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## ASKING THE RIGHT QUESTIONS ABOUT OFFICER IMMUNITY

*Richard H. Fallon, Jr.\**

### INTRODUCTION

If there is a single foundational assumption in conventional thinking about official immunity doctrines, it is that “[t]he resolution of immunity questions inherently requires a balance between the evils inevitable in any available alternative.”<sup>1</sup> On the one hand, it is thought, it would be costly and unfair to hold officials liable out of their own pockets whenever they make erroneous constitutional judgments.<sup>2</sup> On the other hand, to deny redress to victims of constitutional violations is not only unfair to them,<sup>3</sup> but also diminishes the significance of constitutional rights more broadly by undermining incentives for officials to stay within constitutional bounds.<sup>4</sup>

My first goal in this Essay will be to refute the assumption that official immunity doctrine necessarily requires a balance of evils. Although it is undoubtedly true (indeed, almost tautologically so) that official immunity reduces the value of rights, analysis goes wrong at the outset if it assumes that the substantive content of constitutional guarantees and the availability of causes of action to enforce them are fixed, and only then asks whether official immunity should exist as a regrettably necessary expedient. As Professor John Jeffries has observed, official immunity is not a variable among constants but, instead, is one potential variable among others.<sup>5</sup>

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\* Ralph S. Tyler, Jr. Professor of Law, Harvard Law School. I am grateful to Dan Meltzer and Peter Schuck for extremely helpful comments on an earlier draft, and to Alexander Dryer, Mark Savignac, and Previn Warren for outstanding research assistance. In case my views might have been influenced in any way, I should disclose that, during the period in which I wrote this Article, I was representing a plaintiff in a constitutional tort action who was seeking to overcome an official immunity defense.

1. *Harlow v. Fitzgerald*, 457 U.S. 800, 813–14 (1982); *see also* Paul Gewirtz, *Remedies and Resistance*, 92 *YALE L.J.* 585, 587 (1983) (characterizing the law of remedies as “a jurisprudence of deficiency, of what is lost between declaring a right and implementing a remedy”).

2. *See Harlow*, 457 U.S. at 806, 813–14; *Scheuer v. Rhodes*, 416 U.S. 232, 239–40 (1974); *cf.* PETER H. SCHUCK, *SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS* 98–99 (1983).

3. *See Harlow*, 457 U.S. at 814.

4. *See, e.g.*, Mark R. Brown, *Correlating Municipal Liability and Official Immunity Under Section 1983*, 1989 *U. ILL. L. REV.* 625, 630–31; Sheldon Nahmod, *Constitutional Damages and Corrective Justice: A Different View*, 76 *VA. L. REV.* 997, 1019 (1990) (criticizing the argument that victims should not be compensated for all foreseeable damages caused by unconstitutional conduct).

5. *See* John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 *YALE L.J.* 87, 99–100 (1999).

According to him, in the absence of official immunity doctrines, courts might prove more hesitant to expand the scope of constitutional rights.<sup>6</sup> Although Jeffries seems indubitably right about this point, the insight that official immunity is a variable among variables has further-reaching implications than even he has recognized. In the absence of official immunity, even some currently well-established constitutional rights and authorizations to sue to enforce them would likely *shrink*, and sometimes appropriately so.<sup>7</sup>

This reflection both leads to and helps corroborate a broader insight about the relationship among constitutional rights, causes of action to enforce such rights, justiciability doctrines, official immunity, and various rules of pleading and proof that I call the doctrinal Equilibration Thesis.<sup>8</sup> According to the Equilibration Thesis, substantive rights, causes of action to enforce rights, rules of pleading and proof, and immunity doctrines all are flexible and potentially adjustable components of a package of rights and enforcement mechanisms that should be viewed, and assessed for desirability, as a whole.<sup>9</sup> If the Equilibration Thesis is correct, it falsifies the assumption that official immunity is at best a distasteful necessity. Instead, the Equilibration Thesis casts official immunity as a potential mechanism for achieving the best overall bundle of rights and correspondingly calibrated remedies within our constitutional system.

Viewing immunity doctrine as a potential variable among variables frames a question that should occupy the forefront of debates about official immunity: what are the distinctive features of official immunity that might make it well or poorly adapted—in comparison with other potentially adjustable variables—for achieving an optimal bundle of rights and surrounding jurisdictional and related doctrines? My second goal in this Essay is to make progress toward answering this question. In comparison with adjustments of rights and many causes of action, official immunity doctrine is *trans-substantive*. Where recognized, it applies equally to suits to enforce the First Amendment, the Fourth Amendment, the Equal Protection Clause, and every other justiciable provision of the Constitution. Immunity's trans-substantive character makes it a relatively crude tool for defining or redefining packages of rights and enforcement mechanisms that confer meaningful guarantees but are not intolerably costly.

Despite its trans-substantivity, official immunity doctrine is not, of course, wholly inflexible. We can, and do, have different levels of immunity, which can extend to officials performing different functions. It is also possible for different immunity rules to apply to suits for damages, on the one hand, and suits for injunctions, on the other. In thinking about the roles that official immunity can play in achieving desirable alignments

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6. *See id.* at 98–100.

7. *See id.* at 104–05 (appearing to treat rights as fixed and unchangeable once they have been clearly established, despite the social costs of official and enterprise liability).

8. *See* Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—And Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 639 (2006).

9. *See id.* at 690–91.

of substantive rights and mechanisms for enforcing them, we should therefore attend more closely to the purposes that adjustments along these dimensions might serve. At the same time, we should consider whether alterations of other elements of overall packages of substantive rights, causes of action, justiciability doctrines, and rules of pleading and proof might better promote the same goals that current law relies on official immunity to achieve.

My third goal in this Essay is to reconsider the question of how well the traditional justifications for official immunity doctrines stand up once official immunity is seen as one potential variable among others and its distinctive features as a mechanism for doctrinal equilibration lie exposed. My discussion of this question will be tentative, partly because many potentially fruitful comparisons remain unexplored in the literature and partly because much hinges on empirical questions that lack obvious answers. I shall, however, highlight some items that belong on the agenda for scholarly research.

My sharpest conclusion, overall, is that thinking about official immunity ought to start largely afresh, with a willingness to follow analysis and evidence where they lead. On one side of the debate as conventionally framed, critics who believe that immunity only cheapens rights and want to abolish it should think more carefully about what the consequences of abolishing immunity might be. If deprived of official immunity as an equilibrating mechanism, the U.S. Supreme Court might give us more narrowly defined rights or fewer causes of action for constitutional violations. On the other side of the debate, defenders of current doctrines ought to recognize that immunity doctrine, as currently framed, rests on a number of shaky assumptions. Immunity is a means, not an end, and there has been too little thinking about whether there might be better tools for achieving the same purposes. In this state of affairs, I shall advance more questions than answers, but with confidence that framing the right questions can be the first, crucial step down the path to enhanced understanding and ultimately, one hopes, to better law.

### I. THE EQUILIBRATION THESIS

Discussions of official immunity too often begin within an artificially constricted frame. If we ask whether or when officials should have immunity from suit, we characteristically assume all of the following things: (1) the substantive content of constitutional rights is fixed; (2) the applicable law creates a cause of action for damages or injunctions as a mechanism for remedying rights violations; and (3) the party suing an official has standing and otherwise presents a justiciable lawsuit.<sup>10</sup> We typically also assume that (4) the government cannot be sued for the constitutional violations committed by its officials, or at least that a suit against the government would not provide full compensation for a

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10. See, e.g., Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1820–24 (1991).

constitutional wrong.<sup>11</sup> If the government could be sued for the full costs resulting from constitutional violations, plaintiffs would have no incentive to sue the officials too. Only against the background of these assumptions do we conventionally address the desirability of official immunity or consider it as a variable.

This mode of analysis is shallow and artificial. In an earlier article, I advanced what I called the Equilibration Thesis to explain the relationship among doctrines defining substantive rights, authorizing causes of action, regulating the justiciability of claims, and governing judicial remedies.<sup>12</sup> As noted above, the Equilibration Thesis holds that courts charged with implementing constitutional rights or values sometimes view justiciability doctrines, merits doctrines, and remedial doctrines as an integrated unit.<sup>13</sup> Confronted with a situation in which they believe that the values underlying constitutional rights are not adequately realized in practice, courts might take any or all of the steps of expanding the definition of rights, expanding the causes of action available to enforce rights, expanding standing, or relaxing barriers to equitable or damages remedies. Conversely, when courts regard the social costs of the existing bundle of rights and enforcement mechanisms as excessive, they might consider calibrating adjustments in any of the components of the package.

Several assumptions underlie the Equilibration Thesis. First, many and possibly most constitutional rights are not clear and determinate Platonic essences.<sup>14</sup> Rather, rights reflect values or interests, the sensible pursuit or

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11. Both the federal government and the states enjoy sovereign immunity from suit, except to the extent that they may choose to waive it. See RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER, & DAVID L. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 841, 878 (6th ed. 2009) [hereinafter HART & WECHSLER]. Although local governments do not possess sovereign immunity, see *id.* at 885, they are not liable for their officials' torts on a respondeat superior basis, see *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 663 n.7, 691-94 (1978). Under cases decided subsequent to *Monell*, the standards for establishing the liability of local governmental entities for constitutional violations committed by their officials are exceedingly difficult to satisfy. See HART & WECHSLER, *supra*, at 960-63 (summarizing Supreme Court decisions applying *Monell*).

