CONSTITUTIONAL WRONGS WITHOUT REMEDIES: EXECUTIVE OFFICIAL IMMUNITY

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[T]he language of deterrence and of cost/benefit analysis, if used indiscriminately, can have a narcotic effect. It creates an illusion of technical precision and ineluctability. It suggests that not only constitutional principle but also empirical data support the majority's result. . . . [W]e . . . have been drawn into a curious world where the "costs". . . loom to exaggerated heights and where the "benefits". . . are made to disappear with a mere wave of the hand. **

Most state and federal executive officials are protected from section 1983[1] and *Bivens*[2] liability by the affirmative defense of qualified immunity.[3] Qualified immunity was first applied in a section 1983 setting to police officers,[4] and was thereafter extended to governors,[5] school

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** United States v. Leon, 104 S. Ct. 3405, 3430 (1984) (Brennan, J., dissenting) (criticizing Court's "good faith" exception to fourth amendment's exclusionary rule when search warrant issued by a "detached and neutral magistrate"). *See infra* notes 146-60 and accompanying text (discussing cost-benefit analysis in qualified immunity context).

1. 42 U.S.C. § 1983 reads as follows:

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

42 U.S.C. § 1983 (1982).

2. Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971) (implied fourth amendment cause of action for damages against federal law enforcement officers). *See also* Carlson v. Green, 446 U.S. 14 (1980) (implied eighth amendment cause of action for damages); Davis v. Passman, 442 U.S. 228 (1979) (implied fifth amendment cause of action for damages).

3. Qualified immunity was characterized as an affirmative defense for burden of pleading purposes in Gomez v. Toledo, 446 U.S. 635 (1980). The Court's reasoning, however, appears equally applicable to the burden of proof. *See* S. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: A GUIDE TO SECTION 1983 § 8.13 (1979 and Supp. 1984).

4. Pierson v. Ray, 386 U.S. 547 (1967).

5. Scheuer v. Rhodes, 416 U.S. 232 (1974).

board members,[6] mental hospital officials,[7] and prison officials.[8] Qualified immunity in a *Bivens* setting has been applied to federal executive officials, including members of the President's cabinet[9] and his aides.[10] Whether applied in section 1983 or *Bivens* cases, qualified immunity is generally thought to reflect a balancing of the individual and social interests in protection from, and compensation for, constitutional deprivations against the social interest in independent decision making by executive officials.[11]

A clear trend favoring executives has emerged, however. Thus, the balancing of the above interests has resulted in a different rule for the President of the United States: the President is protected by absolute immunity[12] for acts within the "outer perimeter" of his official responsibilities.[13] In addition, federal executive officials who perform judicial and prosecutorial functions in connection with federal agency adjudicatory proceedings are protected by absolute immunity analogous to the absolute immunity from damages liability afforded judges and prosecutors.[14] Moreover, until recently, the qualified immunity test had two hurdles for defendants: an objective part and a subjective part.[15] The Supreme Court, however, has done away with the subjective part of the test.[16] In so doing, the Court went far towards converting the form of qualified immunity into the substance of absolute immunity.

This development is more than simply another example of the way in which the Court recently has moved to limit constitutional tort liability.[17] The Court increasingly is concerned with the potential for con-

6. Wood v. Strickland, 420 U.S. 308 (1978).

7. O'Connor v. Donaldson, 422 U.S. 563 (1975).

8. Procunier v. Navarette, 434 U.S. 555 (1978).

9. Butz v. Economou, 438 U.S. 478 (1978).

10. Harlow v. Fitzgerald, 427 U.S. 800 (1982).

11. *See infra* notes 131-93 and accompanying text. While this Article focuses on executive immunity, qualified immunity has been held to protect private defendants in certain circumstances, *e.g.,* Buller v. Buechler, 706 F.2d 844 (8th Cir. 1983); *see also* Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982) (dictum).

12. Where absolute immunity is applicable, an action will typically be dismissed on motion setting out the defendant's official capacity. *See generally* S. NAHMOD, *supra* note 3, at ch. 7.

