 67:337–77
Rossler MT, Scheer C. 2024. Causes of police officer career apprehension following George Floyd. *Police Q.* 27(4):505–31
Schlanger M. 2003. Inmate litigation. *Harvard Law Rev*. 116:1555–705
Schlanger M. 2015. Trends in prisoner litigation, as the PLRA enters adulthood. *Univ. Calif. Irvine Law Rev*. 5:153–78
Schuck PH. 1983. *Suing Government: Citizen Remedies for Official Wrongs.* Yale University Press
Schwab SJ, Eisenberg T. 1988. Explaining constitutional tort litigation: the influence of the attorney fees statute and the government as defendant. *Cornell Law Rev*. 73:719–83
Schwartz JC. 2010. Myths and mechanics of deterrence: the role of lawsuits in law enforcement decisionmaking. *UCLA Law Rev*. 57:1023–94
Schwartz JC. 2014. Police indemnification. *N.Y. Univ. Law Rev.* 89:885–1005
Schwartz JC. 2016. How governments pay: lawsuits, budgets, and police reform. *UCLA Law Rev*. 63:1144–298
Schwartz JC. 2017. How qualified immunity fails. *Yale Law J*. 127:2–76
Schwartz JC. 2018. The case against qualified immunity. *Notre Dame Law Rev*. 93:1797–852
Schwartz JC. 2020a. Qualified immunity's selection effects. *Northwest. Law Rev.* 114:1101–78
Schwartz JC. 2020b. Civil rights ecosystems. *Mich. Law Rev.* 118:1539–602
Schwartz JC. 2021. Qualified immunity's boldest lie. *Univ. Chicago Law Rev.* 88:605–84
Schwartz J. 2023a. *Shielded: How the Police Became Untouchable*. Viking Books
Schwartz JC. 2023b. Municipal immunity. *Va. Law Rev.* 109:1181–260
Schweiker v. Chilicky, 487 US 412 (1988)
Shapo MS. 1965. Constitutional tort: *Monroe v. Pape*, and the frontiers beyond. *Northwest. Univ. Law Rev*. 60:277–329
Siegert v. Gilley, 500 US 226 (1991)
Smith AF. 1949. Municipal tort liability. *Mich. Law Rev.* 48:41–56
Smith FO Jr. 2021. Beyond qualified immunity. *Mich. Law Rev. Online* 119:121–36
Smith WM. 1979. Notes: "damages or nothing"—the efficacy of the *Bivens*-type remedy. *Cornell Law Rev.* 64:667–703
Sobolski G, Steinberg M. 2010. An empirical analysis of Section 1983 qualified immunity actions and implications of *Pearson v. Callahan*. *Stanford Law Rev*. 59:523–64
States Marine Lines, Inc. v. Shultz, 498 F.2d 1146 (4th Cir. 1974)
Tiezzi J, McNamara R, Smith Pohl E. 2024. *Unaccountable: how qualified immunity shields a wide range of government abuses, arbitrarily thwarts civil rights, and fails to fulfill its promises.* Rep., Institute for Justice
Turner WB. 1979. When prisoners sue: a study of prisoner Section 1983 suits in the federal courts. *Harvard Law Rev*. 92:610–60
United States v. McKoy, 402 F. Supp. 2d 311 (D. Mass. 2004)
Vladeck SI. 2019. Constitutional remedies in federalism's forgotten shadow. *Calif. Law Rev.* 107:1043–59

Whitacre v. Davey, 890 F.2d 1168 (DC Cir. 1989)
White v. Pauly, 580 US 73 (2017)
Wise CR. 1985. Suits against federal employees for constitutional violations: a search for reasonableness. *Public Adm. Rev.* 45:845–56
Ziglar v. Abbasi, 582 US 120 (2017)