12. See Fallon, *supra* note 8, at 637.

13. See *id.* The Equilibration Thesis is in substantial part a synthesis of work done by others. A number of scholars have argued persuasively that views about the merits influence judicial determinations of justiciability. See, e.g., William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 223 (1988) (arguing that standing should be understood as "a question on the merits of plaintiff's claim"); Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1474-75 (1998). Other scholars have established that considerations involving acceptable remedies influence judicial determinations of which rights to recognize and how to define them. See, e.g., SCHUCK, *supra* note 2, at 25-28, 186; Gewirtz, *supra* note 1, at 678-79; Daryl Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 889-99 (1999). My earlier article demonstrated an additional linkage between concerns about acceptable remedies and determinations of justiciability. See Fallon, *supra* note 8, at 648-83. Added to the earlier work, this demonstration provided the necessary support for the Equilibration Thesis, which holds that decisions about justiciability, the merits, and remedies are pervasively interconnected.

14. See, e.g., RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 37-41 (2001) (arguing that in addition to interpreting vague constitutional language, courts must frequently develop and apply implementing tests and doctrines that are not directly traceable either to

realization of which must depend on their interaction with other values or interests.<sup>15</sup> Certainly liberty can be restricted for the sake of liberty. But courts also appropriately take account of various practical and prudential considerations, including social costs and benefits, when they interpret language guaranteeing rights and develop implementing doctrines.<sup>16</sup>

Second, courts assess the social costs and benefits of defining particular rights in particular ways in light of other surrounding, implementing rules, policies, or doctrines,<sup>17</sup> and often feel as free to adjust implementing doctrines as to adjust definitions of rights.<sup>18</sup> As noted already, courts that regard the overall package of rights and implementing doctrines as insufficiently robust may tend to adjust both rights and implementing doctrines in the same expansive direction. For example, the Warren Court not only extended substantive rights, but also relaxed justiciability bars and revitalized the § 1983 cause of action.<sup>19</sup> Similarly, courts that are concerned about the costs of rights may seek not only to redefine the rights themselves, but also to straiten surrounding doctrines bearing on rights' enforcement. Supreme Court practice since the Warren years exemplifies this phenomenon. Although more conservative Justices have sometimes overruled or trimmed back Warren Court decisions establishing substantive rights (while broadening other rights), much of their response to the Warren legacy has come through heightened barriers to the judicial enforcement of rights. The Court has thus expanded state sovereign immunity,<sup>20</sup> made it

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the constitutional text or its originally understood meaning). Even many constitutional originalists recognize a distinction between the interpretive function of identifying constitutional meaning and the related, but distinct, task of doctrinal "construction." *See, e.g.,* RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 118–21 (2004); KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* 6–7 (1999).

15. Philosophers as well as lawyers have so recognized. *See, e.g.,* T.M. Scanlon, Jr., *Freedom of Expression and Categories of Expression*, 40 U. PITT. L. REV. 519, 535–36 (1979).

16. *See* FALLON, *supra* note 14, at 47–52.

17. *See, e.g.,* Gewirtz, *supra* note 1, at 678–79; Levinson, *supra* note 13, at 889–90.

18. With respect to official immunity in particular, the Supreme Court was explicit in the leading case of *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), that its previous decisions had attempted a "balancing of competing values," *id.* at 816, defined by public "policy," *id.* at 813, and that it regarded it as an appropriate judicial function to adjust the applicable standard in order to achieve its policy goals more successfully, *see id.* at 816–19; *see also* *Anderson v. Creighton*, 483 U.S. 635, 645 (1987) (recognizing that *Harlow* "completely reformulated qualified immunity along principles not at all embodied in the common law" and that "we have never suggested that the precise contours of official immunity can and should be slavishly derived from the often arcane rules of the common law"); Kit Kinports, *Habeas Corpus, Qualified Immunity, and Crystal Balls: Predicting the Course of Constitutional Law*, 33 ARIZ. L. REV. 115, 120 (1991) ("As . . . interpreted by the Supreme Court, the qualified immunity defense is not a matter of statutory construction, but instead is a creature of policy . . ."). *But see* *Tower v. Glover*, 467 U.S. 914, 922–23 (1984) (asserting that, absent precedent, the Court does "not have a license to establish immunities . . . in the interests of . . . sound public policy").

19. *See* Fallon, *supra* note 8, at 687–88.

20. *See, e.g.,* *Alden v. Maine*, 527 U.S. 706, 712 (1999); *Seminole Tribe v. Florida*, 517 U.S. 44, 76 (1996).

difficult to establish constitutional violations by cities and counties,<sup>21</sup> selectively stiffened justiciability doctrines,<sup>22</sup> cut back on the *Bivens*<sup>23</sup> cause of action for damages against federal officials who have violated constitutional rights,<sup>24</sup> and elevated the burdens of pleading in suits against government officials.<sup>25</sup>

The most interesting equilibrating adjustments, however, are those in which courts have imposed limits on remedial or enforcement mechanisms as part of an overall strategy that includes the expansion—rather than the contraction—of previously recognized substantive rights. For example, the Warren Court loosely construed applicable equitable principles to establish that the school desegregation mandated by *Brown v. Board of Education (Brown I)*<sup>26</sup> need not commence immediately, but could proceed with “all deliberate speed.”<sup>27</sup> Historical evidence establishes that some of the Justices would not have agreed to *Brown I*’s substantive holding in the absence of this remedial equilibration.<sup>28</sup> The Warren Court also developed non-retroactivity doctrines under which its more sweeping expansions of the rights of criminal suspects did not apply to previously adjudicated cases.<sup>29</sup> In the absence of such doctrines, the Court would almost certainly have been deterred from rendering some of its path-breaking decisions broadening the rights of criminal defendants, such as that in *Miranda v. Arizona*.<sup>30</sup> Professor Jeffries has more generally defended the qualified immunity doctrine that protects government officers from suits from damages unless they have violated “clearly established” rights as facilitating the expansion of previously recognized guarantees.<sup>31</sup>

In asserting that courts do and should feel free to adjust a variety of variables to achieve optimal packages of rights and surrounding doctrines, I do not mean to imply that courts can make any adjustments that they might think desirable on policy grounds. Courts function subject to a variety of role-based constraints, including obligations to act in conformity with constitutional and statutory language, to adhere to precedent in the absence of strong reasons to do otherwise, and to maintain a body of law that generally respects settled expectations.<sup>32</sup> Indeed, as something of a legal

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21. See Richard H. Fallon, Jr., *The “Conservative” Paths of the Rehnquist Court’s Federalism Decisions*, 69 U. CHI. L. REV. 429, 482–84 (2002).

22. See Fallon, *supra* note 8, at 688–89.

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

24. See HART & WECHSLER, *supra* note 11, at 735–40 (describing “retrenchment[s]” that “have given . . . reason to doubt *Bivens*’ continuing vitality”).

25. See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1939 (2009); see also *infra* notes 135–38.

26. 347 U.S. 483 (1954).

27. See *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 301 (1955).

28. See, e.g., MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 312–13 (2004).

29. See, e.g., *Stovall v. Denno*, 388 U.S. 293, 293 (1967); *Linkletter v. Walker*, 381 U.S. 618, 618 (1965); Fallon & Meltzer, *supra* note 10, at 1738–44.

30. 384 U.S. 436 (1966).

31. See Jeffries, *supra* note 5, at 97–105.

32. See generally Richard H. Fallon, Jr., *Constitutional Precedent Viewed Through the Lens of Hartian Positivist Jurisprudence*, 86 N.C. L. REV. 1107, 1127–28 (2008) (arguing

“doctrinalist,” I am disposed to be sharply critical of judicial decisions that disingenuously misapply pertinent sources of legal authority. Nevertheless, as the Supreme Court’s historical pattern of doctrinal adjustment helps to establish, role-based obligations by no means eliminate the Justices’ capacity and indeed their obligation to exercise reasoned judgment in the pursuit of a well-designed overall alignment of rights, justiciability doctrines, causes of action, and immunity doctrines.

The third assumption that underlies the Equilibration Thesis may be implicit in what I have said already: the tools by which courts seek doctrinal equilibration should not be viewed as inherently suspect simply because they preclude some remedies or create obstacles to the enforcement of rights in some cases. We may, for example, be better off with relatively broadly defined rights that are enforceable only through suits for injunctions, or in the context of criminal prosecutions, than we would be with more narrowly defined rights that were also enforceable through suits for damages.

## II. DOCTRINAL EQUILIBRATION AND OFFICIAL IMMUNITY

It takes no intellectual heavy lifting to establish that official immunity doctrines perform an equilibrating function by diminishing the social costs that constitutional rights would have if officers who violated them were always strictly liable in suits for damages. The Supreme Court cited some of the relevant considerations in the leading case of *Harlow v. Fitzgerald*<sup>33</sup>:

[I]t cannot be disputed seriously that 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. These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally, there is the danger that fear of being sued will “dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.”<sup>34</sup>

With the diminution of social costs being official immunity doctrines’ declared purpose, the most fundamental question about official immunity, it is usually thought, is whether—in light of the assumptions that the scope of a constitutional right has been defined and that the law grants the plaintiff an unalterable cause of action—a deviation from the ideal of an individually effective remedy for every constitutional violation can be justified. As the Equilibration Thesis reveals, however, this question rests on a false premise. It is a mistake, in thinking about immunity, to assume that in a world without immunity, other legal doctrines—including those defining rights and furnishing causes of action—would remain as they now are. We will get a better picture of the role that immunity plays in our constitutional

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that the concept of a “rule of recognition” helps to explain the nature of constitutional law and judicial constraint and obligation).

33. 457 U.S. 800 (1982).