13. Nixon v. Fitzgerald, 457 U.S 731 (1982).

14. Butz v. Economou, 438 U.S. 478, 508-16 (1978).

15. Wood v. Strickland, 420 U.S. 308 (1975).

16. Harlow v. Fitzgerald, 457 U.S. 800 (1982).

17. *See, e.g.,* Hudson v. Palmer, 104 S. Ct. 3194 (1984) (no procedural due process violation for negligent or intentional taking of property so long as adequate state tort remedy; holdings capable of expansion to the taking of a liberty interest and to substantive due process as well); City

stitutional tort liability to overdeter government employees in the performance of their duties. This concern has led the Court to limit individual liability to cases of extreme misconduct, in order to provide government employees with a significant margin for error. At the same time, local government liability for unconstitutional official policies or customs under section 1983,[18] and federal government liability under the Federal Tort Claims Act,[19] also may have encouraged the Court to limit individual liability in this manner.

The Court's concern with overdeterrence is surely legitimate; there is a strong social interest in independent decision-making by government employees. Moreover, the Court's recent case law brings qualified immunity law more in line with the doctrine of nonretroactive application of newly announced and unexpected legal rules.[20] It also reflects a related sensitivity to the legal process factors of understanding rules, and the ability to comply with them.[21] There are, however, strong social interests in constitutional compliance as well. To the extent that the Court's recent case law reflects an obsessive concern with overdeterrence, it will tend to underprotect these social interests. In my view, if we do not know enough to regulate conduct perfectly, we should better run the risk of overdeterring unconstitutional conduct than of underdeterring it.

Part I of this Article provides a retrospective which shows the development of section 1983 qualified immunity doctrine. In Part II, federal executive immunity, including the Court's emphasis on function and presidential immunity, is considered. Part III critically analyzes the

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of Los Angeles v. Lyons, 103 S. Ct. 1660 (1983) (limiting section 1983 plaintiff's standing to seek injunctive relief); Polk County v. Dodson, 454 U.S. 312 (1981) (public defender who represents criminal defendant does not act under color of law); City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981) (local government absolutely immune from punitive damages liability); Parratt v. Taylor, 451 U.S. 527 (1981) (no procedural due process violation for negligent or intentional taking of property so long as adequate state tort remedy available; holdings capable of expansion to the taking of a liberty interest and to substantive due process as well); *cf.* Bush v. Lucas, 103 S. Ct. 2404 (1983) (first amendment *Bivens* actions not available to federal employees covered by elaborate congressional remedial scheme); Chappell v. Wallace, 103 S. Ct. 2362 (1983) (*Bivens* actions against superior officers not available to enlisted military personnel).

18. Owen v. City of Independence, 445 U.S. 622 (1980) (no immunity available under section 1983 to local governments); Monell v. Department of Social Serv., 436 U.S. 658 (1978) (local government liability under section 1983 for unconstitutional official policies or customs; overruled Monroe v. Pape, 365 U.S. 167 (1961)).

19. Federal Tort Claims Act, ch. 753, 60 Stat. 842 (enacted as Title 4 under the Legislative Reorganization Act of 1946, 60 Stat. 812) (codified as amended in scattered sections of 28 U.S.C.).

20. *See infra* text accompanying notes 171-78.

21. *See infra* text accompanying notes 179-83.

Court's current approach to executive immunity, as reflected especially in *Harlow v. Fitzgerald*[22] with its questionable reliance on cost-benefit analysis.

I. SECTION 1983 QUALIFIED IMMUNITY: A RETROSPECTIVE

A. Pierson v. Ray: *A Modest Beginning*

The United States Supreme Court's first section 1983 qualified immunity case involving police officers was *Pierson v. Ray*.[23] The plaintiffs, peaceful sit-in demonstrators, asserted they had been arrested under a breach of the peace statute subsequently held unconstitutional. Focusing on the adverse effect of a no-immunity rule for police officers and the consequent need for a margin for error, the Court noted:

> Under the prevailing view in this country a peace officer who arrests someone with probable cause is not liable for false arrest simply because the innocence of the suspect is later proved . . . . A policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does. Although the matter is not entirely free from doubt, the same consideration would seem to require excusing him from liability for acting under a statute that he reasonably believed to be valid but that was later held unconstitutional, on its face or as applied.[24]

The Court in *Pierson* used the same statutory interpretation approach it had previously used when it ruled in *Tenney v. Brandhove*[25] that the common law background of state legislator immunity was intended by Congress—when it enacted section 1983 in 1871—to apply to section 1983 liability of state legislators. The Court in *Pierson* asserted "that a police officer is not charged with predicting the future course of constitutional law,"[26] went on to apply the *Monroe v. Pape*[27] "background of tort liability"[28] approach, and thereby established the qualified immunity defense of good faith and probable cause.