34. *Id.* at 814 (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949)).



scheme if we try to imagine a world without official immunity of any kind. Would a legal regime without official immunity be better or worse than the one we have now?<sup>35</sup>

The difficulty in answering this question arises because it is impossible, as a practical matter, to imagine a world without official immunity in which nothing else changes. Even critics of current immunity doctrine so recognize. When they contemplate a world in which some or all officials lack immunity, they anticipate two changes, both of which they understandably regard as desirable. First, victims of constitutional rights violations who now go uncompensated would receive compensation.<sup>36</sup> Second, threats of individual liability would deter a number of constitutional violations that otherwise would have occurred.<sup>37</sup> I once imagined a third change that I also thought normatively attractive: the abolition of official immunity would effectively force governments to indemnify their officials.<sup>38</sup> Otherwise, I reasoned, too many people would be deterred from entering government service. If so, a *de facto* regime of strict governmental liability for injuries caused by officials' constitutional violations would not only ensure compensation to victims, but also create powerful incentives for the government to take greater care to train and supervise its employees.<sup>39</sup>

In light of the Equilibration Thesis, however, it now seems to me deeply mistaken to think that we can realistically imagine a world in which official immunity doctrines were abolished and in which further, equilibrating adjustments—which critics of immunity doctrine would find less welcome—did not also occur. To put the point succinctly, the social costs of rights and causes of action that have led the courts to develop immunity doctrines in our actual world would impel other, compensating changes in the law if immunity were abolished. The easiest changes to imagine would involve the nature and scope of causes of action to recover damages for constitutional violations. If, for example, it would be unfair and excessively costly to have judges be suable for damages whenever they ruled erroneously on a constitutional claim, or to have legislators be answerable for damages whenever they enacted statutes that a court subsequently held unconstitutional, courts might hold that no cause of action runs against judges when they have done no more than rule erroneously or against legislators when they have done no more than enact

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35. I continue to assume that the government could not be sued in its own name. Without this assumption, as I explained above, the question of official immunity would have no independent significance. See *supra* note 11 and accompanying text.

36. See, e.g., David Achtenberg, *Immunity Under 42 U.S.C. § 1983: Interpretive Approach and the Search for the Legislative Will*, 86 NW. U. L. REV. 497, 498 n.5 (1992); Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 BYU L. REV. 53, 126–27.

37. See, e.g., Achtenberg, *supra* note 36, at 498; Johns, *supra* note 36, at 127–28.

38. See Fallon & Meltzer, *supra* note 10, at 1823. Others have reached similar conclusions. See, e.g., Cornelia T.L. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability Under Bivens*, 88 GEO. L.J. 65, 76 (1999) (summarizing the argument to this effect and citing sources).

39. See Fallon & Meltzer, *supra* note 10, at 1823.

an unconstitutional statute. Indeed, one might well think of official immunity as limiting the scope of causes of action for damages relief in just this way.

The suggestion that immunity doctrines currently function as de facto limits on causes of action to enforce constitutional rights of course depends on the possibility of a distinction between causes of action to sue for damages, which immunity doctrines frequently block, and causes of action to sue for injunctions, which official immunity bars much less frequently. But such a distinction already exists in actions against federal officials. In a development conventionally traced to *Ex parte Young*,<sup>40</sup> the Supreme Court has taken it for granted that the Constitution creates, or that courts should recognize, causes of action to sue for injunctive relief against ongoing constitutional violations.<sup>41</sup> By contrast, absent a statutory authorization to sue, the Court has emphatically not assumed that the Constitution grants, or that courts should routinely uphold, causes of action for damages arising from constitutional violations.<sup>42</sup> As a result, there are frequently constitutional causes of action to sue for injunctions when no cause of action to sue for damages would exist.

If I am right that immunity doctrines and limitations on causes of action frequently can serve as functional equivalents, in a world without immunity, the availability of *Bivens* actions against federal officials who violate constitutional rights might shrink even further.<sup>43</sup> The Court has already made plain that a damages remedy for constitutional violations “is not an automatic entitlement” and that “in most instances . . . a *Bivens* remedy [is] unjustified.”<sup>44</sup> Without official immunity, the Court might begin to interpret § 1983, too, so that it would provide a cause of action to sue for damages for only a subset of constitutional violations. Recognition of one or more non-textual exceptions to the statute would not be wholly unprecedented. The Court has already held that § 1983 creates no cause of action for damages for constitutional violations occurring in the administration of state tax schemes.<sup>45</sup>

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40. 209 U.S. 123 (1908).

41. John Harrison, *Ex Parte Young*, 60 STAN. L. REV. 989 (2008), offers the revisionist view that the cause of action upheld in *Young* derived from the common law, not the Constitution, *id.* at 990. Even if Professor Harrison is correct, there is no doubt that constitutional causes of action to sue for injunctive relief are now routinely upheld. See Richard H. Fallon, Jr., *Jurisdiction-Stripping Reconsidered*, 96 VA. L. REV. 1043, 1111–13 (2010).

42. See, e.g., *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007).

43. On post-*Bivens* retrenchments that have occurred already, see HART & WECHSLER, *supra* note 11, at 735–40.

44. *Wilkie*, 551 U.S. at 550.

45. See *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 719 (1996) (citing *Fair Assessment in Real Estate, Inc. v. McNary*, 454 U.S. 100, 107 (1981)) (characterizing *McNary*, which had held that federal courts were barred from granting relief in a damages action against local officials alleged to have violated the Fourteenth Amendment by assessing taxes unequally, as a decision “about the scope of the § 1983 cause of action, not abstention doctrines”).

Perhaps, however, the Court would regard judicial recognition of a series of non-textual exceptions to § 1983 as overreaching the judicial role. If so, in a world in which the absence of official immunity opened the door to damages relief for all constitutional violations—including those committed in good faith by judges, prosecutors, and legislators—I think it more likely than not that Congress would amend the statute to narrow the § 1983 cause of action. As the history of *Bivens* doctrine suggests, the absence of a cause of action for damages relief for all deprivations of constitutional rights by federal officials has not been thought unconstitutional.<sup>46</sup> If there are any situations in which the Constitution specifically and uniquely mandates the availability of damages remedies, there do not appear to be many.<sup>47</sup>

As another possible response to a world without official immunity, the Supreme Court might diminish the scope of at least some substantive constitutional rights. Indeed, I think I can identify cases in which the Court has already trimmed the scope of constitutional rights for the purpose of stemming what it has regarded as an undue flood of suits for damages into federal court.

Expressing concerns that the Due Process Clause should not become a font of tort law, the Court held in *Paul v. Davis*<sup>48</sup> that a plaintiff whose name and photograph had been included in a police flyer identifying active shoplifters had not alleged an actionable due process violation because mere harm to reputation does not count as a deprivation of constitutionally protected “liberty.”<sup>49</sup> *Paul*’s narrow interpretation of the due process right, which found little support in prior decisions,<sup>50</sup> was almost certainly “motivated by concerns about the section 1983 remedy” and the social costs of “the wholesale federalization of tort claims against state and local government officials and the corresponding prospect of massive damages liability.”<sup>51</sup>

The Court further narrowed its interpretation of constitutionally protected due process rights, apparently in response to the same concern, in *Parratt v. Taylor*,<sup>52</sup> which held that random and unauthorized deprivations of liberty and property do not violate the Due Process Clause unless and until a state has failed to provide post-deprivation corrective process.<sup>53</sup> Again voicing concerns about the social costs of permitting § 1983 and the Due Process Clause to become fonts of tort law, the Court pared back the scope of previously recognized due process rights once more in *Daniels v.*

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46. See Fallon & Meltzer, *supra* note 10, at 1779–87.

47. See HART & WECHSLER, *supra* note 11, at 740–41.

48. 424 U.S. 693 (1976).

49. *Id.* at 697, 712–14.

50. See Henry Paul Monaghan, *Of “Liberty” and “Property,”* 62 CORNELL L. REV. 405, 423–29 (1977); David L. Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293, 324–28 (1976).

51. Levinson, *supra* note 13, at 893.

52. 451 U.S. 527 (1981).

53. *Id.* at 543–44.

*Williams*,<sup>54</sup> which held that merely negligent deprivations of liberty and property do not violate the Fourteenth Amendment.<sup>55</sup>

With the Court having shrunk the scope of the due process guarantee in *Paul*, *Parratt*, and *Daniels*, it is easy to imagine the Justices similarly circumscribing other rights if, in the absence of official immunity, they regarded the social costs of damages actions as too high. For example, the Court could plausibly respond to a flood of suits seeking damages for unreasonable searches and seizures by holding that if any reasonable person could think a search reasonable, it is not unreasonable.<sup>56</sup>

Even if some rights shrank in the absence of official immunity, it is of course hard to imagine that all rights would do so. Nor have I meant to suggest that all causes of action that are now barred by official immunity would necessarily be recalibrated to a point of extensional equivalence with the current regime. To the contrary, it seems undeniable that the availability of official immunity sometimes makes a difference, even if the central premises of the Equilibration Thesis are accepted. Nevertheless, the thought experiment of trying to imagine a world without official immunity persuades me that if courts and other decision makers were deprived of official immunity as an equilibrating device, they would at least sometimes turn to other tools in an effort to reduce the overall social costs of packages of rights and surrounding doctrines. Some of the results might be better than those that official immunity now produces, but others might prove worse.

If so, then we should begin to see official immunity not as an inherently regrettable doctrine, but as a tool that can be used wisely or unwisely in efforts to promote ends that we should sometimes judge more laudable than deplorable. In particular, we should recognize the possibility that official immunity doctrine could serve goals that those who favor broadly defined rights should endorse.

### III. THE NATURE OF OFFICIAL IMMUNITY AS A TOOL OF EQUILIBRATION

So far, I have spoken generally about the potential value of official immunity as an equilibrating mechanism, but I have not examined the peculiar features in light of which we should assess its attractiveness relative to other doctrines. This part offers a preliminary survey and appraisal. To summarize my conclusions at the outset, among official immunity's most striking features is its trans-substantive character, which makes it a blunt tool for achieving doctrinal equilibration. Nevertheless, immunity doctrine is not wholly inflexible. Elements of flexibility come from its potentially variable applicability to suits for injunctions and suits

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54. 474 U.S. 327 (1986).

55. *Id.* at 335–36.

56. *Cf.* Levinson, *supra* note 13, at 915 (“In a world where damages for every unreasonable search were potentially enormous, the Fourth Amendment guidelines for what counts as reasonable would likely become both broader and, to create safe harbors for police attempting in good faith to follow the rules, clearer and more precise.”).

for damages, and its capacity to adjust the degree of officials' protection against suit on a function-sensitive basis.

#### A. *Trans-substantive Character*

Earlier, I said that official immunity operates so much like a limit on causes of action that it could be so conceptualized for some purposes. But whereas causes of action are often defined in substantive terms—establishing entitlements to seek redress for violations of particular rights—immunity doctrine does not, for example, operate as a distinctive limit on rights to sue for First Amendment or Equal Protection Clause violations. Rather, it establishes a trans-substantive barrier to suits against particular officials, regardless of the constitutional provision that those officials allegedly violated. Perhaps this feature of official immunity doctrine should not be viewed as unalterable. In theory, it would be possible for the Supreme Court (or Congress) to make immunity—or the degree of immunity that an official can claim—depend on the right that the official allegedly violated. The Court, however, has never taken this approach. At the very least, trans-substantivity is a feature of official immunity doctrine as we have always known it.

The trans-substantive character of immunity doctrine makes it a poor tool for attempting to achieve an equilibration of the values underlying *particular* rights and the social costs of enforcing them. A trans-substantive immunity must be defended instead on the ground that some of the social costs inherent in the enforcement of rights vary so little from right to right that they can be addressed most efficiently on an across-the-board basis. I shall consider this possibility slightly more fully below.<sup>57</sup>

#### B. *Flexibility Along Other Dimensions*

Although official immunity is utterly inflexible along the dimension of trans-substantivity, it has notable elements of flexibility along other dimensions.

##### 1. Potentially Variable Applicability to Damages and Injunctions

Although the range of potential remedies for official misconduct is enormously broad, damages and injunctions rank among the most familiar.<sup>58</sup> Among official immunity doctrines' elements of flexibility, they can apply differentially to suits for damages and suits for injunctions.<sup>59</sup> For the most part, the Supreme Court has placed little reliance on immunity

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57. See *infra* Part IV.F.

58. In Henry Hart's celebrated formulation, "Congress necessarily has a wide choice in the selection of remedies, and . . . a complaint about action [substituting one for another] can rarely be of constitutional dimension." Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1366 (1953).

59. See HART & WECHSLER, *supra* note 11, at 995, 1007–11.

doctrines to bar injunctive remedies.<sup>60</sup> Although the rule once was otherwise, the Court increasingly appears to regard injunctive relief against ongoing constitutional violations as being—at least in many contexts—the most appropriate if not minimally necessary remedy to give vitality to constitutional guarantees.<sup>61</sup>

If one accepts the premise that injunctions are normally (even if not always) an appropriate or even constitutionally necessary remedy, any trans-substantive barrier to injunctive relief obviously looks undesirable. In cases involving suits for injunctions, the Court has therefore relied more on other doctrines to mitigate some of the social costs that broad packages of rights and remedies would otherwise entail. These include equitable barriers to the award of injunctions under some circumstances<sup>62</sup> and standing and ripeness doctrines.<sup>63</sup>

For various reasons, however, none of these other mechanisms is well suited to reducing the social costs of suits for damages. For example, equitable principles do not apply to damages actions,<sup>64</sup> and parties who seek damages for past injuries almost never encounter difficulties in satisfying the demands of standing doctrine.<sup>65</sup> The juxtaposition of official immunity in damages actions with non-immunity in suits for injunctions does not reflect a necessary pairing. Official immunity doctrines bar suits for injunctions as well as damages against some officials under some circumstances.<sup>66</sup> Nevertheless, among the Supreme Court's most recurring strategies of doctrinal equilibration is coupling official immunity from suits for damages with non-immunity in suits for injunctions.

## 2. Degrees of Official Immunity: Absolute and Qualified

Official immunity need not be all or nothing. So-called absolute immunity confers inviolable protection against liability in the suits to which

60. See Jeffries, *supra* note 5, at 108 (“In general, constitutional tort actions against state officers for manifestly official misconduct are routinely allowed . . .”).

61. See Fallon, *supra* note 41, at 1111–13.

62. Among the most significant are the *Pullman* and *Younger* abstention doctrines, which take their names, respectively, from *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941), and *Younger v. Harris*, 401 U.S. 37 (1971). For discussion of the *Pullman* doctrine, see HART & WECHSLER, *supra* note 11, at 1057–83; for a discussion of *Younger* abstention, see *id.* at 1083–1128.

63. See, e.g., *City of Los Angeles v. Lyons*, 461 U.S. 95, 105–10 (1983) (invoking standing doctrine as a barrier to a suit seeking injunctive relief); *O’Shea v. Littleton*, 414 U.S. 488, 493–99 (1974) (holding a suit for equitable relief against an array of local officials nonjusticiable).

64. See, e.g., *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 721 (1996).

65. See, e.g., *Lyons*, 461 U.S. at 111 (holding that a party who had suffered a past injury had standing to sue for damages but not injunctive relief).

66. The Supreme Court has held clearly that officials acting in a legislative capacity are normally immune from suits seeking to enjoin them in that capacity. See *Supreme Court of Va. v. Consumers Union of the U.S., Inc.*, 446 U.S. 719, 732–34 (1980); *Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 491, 502–03 (1975). For a discussion of the scope of this immunity, and of the possibility that the President might have immunity from suits for injunctions, see HART & WECHSLER, *supra* note 11, at 1007–11.

it applies.<sup>67</sup> But there can be less than absolute or what the Supreme Court has characterized as “qualified” immunity.<sup>68</sup> The Court currently recognizes just one type of qualified immunity, which, where it exists, defeats suits for damages unless an official violated “clearly established statutory or constitutional rights of which a reasonable person would have known.”<sup>69</sup> All else being equal, absolute immunity more sharply diminishes both the value of rights and the social costs of their enforcement than does qualified immunity.

In theory, it would be possible for the Court to introduce multiple tiers of immunity, or to have the degree of available immunity rise or fall along a sliding scale. The Court apparently contemplated such an approach in *Scheuer v. Rhodes*,<sup>70</sup> when it said that “in varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and the responsibilities of the [defendant’s] office.”<sup>71</sup> Professor Schuck has also advocated a variability of this kind.<sup>72</sup> Although this approach surely deserves consideration, it has proven challenging for the courts to administer even the single qualified immunity standard that the Supreme Court articulated in *Harlow*.<sup>73</sup> At least since *Harlow*, the Court has applied that single standard invariantly to all executive officials to whom it has not extended absolute immunity.<sup>74</sup>

### 3. Potential for Function-Based Application

With the Supreme Court having recognized official immunity of just two rigid types, it has of course needed to determine which defendant officials receive which. The Court does so based not on officials’ titles or their location in a particular branch of government, but according to their functions.<sup>75</sup> To oversimplify slightly, the Court has held that officials sued for performing judicial, legislative, and prosecutorial functions possess absolute immunity from damages liability.<sup>76</sup> Officials performing nearly all other functions receive qualified immunity.<sup>77</sup>

Whether function-based distinctions among levels of official immunity promote optimal packages of rights and implementing doctrines obviously rests on a complex mix of empirical and normative considerations. I cannot pause even to list, much less to probe, all of them here. But two

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67. See HART & WECHSLER, *supra* note 11, at 995.

68. See *id.*

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

70. 416 U.S. 232, 247 (1974).

71. *Id.*; see also *Wood v. Strickland*, 420 U.S. 308, 321–22 (1975) (articulating immunity principles applicable to school board members).

72. See SCHUCK, *supra* note 2, at 56.

73. 457 U.S. 800.

74. See generally HART & WECHSLER, *supra* note 11, at 995 (describing the qualified immunity standard and contrasting it with absolute immunity).

75. See *Harlow*, 457 U.S. at 810–11; HART & WECHSLER, *supra* note 11, at 995.

76. See *Harlow*, 457 U.S. at 807, 811.

77. See *id.* at 807 (“[Q]ualified immunity represents the norm.”).

assumptions seem especially central: officials performing some functions are more likely to be the targets of greater numbers of distracting, yet ultimately meritless, suits than are officials performing other functions;<sup>78</sup> and constitutional violations by judges and prosecutors are more likely to be deterred and adequately remedied by mechanisms that immunity does not displace, such as dismissals of indictments and reversals on appeal, than are violations by officials performing other functions.<sup>79</sup>

If we provisionally grant the validity of these assumptions, and further assume that there will be two tiers of immunity doctrine—absolute and qualified—then official immunity doctrine affords the Court three viable modes of doctrinal adjustment. First, the Court can expand or contract the range of functions for which officials possess absolute rather than qualified immunity. It did so, for example, when it held that the President was entitled to absolute immunity in the performance of all presidential functions in *Nixon v. Fitzgerald*.<sup>80</sup> The Court has also made a number of consequential decisions about which functions are sufficiently prosecutorial and judicial to merit absolute immunity.<sup>81</sup>

Second, the Court could contract the range of functions for which officials receive any immunity at all. Although qualified immunity now seems firmly entrenched, matters were apparently otherwise for much of early American history.<sup>82</sup> Indeed, it was not until 1967, in *Pierson v. Ray*,<sup>83</sup> that the Supreme Court expressly held an executive official immune from damages liability for a constitutional (as distinguished from a common

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78. See *infra* note 134 and accompanying text.