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22. 427 U.S. 800 (1982).

23. 386 U.S. 547 (1967).

24. *Id.* at 555 (citations and footnotes omitted).

25. 341 U.S. 367 (1951).

26. 386 U.S. at 557.

27. 365 U.S. 167 (1961).

28. For a discussion of the proper meaning of this phrase, see Nahmod, *Section 1983 and the "Background" of Tort Liability,* 50 IND. L.J. 5 (1974). Tort law should inform section 1983 doctrine, but not determine it. Section 1983 is, after all, a federal statute vindicating fourteenth amendment rights.

B. Scheuer v. Rhodes: *Upper Level Executives*

Pierson involved law enforcement officers, or "street level" executives. Some years later, the Court applied a comparable reasonable good faith standard to the highest state executives. *Scheuer v. Rhodes*[29] dealt with section 1983 actions against the Governor of Ohio, the Adjutant General and his assistant, various named and unnamed officers and enlisted members of the Ohio National Guard, and the President of Kent State University. All these actions arose out of the death of three university students during alleged civil disorders. The Court held that qualified, rather than absolute, immunity was applicable. The Court admitted the usefulness of the common law rule of absolute immunity for high ranking executives, noting that the "public interest requires decisions and action to enforce laws for the protection of the public."[30] However, in addition to considering the harm to this interest stemming from the possibility of section 1983 liability, the Court considered the purposes of section 1983. It found that granting absolute immunity to executives would drain section 1983 of all meaning. After discussing *Pierson* and considering the differences in the extent of discretion for law enforcement executives at the police level and those at higher levels, the Court held:

> [I]n 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 responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct.[31]

In *Scheuer*, the Court more clearly articulated the emerging two-part qualified immunity test. The objective part related to reasonable grounds for a defendant's belief in the legal validity of his conduct. The subjective part dealt with the existence of such a belief in fact. In addition, the Court enumerated the costs involved if it were to adopt an absolute liability rule. First, there would be an injustice to the officer if liability were imposed when discretion must be exercised. Second, such liability would have a chilling effect upon an officer's exercise of

29. 416 U.S. 232 (1974).

30. *Id.* at 241.

31. *Id.* at 247-48.

judgment and discretion through overdeterrence. The Court observed that the exercise of judgment and discretion includes an officer's failure to act when necessary.

At the same time, the Court explained the costs involved in adopting an absolute immunity rule for higher level executives. Section 1983 would be inapplicable to those executives; thus, the costs of their constitutional violations would be borne solely by those injured. Further, section 1983 would perform no deterrent function for those executives. An absolute immunity rule would have been especially anomalous in view of the fact that police officers who individually can do far less harm than governors are protected only by qualified immunity.

C. Wood v. Strickland: *The Duty to Know*

Wood v. Strickland,[32] decided a year after *Scheuer*, was the Court's most important qualified immunity case at the time. In *Wood*, the plaintiffs were expelled from school for violating a regulation prohibiting intoxicating beverages at school or school activities. Bringing section 1983 actions against school board members for damages and other relief, the plaintiffs alleged that the expulsions violated procedural and substantive due process. The Court observed that "state courts have generally recognized that [school board members] should be protected from tort liability under state law for all good-faith, nonmalicious action taken to fulfill their official duties."[33] It went on to acknowledge that school board members function variously as legislators and adjudicators, functions which involve the exercise of considerable discretion over both the long and short term. The Court nevertheless held that school board members are protected by only qualified immunity.

But the Court's holding did not stop there. The Court added an important gloss to what it called the objective part of the qualified immunity test:

> The official himself must be acting sincerely and with a belief that he is doing right, but an act violating a student's constitutional rights can be no more justified by *ignorance or disregard of settled, indisputable law* on the part of one entrusted with supervision of students' daily lives than by the presence of actual malice. To be entitled to a special exemption from the categorical remedial language of § 1983 in a case in which his action violated a student's constitutional rights, a school board member, who has

32. 420 U.S. 308 (1975).

33. *Id.* at 318 (footnote omitted).

> voluntarily undertaken the task of supervising the operation of the school and the activities of the students, must be held to a standard of conduct based not only on permissible intentions, but also on *knowledge of the basic, unquestioned constitutional rights of his charges*. Such a standard imposes neither an unfair burden upon a person assuming a responsible public office requiring a high degree of intelligence and judgment for the proper fulfillment of its duties, nor an unwarranted burden in light of the value which civil rights have in our legal system. Any lesser standard would deny much of the promise of § 1983. Therefore, *in the specific context of school discipline, we hold that a school board member is not immune from liability for damages under § 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student*.[34]

It is important to note that *Wood*'s duty to know settled law did not necessarily limit the objective part of the test. *Wood* could be read to expand it to cover those situations when a defendant might fail the objective part as a matter of law. Thus, even when there is no settled law in a given case, a defendant might still be found to have acted unreasonably and thereby fail the test.[35] *Wood* was also significant because it modified the subjective part of the qualified immunity test by framing it as an inquiry into the existence of malicious intent to violate a student's constitutional rights or to cause other injury.

The dissenting opinion criticized the majority's duty to know requirement as imposing "a higher standard of care upon public school officials sued under Section 1983, than that previously required of any other official."[36] The dissent characterized this second guessing by a factfinder of a school board member's decision-making as a "harsh standard," because of the difficulty that even lawyers and legal scholars have in describing constitutional rights as "settled" and "indisputable." The dissent also questioned whether most school boards and officials have "ready access" to counsel in making many decisions for the operation of public schools. Moreover, the dissent emphasized the effect of potential liability upon the willingness of citizens to serve on school boards.

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34. *Id.* at 321-22 (emphasis added).

35. *Developments in the Law—Section 1983 and Federalism,* 90 HARV. L. REV. 1133, 1214-17 (1977).

36. 420 U.S. at 327 (Powell, J., dissenting).

As it had done in *Scheuer*, the Court in *Wood* spoke of the potential costs of no immunity protection whatever. In addition to the costs mentioned in *Scheuer* regarding independent decision-making, the Court was concerned with discouraging potential candidates from volunteering to serve on school boards. When it balanced these interests, the Court concluded that when there is clearly settled law, a governmental employee may be under an obligation to know and comply with it, an obligation comparable to the common knowledge required of the reasonable person in tort law.[37] In contrast, the dissenters emphasized the costs of access to counsel stemming from *Wood*'s duty to know settled law and expressed doubt whether any constitutional doctrine could be settled.[38]

D. Procunier v. Navarette: *A Step Back?*

In *Procunier v. Navarette*,[39] the Court held that qualified, not absolute, immunity protects prison officials at both the supervisory, high discretion level and the subordinate, ministerial, minimal discretion level. While in this respect *Navarette* appears to limit the protection of prison executives, in reality *Navarette* cuts back on *Wood*'s duty to know settled law by applying it restrictively. *Navarette* also shows that the statement of a general rule is only as sound as its application.

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37. *E.g.*, Delair v. McAdoo, 324 Pa. 392, 188 A. 181 (1936). *See generally* W. PROSSER, LAW OF TORTS 157-61 (4th ed. 1971).

38. 420 U.S. at 329-31 (Powell, J., dissenting).

39. 434 U.S. 555 (1978).

Between *Wood* and *Navarette*, the Court decided O'Connor v. Donaldson, 422 U.S. 563 (1975), which held that mental hospital officials, like school officials, are protected by qualified immunity. *O'Connor* was an action against the superintendent of a mental hospital and others for allegedly confining plaintiff wrongfully for 15 years. The jury returned a verdict for plaintiff and the Fifth Circuit affirmed. The Supreme Court affirmed the jury verdict to the extent that it included a finding that the superintendent had knowingly violated plaintiff's right to freedom. However, the Court remanded to the Fifth Circuit to consider whether the trial court's instructions to the jury on the defendant's qualified immunity were correct in light of *Wood*.

The trial court had instructed the jury that the defendant was immune from damages

> [if he] reasonably believed in good faith that the detention of [plaintiff] was proper for the length of time he was so confined . . . . However, mere good intentions which do not give rise to a reasonable belief that detention is lawfully required cannot justify [plaintiff's] confinement in the Florida State Hospital.

Id. at 571-72. The trial court had also rejected defendant's requested instruction that "if defendants acted pursuant to a statute which was not declared unconstitutional at the time, they cannot be held accountable for such action." Remanding in light of *Wood*, the Court directed the Fifth Circuit to consider whether the trial court's refusal "to instruct with regard to the effect of [defendant's] claimed reliance on state law rendered inadequate the instructions as to [defendant's] liability." *Id.* at 577.