79. See *infra* note 139 and accompanying text.

80. 457 U.S. 731 (1982).

81. See, e.g., *Forrester v. White*, 484 U.S. 219, 229 (1988) (determining that a judge acted in a non-judicial capacity when firing a probation officer); *Mitchell v. Forsyth*, 472 U.S. 511, 520–21 (1985) (holding that the Attorney General does not act in a prosecutorial capacity when authorizing a warrantless national security wiretap).

82. See, e.g., *Mitchell v. Harmony*, 54 U.S. (13 How.) 115, 150 (1851) (affirming damages award against U.S. military officer for wrongful confiscation of plaintiff's goods and rejecting military necessity defense); *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 179 (1804) (holding a Navy captain personally liable for unlawfully seizing a Danish vessel despite his having acted under presidential orders). An important recent study, James F. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. REV. 1862 (2010), concludes that federal officials generally enjoyed no immunity from suit during the antebellum era, but that Congress routinely provided indemnification for official action taken in good faith discharge of official duties, see *id.* at 1924–26. For other valuable discussions of early practice involving official immunity and liability, see David P. Currie, *Sovereign Immunity and Suits Against Government Officers*, 1984 SUP. CT. REV. 149, 149–56; David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1, 5–40 (1972) (tracing the history of official immunity doctrine, including its roots in English common law); Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 GEO. WASH. INT'L L. REV. 521, 553–57 (2003); Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 19–39 (1963); and Ann Woolhandler, *Patterns of Official Immunity and Accountability*, 37 CASE W. RES. L. REV. 396, 414–17 (1987) (examining the prevalence of actions against officers in the early nineteenth century).

83. 386 U.S. 547 (1967).



law) violation.<sup>84</sup> The prospect that some officials might have no immunity from damages actions is thus not wholly unimaginable.

Third, the Court could adjust the standard by which it defines qualified immunity. Although that formula has remained relatively untouched in recent decades, the Court made a major adjustment in its now canonical 1982 decision in *Harlow*. Prior to *Harlow*, officials received immunity only insofar as they acted with both objective reasonableness and subjective good faith.<sup>85</sup> *Harlow* extended the protective shield of official immunity to all officials who do not violate clearly established rights, regardless of their motivations.<sup>86</sup> According to *Harlow*, permitting suits against officials whenever plaintiffs alleged that they had acted with subjective bad faith gave rise to excessively high social costs.<sup>87</sup>

#### 4. Potential to Link Liability to Clearly Established Rights

As the currently applicable qualified immunity formula illustrates, it is possible to deploy official immunity to bar suits in cases in which the law was not previously clearly established, but to allow suits in cases where clearly established rights were violated. This potential usage obviously makes official immunity doctrines attractive as tools for doctrinal equilibration insofar as one could justifiably believe that the clarity with which rights were previously established bears importantly on any of a number of questions. These include: the appropriate balance to strike between deterring officials from violating rights, on the one hand, and chilling officials from acting conscientiously to discharge their responsibilities, on the other hand;<sup>88</sup> the fairness of assessing liability for violations of rights when their applicability to new facts was not readily foreseeable;<sup>89</sup> and the incentives and constraints that courts should be made to consider when asked to resolve a previously doubtful constitutional question by either upholding or rejecting a claim of right.<sup>90</sup>

Whether the clarity with which rights are established does in fact bear importantly on these matters obviously hinges on a number of empirical and normative assumptions. Although I shall not pause to examine those assumptions here, their validity will emerge as an important topic of discussion in Part IV.

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84. *Id.* at 557.

85. *See* *Wood v. Strickland*, 420 U.S. 308, 322 (1975) (affirming that immunity would be defeated if an official acted “with the malicious intention to cause a deprivation of constitutional rights or other injury”).

86. *See supra* note 69 and accompanying text.

87. Among these, the Court emphasized “the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office,” and “the danger that fear of being sued will ‘dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.’” *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982) (alteration in original) (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949)).

88. *See, e.g., id.* at 817–19.

89. *See, e.g.,* John C. Jeffries, Jr., *Compensation for Constitutional Torts: Reflections on the Significance of Fault*, 88 MICH. L. REV. 82, 96–101 (1989).

90. *See* Jeffries, *supra* note 5, at 97–110.

*C. The Difficulty of Assessing the Comparative Attractiveness  
of Official Immunity*

Rigorous assessment of the attractiveness of official immunity as a mechanism of doctrinal equilibration would obviously include a comparative aspect. A decision maker assessing immunity doctrine as a tool of doctrinal equilibration would ideally consult a menu of other options, supplemented by sound appraisals of the capacities of other mechanisms, to achieve an optimal balance of the social costs and benefits of constitutional rights and surrounding doctrines. Unfortunately, however, the work needed to ground good comparative judgments in every case would be Herculean, far beyond the capacities of actual judges and scholars. Indeed, one well might doubt whether courts or other decision makers could know even a small fraction of what they would ideally know in order to make good judgments about whether and how to employ official immunity doctrine in light of the Equilibration Thesis.

This recognition should by no means disable further analysis. The need to make decisions based on imperfect information is endemic not only to the judicial function, but also to the human condition more generally. The crucial point is thus a simple one: in thinking about the attractiveness of official immunity in light of the Equilibration Thesis, we should look imaginatively for better mechanisms for achieving immunity doctrine's purposes.

IV. THE EFFICACY OF OFFICIAL IMMUNITY AS A TOOL  
FOR ACHIEVING IDENTIFIED PURPOSES

Having examined some of the distinctive features of official immunity as a tool for adjusting the value and social costs of overall packages of rights and enforcement mechanisms, in this part I shall critically examine a number of claims sometimes made about the desirability of immunity doctrines in damages actions.<sup>91</sup> A recurrent theme will be that although the leading justifications of official immunity doctrine frequently depend on projected consequences—involving how immunity or its absence would shape official behavior—we currently lack much of the information that would aid crucially in making informed projections.

*A. Optimizing the Balance Between Benefits of Deterrence  
and Costs of Chilling*

In *Harlow*, the Supreme Court postulated that an important purpose of immunity doctrine is to strike the right balance between deterring officials from violating constitutional rights and avoiding an undue chilling of conscientious officials from the fearless discharge of their duties.<sup>92</sup> In recalibrating the qualified immunity standard in light of this goal, the Court

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91. The limitation of my inquiry to damages actions reflects considerations of relative importance, not logical necessity. As I said above, official immunity doctrines could, and sometimes do, apply in suits for injunctions as well as in suits for damages.

92. *Harlow*, 457 U.S. at 819; see *Scheuer v. Rhodes*, 416 U.S. 232, 240 (1974).

relied heavily on the assumption that officials, absent immunity, would face the threat of personal liability for constitutional violations committed in the ostensible performance of their official duties.<sup>93</sup> Yet this assumption is by no means obviously correct. To the contrary, most scholars appear to believe that many, and perhaps most, officials are indemnified by their employers for some or all constitutional violations for which they might be sued.<sup>94</sup>

In assessments of whether official immunity doctrine is well designed to achieve its purposes, the question of indemnification practices holds large potential significance. Officials would indubitably respond differently to the prospect of governmental liability than they would to the threat of personal liability. Yet, roughly thirty years after *Harlow*, no good empirical study has sought to establish the pervasiveness and scope of governmental indemnification.<sup>95</sup> This gap in empirical knowledge crucially handicaps instrumental analysis. If indemnification occurs routinely, the prospect of needing to pay judgments against officials might motivate governments to establish training and deterrent mechanisms of their own<sup>96</sup>—a consideration that I mentioned earlier and shall examine more closely below. Nevertheless, the calculation necessary to set the immunity standard at the right level to achieve an optimal balance between deterring constitutional violations and unduly chilling conscientious official action would need to be far more complex than the analysis that the Court performed in *Harlow*.

Another assumption underlying the *Harlow* standard is that officials can reasonably be expected to keep abreast of appellate court decisions clearly establishing applicable law.<sup>97</sup> This assumption also seems questionable, at least in the absence of a demonstration that government agencies provide officials who are not lawyers with continuing education. If government entities routinely indemnify their officials, they would certainly have an incentive to provide those officials with training regarding applicable law, including court decisions.<sup>98</sup> But just as we cannot confidently claim to

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93. See SCHUCK, *supra* note 2, at 56 (emphasizing the significance of this threat).

94. See John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 50 & n.16 (1998) (reporting on the basis of “personal experience” and anecdotal evidence that “[t]he state or local government officer who is acting within the scope of his or her employment in something other than extreme bad faith can count on governmental defense and indemnification”); Daniel J. Meltzer, *State Sovereign Immunity: Five Authors in Search of a Theory*, 75 NOTRE DAME L. REV. 1011, 1019 (2000) (reporting that indemnification is “generally thought to be widespread”). *But cf.* SCHUCK, *supra* note 2, at 85 (describing indemnification as “neither certain nor universal”).

95. See Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 VAND. L. REV. 57, 108 (1999) (surveying debates about the prevalence of indemnification and calling for an empirical study).