Plaintiff, a prison inmate, sued the director of the California Department of Corrections, the warden and assistant warden of a state prison (supervisory officials), two correctional counselors, and a member of the prison staff in charge of handling incoming and outgoing mail (subordinate officials) on various section 1983 grounds, including negligent interference with his constitutional right to mail outgoing letters. On appeal from a grant of summary judgment for all defendants, the Ninth Circuit reversed, holding that the plaintiff had stated a section 1983 cause of action and that summary judgment was improper.[40] On certiorari, the Supreme Court found that summary judgment for defendants was appropriate on qualified immunity grounds.[41]

The *Navarette* Court characterized the qualified immunity available to executives, school board members, mental hospital superintendents, and policemen as a unitary standard and quoted the *Scheuer v. Rhodes*[42] reasonable grounds, good faith belief formulation. It then applied the two-part test elaborated in *Wood* to the defendants. The objective part related first, to whether at the time of the challenged conduct, 1971 and 1972, the defendants knew or should have known of the existence of the right asserted and second, to whether they knew or should have known that they were violating the protected right. The Court found that the defendants neither knew nor should have known, because there was no such federal right at the time. It observed that the Ninth Circuit itself had only upheld such a right in 1973 and 1974 and that a three-judge court opinion from California to the same effect was also decided in 1973.[43]

Furthermore, the Supreme Court's own 1974 opinion on a similar issue dealt with it from the perspective of the constitutional right of the addressee, rather than the perspective of the prisoner, as in *Navarette*.[44] Other California federal district court decisions from 1970 through 1972, offered by the plaintiff to show that a prisoner's right to send mail was clearly established by 1971 and 1972, were described by the Court as distinguishable and inapposite to a showing of a clearly established right.[45] Thus, because no decisions of the Supreme Court, the various circuit courts, or the local district court definitively set out a prisoner's

40. 434 U.S. at 558.
41. *Id.* at 558, 566.
42. 416 U.S. 232 (1974).
43. 434 U.S. at 563.
44. *See* Procunier v. Martinez, 416 U.S. 396 (1974).
45. 434 U.S. at 564.

right to send mail in 1971 and 1972, the Court held as a matter of law that defendants acted reasonably and without "disregard" for the established law.

The Court also elaborated on the subjective part of the qualified immunity test, which it had described in *Wood* as an inquiry into whether a defendant acted with "the malicious intention to cause a deprivation of constitutional rights or other injury."[46] The *Navarette* Court characterized this part of the test as speaking "of 'intentional injury,' contemplating that the actor intends the consequences of his conduct."[47] It also cited section 8A of the *Restatement (Second) of Torts*, which defines "intent" as including a belief that "the consequences are substantially certain to result" from the act.[48] Because the defendants were all charged with either negligent interference with plaintiff's mail or with negligent failure to provide proper training to mail handlers, the Court found that the defendants' intent to cause harm was clearly not at issue. Thus, the Court held as a matter of law that the defendants passed the subjective part of the qualified immunity test.

Navarette added little to the Court's earlier approach to section 1983 statutory interpretation and its articulation of the specific costs implicated by the qualified immunity test. However, by reading *Wood* as *limiting* liability to those situations when clearly settled law is violated,[49] and by a narrow application of the concept of settled law, the Court was apparently beginning to reconsider whether the qualified immunity test was overdeterring government employees.

In summary, *Pierson*, *Scheuer*, *Wood*, and *Navarette* established that state and local executive officials were protected by an elaborate two-part qualified immunity test. This test was justified as a matter of statutory interpretation, emphasis being on the common law background in existence in 1871 when section 1983 was enacted. In addition, the test was premised on a two-faceted policy of not overdeterring executives in the performance of their duties on the one hand, and of not underprotecting constitutional rights on the other. This policy was designed, if only implicitly, to achieve optimum deterrence. Closely related was the Court's worry that liability imposed through retroactive

46. 420 U.S. at 322.

47. 434 U.S. at 566.

48. *Id.*

49. *See supra* note 35 and accompanying text; *see also* Davis v. Scherer, 104 S. Ct. 3012, 3018 (1984) (Court applied clearly settled law component of qualified immunity test in pro-defendant manner); *infra* note 168.

application of newly established constitutional doctrine would not only overdeter but also would be unfair. These considerations were similarly applied by the Court to justify qualified immunity for most federal executive officials.

II. FEDERAL EXECUTIVE OFFICIALS

A. Butz v. Economou: *Form Follows Function*

Butz v. Economou,[50] the seminal Supreme Court decision dealing with the scope of immunity in *Bivens*[51] actions, established several important principles. First, *Butz* made clear that even members of the President's cabinet are not absolutely immune from *Bivens* liability. Instead, they are only protected by the qualified immunity developed for state and local government executives in section 1983 actions.[52] Second, *Butz* established that those executives who function as judges and prosecutors in connection with federal agency adjudicatory proceedings are protected by absolute immunity.[53]

Butz involved a damages action brought against various officials in the Department of Agriculture who had investigated plaintiff and his corporation and had initiated an adjudicatory proceeding against him. The defendants included the Secretary and Assistant Secretary of Agriculture, the Judicial Office and Chief Hearing Examiner, the agency attorney who presented the enforcement proceeding, and several auditors who investigated plaintiff, or who were witnesses against him. Several of plaintiff's claims were based on the first and fifth amendments.[54] The district court dismissed the action on the ground that the defendants were absolutely immune from liability for all discretionary actions within the scope of their authority.[55] The Second Circuit reversed and held that all the defendants were protected by only qualified immunity.[56] Vacating and remanding, the Supreme Court, in an opinion by Justice White, held that the defendant agency officials were protected by qualified immunity except insofar as their challenged conduct consisted of initiating, continuing, or prosecuting the adjudicatory pro-

50. 438 U.S. 478 (1978).
51. Bivens v. Six Unknown Named Agents, 403 U.S. 338 (1974); *see supra* note 2.
52. *E.g.,* Scheuer v. Rhodes, 416 U.S. 238 (1974).
53. 438 U.S. at 508-17.
54. *Id.* at 483 n.5.
55. *Id.* at 483-84.
56. *Id.* at 484-85.

ceeding, or acting as judges in that proceeding.[57]

The Court rejected an across the board absolute immunity rule for federal executive officials. It distinguished its earlier plurality opinion in *Barr v. Matteo*,[58] which applied absolute immunity to the discretionary conduct of the acting director of an agency who had been sued by former employees for malicious defamation. In *Barr*, the executive's conduct was within the outer perimeter of his line of duty, while here, because the challenged conduct was allegedly unconstitutional, it was unauthorized.[59] The Court similarly distinguished *Spalding v. Vilas*,[60] which held the Postmaster General to be absolutely immune from liability for defamation and interference with plaintiff's contractual relationships. According to the *Butz* Court, the defendant in *Spalding* also had not acted beyond the scope of his official duties.

Further, while *Barr* and *Spalding* did not address the executive immunity issue in connection with constitutionally derived *Bivens* actions, the analogous issue had already been considered by the Court in the section 1983 case of *Scheuer v. Rhodes*.[61] The Court reasoned that if, under *Scheuer*, a state's highest executive—its Governor—and other executive officials are protected only by qualified immunity, then a similar standard also should apply to federal executives sued pursuant to *Bivens*. The Court stated:

> [I]n the absence of congressional direction to the contrary, there is no basis for according to federal officials a higher degree of immunity from liability when sued for a constitutional infringement as authorized by *Bivens* than is accorded state officials when sued for the identical violation under section 1983.[62]

Finally, granting absolute immunity to all executive officials exercising discretion would undercut the *Bivens* holding.[63]

Nevertheless, the Court went on to assert that there may be "excep-

57. *Id.* at 486, 516.

58. 360 U.S. 564 (1959).

59. Some question this distinction and consequently argue that *Barr* is no longer good law even for common law tort actions. *See, e.g.,* Note, *Government Immunity—Civil Rights—Constitutional Law—Scope of Immunity Available to Federal Executive Officials,* 1979 WIS. L. REV. 604.

60. 161 U.S. 483 (1896).

61. 416 U.S. 232 (1974).

62. 438 U.S. at 500.