96. See *Owen v. City of Independence*, 445 U.S. 622, 651–52 (1980); SCHUCK, *supra* note 2, at 102–06; Fallon & Meltzer, *supra* note 10, at 1823.

97. See *Harlow*, 457 U.S. at 818–19 (postulating that “a reasonably competent public official should know the law governing his conduct”).

98. *Cf.* Pfander & Hunt, *supra* note 82, at 1922–24 (suggesting that during the antebellum era, federal officials generally had no immunity from damages actions, but that Congress routinely provided indemnification for official action taken in good faith discharge

know how widely indemnification occurs, we might doubt how well we understand how the availability of indemnification would affect the incentives of high level officials to implement continuing education programs for lower level employees. Among other reasons for uncertainty, Daryl Levinson has raised important questions about whether governmental bodies—which are not-for-profit enterprises—respond to threats of government liability in the same way as individuals or corporate officers would respond to threats of personal or corporate liability.<sup>99</sup>

Although gaps in current learning make it difficult to make good comparisons between official immunity doctrines and other possible mechanisms for achieving the optimal calibration between the benefits of deterring constitutional violations and the costs of chilling conscientious officials, alternative or complementary strategies deserve consideration. Two may suffice as examples.

First, it might be desirable to reconsider current doctrines that largely shield governments from direct liability for their officials' wrongs, especially if empirical studies were to establish that government employers routinely indemnify their officials anyway.<sup>100</sup> I said above that I did not think that across-the-board strict liability would be feasible or attractive in light of the Equilibration Thesis. To repeat what seems to me to be a clear example, it is nearly unimaginable that the government should have to pay damages every time a judge erroneously deprives someone of a claimed constitutional right, even if the error is corrected on appeal. Nevertheless, a more limited regime of government liability could imaginably improve the current balance between deterrence of violations and chilling of conscientious action by creating better incentives for improved hiring, training, and supervision.<sup>101</sup>

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of official duties, and that this arrangement left responsibility for adjusting incentives for official action with Congress).

99. See Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 347–48 (2000); see also SCHUCK, *supra* note 2, at 125 (asserting that “our understanding of how bureaucracies behave is so rudimentary” that it is difficult to predict how changes in legal liability rules would affect behavior). But see Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 GA. L. REV. 845, 858–59 (2001) (asserting that tort remedies effectively deter governmental misconduct). It also might matter whether indemnifying institutions rely on insurance or self-insurance to pay judgments against their officials and, if the latter, to what extent the consequences of an adverse judgment against a police officer, for example, would be felt distinctively within the police department that had failed to deter the officer's wrongdoing, rather than being spread across the entirety of a municipal budget.

100. For proposals to this effect, see, for example, SCHUCK, *supra* note 2, at 100–21; Laura Oren, *Immunity and Accountability in Civil Rights Litigation: Who Should Pay?*, 50 U. PITT. L. REV. 935, 1000–07 (1989).

101. See SCHUCK, *supra* note 2, at 100–13 (advocating such an approach). As Larry Kramer and Alan Sykes have argued, the relevant calculations in designing an ideal liability regime would be complex, depending on such considerations as whether officials possess the personal resources to pay judgments against them and on transaction costs, including those necessary to negotiate contracts with indemnification provisions. See Larry Kramer & Alan O. Sykes, *Municipal Liability Under § 1983: A Legal and Economic Analysis*, 1987 SUP. CT. REV. 249, 272–94. They very plausibly conclude, however, that government liability is

Insofar as cities and counties—which do not possess sovereign immunity—are concerned, reforms of this character would need to involve two elements. On the one hand, either the Supreme Court or Congress would have to revisit and overturn decisions that have categorically rejected respondeat superior liability and made municipalities' causal responsibility for their officials' torts virtually impossible to establish.<sup>102</sup> On the other hand, the Court or Congress would need to establish exactly what municipalities could be liable for—if not, once again, for the damage occasioned by every constitutional violation committed by every government official, including every erroneous judicial ruling and every attempt by a prosecutor to enforce a statute that a court subsequently holds unconstitutional. Although a myriad of important details would need to be worked out, establishing sensible standards of municipal liability would almost certainly require displacement of the holding of *Owen v. City of Independence*<sup>103</sup> that municipalities cannot claim any good faith or comparable immunity from damages claims when plaintiffs state otherwise valid causes of action.<sup>104</sup> It might, for example, be desirable to permit otherwise suable entities to benefit in litigation from having good internal mechanisms for training their officials to respect constitutional norms and for disciplining those who run amok.<sup>105</sup>

Where the constitutional violations of state employees are at stake, the Supreme Court's sovereign immunity jurisprudence may be too deeply entrenched for us currently to imagine a judicially mandated transition from

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likely to produce better deterrence and training than officer liability when the officers are judgment-proof. *See id.* at 276–87. (I add the qualification that Kramer and Sykes have “very plausibly” reached their conclusions because of empirical uncertainties about whether public officials making decisions involving potential expenditures of public money have the same incentives as officers of private, for-profit corporations. *See supra* note 99 and accompanying text.) Where significant transaction costs exist, Kramer and Sykes also recommend that government liability should be limited to cases involving negligent supervision and training. *See Kramer & Sykes, supra*, at 287–94.

102. Justice Breyer's dissenting opinion in *Board of County Commissioners v. Brown*, 520 U.S. 397 (1997), which two other Justices joined, called for consideration of this course. *See id.* at 430–32 (Breyer, J., dissenting).

103. 445 U.S. 622 (1980).

104. *Id.* at 638.

105. In the partly analogous case of “hostile environment” suits against employers under Title VII of the 1964 Civil Rights Act, an employer is “‘subject to vicarious liability . . . for an actionable hostile environment created by a supervisor with . . . authority over the employee.’” but the employer has an affirmative defense when it “‘exercised reasonable care to prevent and correct promptly any’ discriminatory conduct and ‘the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.’” *Crawford v. Metro. Gov’t of Nashville & Davidson Cnty.*, 555 U.S. 271, 129 S. Ct. 846, 852 (2009) (quoting *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998)). Studies cited by the Court suggest that this affirmative defense has “prompted many employers to adopt or strengthen procedures for investigating, preventing, and correcting discriminatory conduct” and that “[e]mployers are thus subject to a strong inducement to ferret out and put a stop to any discriminatory activity in their operations as a way to break the circuit of imputed liability.” *Id.*

officer to state liability,<sup>106</sup> at least in the short term. Congress, however, suffers from no precedent-based incapacity. Acting pursuant to Section 5 of the Fourteenth Amendment, Congress could strip the states of sovereign immunity from suits predicated on their officials' constitutional violations.<sup>107</sup> If it did so, it could provide for state liability based on whatever kind of fault it might deem appropriate. It could also, if it so chose, create a statutory exception to the otherwise available federal cause of action for cases in which state law establishes an adequate alternative compensation system—which could potentially be one with sensible limits on punitive or even compensatory damages.<sup>108</sup>

In offering vague suggestions such as these, I make no pretense of having established what a preferable alternative to our current official immunity regime would look like, or even of having shown that a preferable alternative necessarily exists. Grave difficulties could potentially arise in efforts to work out details. For example, if judicial determinations of entity liability would require fine-grained assessments of the adequacy of training, supervision, and disciplinary mechanisms that courts are ill-equipped to make, then the evident manageability of a formula that predicates liability on the presence or absence of clearly established law might look better by comparison.<sup>109</sup> I do not exclude this possibility. It seems clear, however, that the assumptions underlying the current regime of official liability subject to *Harlow's* "clearly established law" standard are sufficiently doubtful that scholars could profitably consider the potential superiority of alternative mechanisms for achieving an optimal balance between deterrence of constitutional violations and chill of conscientious official action.<sup>110</sup>

A second possible mechanism for improving the calibration between deterring constitutional violations and avoiding undue chilling of public-spirited action is far easier to describe, at least in concept. In crafting doctrine, the Supreme Court should avoid the kind of complexity that would make it unreasonable to expect officials to know where constitutional boundaries lie. The rule of law may not inherently require a law of rules,<sup>111</sup> but it is surely more reasonable to expect officials to know and comply with broad, clear rules than it is to expect them to keep up with a flow of judicial opinions that clarify the law only from the perspective of legal specialists. Existing doctrine partly reflects this recognition. When

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106. See David L. Shapiro, *The Role of Precedent in Constitutional Adjudication: An Introspection*, 86 TEX. L. REV. 929, 947–56 (2008) (arguing that the Court's decisions, although erroneous, should be accepted on grounds of stare decisis).

107. See *United States v. Georgia*, 546 U.S. 151, 158–59 (2006).

108. Cf. Oren, *supra* note 100, at 1006.

109. See generally Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274 (2006) (discussing judicially manageable standards as a requisite for judicial decision making).

110. For a broad-based and thoughtful attack on judicial decision making predicated on this likely fiction, see Pillard, *supra* note 38.

111. Cf. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1176 (1989).

the controlling tests of constitutional validity take the form of vague standards, the correct application of which depends on nuanced determinations, the Court makes it difficult for plaintiffs to show that “clearly established” law governs their cases: it insists that “the right the official is alleged to have violated must have been ‘clearly established’ in a . . . particularized . . . sense.”<sup>112</sup> Insofar as legal complexity tends to support claims of official immunity, more sharply etched doctrines could thus serve better both to deter official misconduct and to ensure compensation to victims.

However one judges these proposals, two things seem clear. First, we could make far better judgments of how well qualified immunity serves the function of getting the right balance between deterrence of constitutional violations and chill of conscientious official action if we had better empirical information. Second, given that immunity will always be an imperfect device, we ought to consider other possible mechanisms that would either complement official immunity or perform its intended functions better.