63. Analogously, it has been argued that the legislative history of section 1983 demonstrates that higher level executives should not be absolutely immune from section 1983 liability. *See* Freed, *Executive Official Immunity for Constitutional Violations: An Analysis and a Critique,* 72 NW. U. L. REV. 526 (1977) (pre-*Butz*).

tional situations where it is demonstrated that absolute [executive] immunity is essential for the conduct of the public business."[64] Canvassing decisions holding that judges and prosecutors are absolutely immune from common law and constitutional damages liability,[65] the Court ruled that despite their status as executives,[66] executive officials exercising such special functions are entitled to absolute immunity in connection with those functions. Because adjudication within a federal administrative agency shares many important characteristics of the judicial process,[67] hearing examiners and administrative law judges are "functionally comparable" to judges and should be protected by absolute immunity. Similarly, agency executives performing functions comparable to those of a prosecutor are also entitled to absolute immunity.[68] This includes those who initiate or continue adjudicatory proceedings, as well as agency attorneys who conduct such proceedings.[69]

Justice Rehnquist, together with Chief Justice Burger and Justices Stewart and Stevens, concurred as to those executives protected by absolute immunity, but dissented as to those executives protected only by qualified immunity.[70] They argued that *Spalding* and *Barr* could not be satisfactorily reconciled with *Butz*, that constitutional and common law claims frequently cannot be readily distinguished,[71] and that section 1983 qualified immunity principles should not apply to *Bivens* actions against federal executives.[72] They also emphasized the potential for disruption and predicted that courts would have difficulty weeding out insubstantial claims, even on summary judgment motions, because the parties typically will dispute the state of mind inquiry implicated in

64. 438 U.S. at 507.

65. Imbler v. Pachtman, 424 U.S. 409 (1976); Pierson v. Ray, 386 U.S. 547 (1967); Yaselli v. Goff, 275 U.S. 503 (1927), *summarily aff'g* 12 F.2d 396 (2d Cir. 1926); Bradley v. Fisher, 80 U.S. 335 (1871).

66. The *Butz* defendants' executive status had been relied on by the Second Circuit.

67. According to the Court, these factors included the following: the similarity of the powers of hearing examiners and judges; the exercise by hearing examiners of independent judgment free from pressures; and the similarity of procedural safeguards in adjudicatory and judicial proceedings. 438 U.S. at 513-14.

68. *Id.* at 513.

69. *Id.* at 515-17.

70. *Id.* at 517 (Rehnquist, J., concurring in part and dissenting in part).

71. Consider the long running debate as to whether negligence is actionable under section 1983. *See, e.g.*, Parratt v. Taylor, 451 U.S. 527 (1981). *See generally* Nahmod, *Constitutional Accountability in Section 1983 Litigation,* 68 IOWA L. REV. 1 (1982).

72. 438 U.S. at 524-26.

the subjective part of the qualified immunity test.[73] Thus, these Justices would have *Bivens* actions available only against lower level executives, including law enforcement officers.

Butz made the executive official immunity rules of section 1983 largely applicable to *Bivens* actions. The Court characterized these rules as derived from a combination of policy analysis and section 1983 statutory interpretation, and not from the Constitution.[74] This means that Congress could, if it wanted, change those rules. It also follows that the way in which the qualified immunity test is applied to executive officials in section 1983 cases is instructive for *Bivens* actions as well. In reaching this conclusion, the Court pointed out the need to reconcile a plaintiff's right to compensation for a constitutional deprivation with the need to protect the decision-making process of an executive department. Although there was concern for independent decision-making, the Court found absolute immunity generally not appropriate because the greater power of higher executives afforded them greater potential for lawless conduct.[75]

For the first time in a qualified immunity case, the Court in *Butz* took an expressly functional approach to the scope of immunity issue. While most executives were entitled to qualified immunity, executive status did not automatically confer qualified immunity protection. The Court's sensitivity both to the need for executive flexibility[76] and to the nonexecutive functions of certain executive officials led it to decide that those executives acting as judges or prosecutors in adjudicatory proceedings should, like their judge and prosecutor counterparts, be absolutely immune.

Several observations should be made in this regard. First, those executive officials who primarily[77] adjudicate, such as hearing examiners and administrative law judges, and those who primarily prosecute, such as agency attorneys who conduct adjudicatory proceedings, will always

73. *Id.* at 527. The significance of the prediction is demonstrated by Harlow v. Fitzgerald, 457 U.S. 800 (1982), which changed the qualified immunity test for this very reason. *See infra* text accompanying notes 116-129.

74. 438 U.S. at 497.