*B. Limiting Liability to Cases of Moral Entitlement to Compensation*

The Supreme Court has frequently suggested that it would be unfair to hold officials liable if they could not reasonably have known that their conduct would violate constitutional rights.<sup>113</sup> Going a step further, Professor Jeffries argues that a fault system is preferable to a strict liability regime as a matter of fairness.<sup>114</sup> He additionally claims that the currently prevailing immunity doctrines create a reasonable approximation of fault-based liability, especially through the qualified immunity standard of *Harlow*.<sup>115</sup> Even if we were to grant the assumption that Jeffries is right about the desirability of a fault system, absolute immunity sometimes bars recovery in cases in which fault unquestionably exists. What is more, even qualified immunity seems overbroad insofar as it protects officials who act with subjective bad faith and violate constitutional rights. But these are obvious points. No one denies that immunity doctrine bars recovery in some cases of fault. The question is whether the desirability of a fault system justifies the main outlines of our current immunity regime, not all of its details, some of which might of course be justifiable on other grounds anyway.

With the inquiry focused in this way, the two basic questions are whether Jeffries is right that a fault system is preferable to a strict liability regime and whether we currently have a structure of immunity and liability rules that is mostly fault-based in the morally relevant sense. The answers are not obvious. In the most characteristic situations in which the law makes fault a condition of liability—such as under the negligence standard in

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

113. *See, e.g., Wood v. Strickland*, 420 U.S. 308, 319 (1975).

114. *See Jeffries, supra* note 89, at 95–96.

115. *See id.* at 97–99.

private tort law—the law also defines the parties’ rights and duties by reference to negligence.<sup>116</sup> If non-negligent conduct violates no one’s rights, it is easy to see why a party who acted without fault, and thus violated no one’s rights, should have no moral duty of compensation. By contrast, the “clearly established law” standard for qualified immunity excludes recovery by people who have suffered rights violations.<sup>117</sup> This distinction has potential importance. From the premise that the law should sometimes define rights by reference to “fault,” in one sense of the term, it does not follow directly that people who have rights, and whose rights have been violated, have no moral entitlement to compensation unless the right-violator acted with “fault” in another sense.<sup>118</sup> Sometimes the law provides monetary remedies for violations of rights that were not previously clearly established, including in cases involving regulatory takings.<sup>119</sup>

However one ultimately judges Jeffries’s argument, the Equilibration Thesis that I have advanced in this Essay may offer a distinctive reason for concluding that no moral entitlement to compensation exists in many cases involving rights that were not previously clearly established. As noted above, fairness-based objections to immunity have frequently assumed that substantive rights are constants, not variables.<sup>120</sup> The fairness-based claim to a damages remedy for every violation of every right surely weakens when we recognize that, in the absence of official immunity, at least some substantive rights might be defined more narrowly. Absent immunity, some right-holders who sue to seek redress for violations would possess no rights and, accordingly, no moral entitlement to relief.

This possible justification for a “clearly established rights” standard is undeniably overbroad. Even in the absence of qualified immunity, some plaintiffs for whom qualified immunity currently bars recovery would persuade courts to accept their claims of constitutional right. Nevertheless, the suggestion that the *Harlow* standard helps to restrict damages

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116. See, e.g., RESTATEMENT (SECOND) OF TORTS § 281 (1965) (liability for negligence exists when, inter alia, an “interest invaded is protected against unintentional invasion” and the “conduct of the actor is negligent with respect to the [plaintiff]”).

117. *Harlow v. Fitzgerald*, 457 U.S. 800, 818–19 (1982).

118. Jeffries points out, rightly, that the availability of qualified immunity under *Harlow* depends on a “negligence-type inquiry” into whether an official should have known that her conduct was unconstitutional. Jeffries, *supra* note 89, at 100; see also Barbara E. Armacost, *Qualified Immunity: Ignorance Excused*, 51 VAND. L. REV. 583, 667 (1998) (arguing that “notice functions as a surrogate for fault”). Nevertheless, there is a distinction between negligence as a standard for determining whether a wrong has been done and negligence as a standard for determining whether a wrongdoer owes compensation to her victim. It is at least arguable, for example, that wrongdoing is inherent in the idea of a constitutional violation, see Nahmod, *supra* note 4, at 1008, or that constitutional violations should trigger compensation even in the absence of subjective official fault, see Owen v. City of Independence, 445 U.S. 622, 657 (1980) (“[T]he principle of equitable loss-spreading has joined fault as a factor in distributing the costs of official misconduct.”).

119. See, e.g., *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 306–07, 320 (1987) (holding that where government has taken property by land use regulation, a landowner may “recover damages for the time before it is finally determined that the regulation constitutes a ‘taking’ of his property”).

120. See *supra* note 5 and accompanying text.



compensation to cases of moral entitlement may have at least some explanatory and justificatory power for reasons that are conceptually unrelated to official fault or lack thereof. If so, the ultimate question would be whether an admittedly overbroad “clearly established rights” standard is adequately justified, not because it is inherently fair as applied to every case (as Jeffries suggests), but because it is not unfair as applied to some significant fraction of cases and may be preferable to other potential mechanisms of doctrinal equilibration when the full gamut of potentially pertinent costs and benefits comes into view.

### C. *Avoiding Chill with Respect to Change of Law*

Professor Jeffries has also argued that immunity doctrines, and especially qualified immunity, are desirable because they eliminate a practical impediment that courts would otherwise encounter when considering whether to recognize rights that they had not previously established.<sup>121</sup> As I have said already, Jeffries is surely right that official immunity serves the function of facilitating legal change. But it is a separate question how well immunity does so.

In *Saucier v. Katz*,<sup>122</sup> the Court attempted to push immunity doctrine in a maximally change-facilitating direction by holding that courts should always rule first on whether a plaintiff had alleged a constitutional violation.<sup>123</sup> Only if the answer was affirmative should a court go on to address the further question whether the right was clearly established at the time of the defendant’s alleged action. More recently, in *Pearson v. Callahan*,<sup>124</sup> the Court overruled *Saucier* and held that courts should make a case-by-case determination of whether to decide first whether a rights violation occurred or to proceed directly to the question whether the right asserted by the plaintiff was clearly established.<sup>125</sup> This decision renders qualified immunity a less effective mechanism for facilitating legal change than it was under *Saucier*.<sup>126</sup> With the prospect that qualified immunity might reduce the number of occasions when courts will address arguments seeking an expansion of constitutional rights, the doctrine’s overall effect in facilitating legal change grows uncertain.

Under these circumstances, alternative mechanisms to stop changes in law from becoming too costly merit discussion. Absent immunity, the prospect of imposing retroactive official liability would create the greatest impediments to change of law in cases in which courts contemplate dramatic innovations that would catch large numbers of officials unawares. The Supreme Court once addressed this problem through non-retroactivity

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121. See Jeffries, *supra* note 5, at 97–105.

122. 533 U.S. 194 (2001).

123. *Id.* at 200–01.

124. 555 U.S. 223 (2009).

125. *Id.* at 236.

126. See John C. Jeffries, Jr., *Reversing the Order of Battle in Constitutional Torts*, 2009 SUP. CT. REV. 115, 117 (“Going directly to qualified immunity will . . . inhibit the development of constitutional doctrine . . .”).

doctrines that applied only in cases where judicial rulings constituted a sharp break with prior law.<sup>127</sup> The Court could do so again.<sup>128</sup> Over the past several decades, it has frowned on doctrines that expressly hold judicial determinations of rights not to be retroactively applicable to cases on direct review.<sup>129</sup> In its view, failure to apply a rule articulated in one case to other cases still pending on direct review unfairly treats similarly situated litigants unequally<sup>130</sup> and “violates basic norms of constitutional adjudication.”<sup>131</sup> For reasons I have given elsewhere, I do not find the Court’s stated reasoning wholly convincing.<sup>132</sup> Without rehearsing those reasons, I would make just one point here: as the Equilibration Thesis emphasizes, official immunity is not the only possible mechanism for promoting some or all of the goals that immunity currently serves, including avoiding chill with respect to changes of law.

#### D. *Facilitating Early Dismissal of Frivolous Suits*

In *Harlow*, the Supreme Court emphasized the function of official immunity in facilitating the dismissal of frivolous suits prior to trial.<sup>133</sup> In considering this justification for official immunity, it is important to be precise about the senses in which immunity doctrines might successfully target frivolous suits. As a conceptual matter, the only effect that every immunity doctrine has, simply by virtue of being an immunity doctrine, is to shift the substantive standard that differentiates frivolous from non-frivolous litigation. For example, absolute judicial immunity makes frivolous every suit against a judge arising from the exercise of a judicial function. Qualified immunity makes suits frivolous when they do not allege violations of clearly established rights. But immunity rules do not

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127. See, e.g., *Stovall v. Denno*, 388 U.S. 293, 299–300 (1967); *Linkletter v. Walker*, 381 U.S. 618, 636–37 (1965); Fallon & Meltzer, *supra* note 10, at 1738–44.

128. See, e.g., David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. PA. L. REV. 23, 79 (1989) (proposing this approach).

129. See, e.g., *Griffith v. Kentucky*, 479 U.S. 314, 322–23 (1987) (holding that “the integrity of judicial review requires” full retroactive application of new rules in criminal cases “to all similar cases pending on direct review”); see also *Harper v. Va. Dep’t of Taxation*, 509 U.S. 86, 97 (1993) (adopting a similar approach to civil cases).

130. See *Harper*, 509 U.S. at 97.

131. *Griffith*, 479 U.S. at 322.

132. See Fallon & Meltzer, *supra* note 10, at 1764–67, 1807–11 (arguing that most retroactivity and non-retroactivity questions are best analyzed as arising within the law of remedies and that the law of remedies does not invariably require a remedy for every rights violation, especially when there are compelling practical reasons to withhold remedies).

133. See *Harlow v. Fitzgerald*, 457 U.S. 800, 813 (1982) (stating that “public policy . . . mandates an application of the qualified immunity standard that would permit the defeat of insubstantial claims without resort to trial”); *id.* at 819 n.35 (reiterating prior admonitions that “‘insubstantial’ suits against high public officials should not be allowed to proceed to trial”); see also *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (characterizing qualified immunity as “an immunity from suit” that is “effectively lost if a case is erroneously permitted to go to trial”); Kit Kinports, *Qualified Immunity in Section 1983 Cases: The Unanswered Questions*, 23 GA. L. REV. 597, 661 (1989) (observing that “*Harlow*’s decision to revise the qualified immunity standard by deleting the subjective prong of the defense may have been justifiable in order to shield public officials from frivolous . . . suits”).

necessarily succeed in excluding suits that are frivolous in a deeper, non-tautological sense. For instance, plaintiffs can frequently avoid the immunity bar by pleading plausible-sounding constitutional violations that they almost certainly could not prove. There is a second sense, however, in which immunity doctrines might be thought to target frivolous litigation and to do so relatively successfully. Official immunity might facilitate dismissal of suits in which good reason exists to think that no actual constitutional violation has occurred or that plaintiffs could not prove the facts on which their claims depend. For example, one might think that suits against judges or prosecutors are especially likely to be frivolous based on psychological predictions that disgruntled litigants will frequently allege constitutional violations when none has in fact occurred.<sup>134</sup> One might also speculate that claims resting on allegations of subjective bad faith are likely to be frivolous because incapable of proof.

If we assume that immunity doctrines aim to weed out frivolous suits in this second sense, they almost surely have some effect in doing so, but it is obvious, too, that they are at best crudely fitted to that purpose. It is therefore worth asking whether better mechanisms might exist. This question has current resonance because the Supreme Court appears recently to have adopted a different, albeit complementary rather than alternative, doctrinal innovation aimed at securing dismissal of frivolous suits prior to trial. In *Ashcroft v. Iqbal*,<sup>135</sup> the Court held, by a 5-4 vote, that district courts should dismiss complaints that assert conclusory or factually implausible claims to relief.<sup>136</sup> In my view, the *Iqbal* standard contravenes the plain directive of Rule 8 of the Federal Rules of Civil Procedure.<sup>137</sup> It also licenses discretionary judicial decision making that could seriously disadvantage plaintiffs asserting unpopular claims.<sup>138</sup> *Iqbal* does, however, illustrate the possibility of employing other, potentially better adapted

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134. See, e.g., *Butz v. Economou*, 438 U.S. 478, 512 (1978) (“The loser in one forum will frequently seek another, charging the participants in the first with unconstitutional animus.”); *Imbler v. Pachtman*, 424 U.S. 409, 425 (1976) (reasoning that in the absence of immunity, suits against prosecutors “could be expected with some frequency, for a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions to the State’s advocate”); *Pierson v. Ray*, 386 U.S. 547, 554 (1967) (observing that a judge’s “errors may be corrected on appeal” and that “he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption”).

135. 129 S. Ct. 1937 (2009).

136. *Id.* at 1949–50.

137. See, e.g., Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 86 (2010) (“*Twombly* and *Iqbal* have redefined Rule 8(a)(2).”); see also *id.* at 10 (stating that *Twombly* and *Iqbal* continue a “retreat from the principles of citizen access, private enforcement of public policies, and equality of litigant treatment”).

138. See, e.g., *id.*, at 83 (“By leaving the notions of abusive discovery and meritless litigation undefined in *Twombly* and *Iqbal* while simultaneously encouraging judges to factor concerns about them into their Rule 12(b)(6) decisions, the Court has authorized judges to let their own views and attitudes regarding these phenomena influence their decisionmaking. This virtually unbridled discretion is inappropriate. It compounds the subjectivity inherent in the plausibility inquiry.”).

mechanisms to deal with social costs of frivolous litigation that the Court has more typically tried to address through official immunity doctrines.

*E. Eliminating Costly Litigation when Other Remedies Are Adequate*

Absolute judicial and prosecutorial immunity, in particular, are often justified on the ground that other corrective devices internal to the judicial process make suits for damages against judges and prosecutors unnecessary as a mechanism for vindicating constitutional rights.<sup>139</sup> When coupled with the argument that judges and prosecutors would be especially likely to attract suits from disgruntled parties, notably including criminal defendants,<sup>140</sup> this argument has long prevailed—and deservedly so, I would opine. Against the backdrop of the analysis that I have offered previously, I would add just one further word of caution: even if the conventional justifications for official immunity doctrines seem persuasive with respect to one segment of immunity law, we should not complacently assume that the conventional wisdom is more pervasively correct.

*F. Simultaneously Promoting a Multitude of Goals*

A final possible aim of official immunity is avowedly multi-faceted: although not perfectly suited to achieving any of the individual goals that I have discussed so far, immunity might provide a uniquely elegant, judicially manageable, and comprehensible means of simultaneously promoting a weighted mix of all those aims. On this view, trans-substantivity is more a virtue than a vice. It minimizes doctrinal complexity while serving a number of functions reasonably well, even if none optimally.

Of all possible accounts of what official immunity might be good for, this one poses the hardest challenge of evaluation. Admittedly, any full assessment would need to consider a potentially long series of possible bundles of doctrinal reforms, not one-for-one substitutions of one rule for another. But the suggestion that immunity doctrine might be desirable overall, even if it performs all of its individual functions relatively crudely, is merely a suggestion, not a conclusion that anyone, so far as I know, has attempted to establish by careful argument.

Moreover, in the absence of careful argument, skepticism about the optimality of the status quo seems very much in order. The central, incentive-based and fairness-based defenses of official immunity both depend on the assumption that it, and it alone, shields individual officers from the prospect of potentially devastating personal liability for acts committed in their personal capacities. As noted above, however, that premise is at best uncertain and is quite likely mistaken. Without more empirical knowledge about practices of indemnification, and the incentives

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139. See, e.g., *Imbler*, 424 U.S. at 427–29 (noting the availability of alternative remedial mechanisms for prosecutorial misconduct); *Pierson*, 386 U.S. at 554 (noting that appellate review can correct a judge’s errors without exposing the judge to civil liability).

140. See *supra* note 134 and accompanying text.

that they create, we cannot be confident that the main elements of the existing doctrinal structure do not rest on fallacies. And it seems unlikely, even though it is not impossible, that doctrines erected on mistaken premises would turn out by happy accident to be the best possible response to a diverse amalgam of goals.

### G. *Partial Summary and Agenda*

My inquiry in this part into whether official immunity is well designed to achieve its intended purposes has generated as many questions as answers. Although immunity is not obviously maladapted to its asserted aims, it is not obviously optimal in all respects either. In considering possible avenues of doctrinal reform, we should ask two kinds of questions that the scholarly literature to date—albeit with some glorious exceptions<sup>141</sup>—has addressed too infrequently. Some are empirical; we should more searchingly examine a number of the factual assumptions on which leading arguments purporting to justify official immunity currently rest. Other questions that cry out for attention are comparative. Viewing official immunity doctrine as one potential mechanism of doctrinal equilibration among others, we should think more imaginatively about possible alternatives.

#### CONCLUSION: AN AGENDA FOR COURTS AND SCHOLARS

In this Essay, I have sought to situate questions about official immunity in the context of broader issues of constitutional implementation. The Equilibration Thesis that I have advanced here reveals immunity as a variable among other variables, not a variable among constants. The Equilibration Thesis depicts rights, causes of action, and surrounding implementing mechanisms as a package. It further frames the question of how individual elements of the package might best be calibrated to achieve the most desirable overall alignment.

In light of the Equilibration Thesis, official immunity is by no means necessarily the inherently regrettable outcome of a balance of evils that the conventional wisdom has long assumed it to be. With immunity, we may have a better scheme of substantive constitutional rights than we would have without immunity. Without immunity, the social costs of defining rights broadly would be greater, and we might well have fewer recognized rights than we have now. But if the purpose of immunity doctrines is, or ought to be, to promote achievement of the best overall bundle of recognized substantive rights, causes of action, and other implementing and limiting doctrines, a leading question needing to be asked involves the functions, if any, that official immunity doctrines are better adapted to serve than other doctrines would be. Besides highlighting that question, I have

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141. Exemplars include, but are surely not limited to, SCHUCK, *supra* note 2; Jeffries, *supra* note 89; Jeffries, *supra* note 5; Kramer & Sykes, *supra* note 101; Pillard, *supra* note 38; and Christina B. Whitman, *Government Responsibility for Constitutional Torts*, 85 MICH. L. REV. 225 (1986).

suggested some alternative mechanisms for achieving immunity's ostensible purposes and have emphasized that the Supreme Court and other policy makers would be better situated to make good decisions if they had better empirical information.

Critics of official immunity who confine themselves to narrowly textual, historical, and precedential analysis risk missing vitally important questions of constitutional implementation that immunity doctrines inescapably implicate. By identifying kinds of comparative analysis and types of information that more sophisticated thinking about official immunity would require, I have sought in this Essay to mark lines of inquiry not just for judges and justices, but also for scholars.