75. Scheuer v. Rhodes, 416 U.S. 232, 241-49 (1974).

76. This factor was surely critical to the Court's decision in Nixon v. Fitzgerald, 457 U.S. 731 (1982), *see infra* notes 94-114, that the President of the United States is absolutely immune from damages liability for official conduct within the outer perimeter of his duties.

77. Even full-time judges and prosecutors will sometimes perform acts of a non-judicial and non-prosecutorial nature which are not protected by absolute immunity. For example, judges hire and fire—administrative acts—and prosecutors investigate—a non-advocacy law enforcement act.

be protected by absolute immunity for their judicial and prosecutorial acts. Second, those executive officials who only sometimes execute and only sometimes initiate or continue adjudicatory proceedings will be protected by qualified immunity for the former and by absolute immunity for the latter. Distinguishing between these kinds of acts is not always easy, because often a decision to investigate, for example, can sensibly be described as closely related to a decision to prosecute.[78] The Court's functional approach in *Butz* leaves no alternative but to draw such lines.

Butz's focus on adjudicatory proceedings raises the question whether executive official conduct in federal agency rulemaking proceedings[79] is similarly protected by absolute immunity. The promulgation of legislative-type regulations[80] might be absolutely immune by analogy both to the absolute immunity of federal and state legislators for legislative acts[81] and to the absolute immunity of state judges for legislative acts made under delegated legislative authority over a particular subject matter.[82] If function is determinative, then absolute immunity should apply to such executive official legislative conduct, as well as to judicial and prosecutorial conduct.

In addition, the Court increasingly has applied its functional approach to section 1983 cases involving both qualified and absolute immunity. The Court has held that when regional legislators function like state legislators they are absolutely immune from section 1983 liability for their legislative acts.[83] Police officers, ordinarily protected by qualified immunity, are protected by absolute immunity from liability for their testimony as witnesses in state criminal trials.[84] The Court also has ruled, as noted earlier, that state judges, who are delegated legislative powers over a particular subject, are protected by absolute immunity for their legislative acts.[85]

A functional approach does not, however, lead inevitably to more

78. *E.g.*, Imbler v. Pachtman, 424 U.S. 409 (1976). *See also* Comment, *Qualified Immunity for Executive Officials for Constitutional Violations:* Butz v. Economou, 20 B.C.L. REV. 575 (1979).

79. Federal agency rulemaking is described in part at 5 U.S.C. § 553 (1982).

80. When validly enacted, certain agency rules and regulations have the force and effect of federal law and are called "legislative" in contrast to "interpretative" rules.

81. Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975) (congressmen); Tenney v. Brandhove, 341 U.S. 367 (1951) (state legislators).

82. Supreme Court of Virginia v. Consumers Union, 446 U.S. 719 (1980).

83. Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979).

84. Briscoe v. Lahue, 103 S. Ct. 1108 (1983).

85. Supreme Court of Virginia v. Consumers Union, 446 U.S. 719 (1980).

protection for an official. For example, the Court has held that state judges are not protected by absolute immunity from injunctive relief liability for their prosecutorial role in initiating law enforcement.[86] It has also intimated that a congressman is not absolutely immune from damages liability for a challenged administrative act constituting sex discrimination.[87] Thus, while a functional approach frequently will benefit those defendants ordinarily protected by qualified immunity, there will also be times when defendants such as legislators and judges who ordinarily are protected by absolute immunity for their legislative and judicial acts will not be so protected from liability for nonlegislative and nonjudicial acts.

Butz's functional approach has had considerable impact on the circuit courts as well. Increasingly, courts are conferring absolute immunity on local legislators for their legislative acts,[88] and on parole board officials and other executives for what is termed their quasi-judicial conduct.[89] Taken to an extreme, the *Butz* approach could result in undermining that part of *Wood v. Strickland* which applied qualified immunity to the quasi-judicial conduct of school board members in disciplinary proceedings. Even if a qualified immunity line could be drawn around school board members on the ground that their common law immunity so warrants, a functional approach could ultimately apply to the quasi-judicial conduct of members of state and local government agencies.[90]

In any event, *Butz* made clear that, notwithstanding the absolute immunity from tort liability conferred on executive official conduct within the outer perimeter of duty, a different rule applies for *Bivens* actions. Further, *Butz* demonstrated the Court's continuing view that a proper balance of the competing costs and benefits warranted a qualified immunity rule for most executive official conduct, whether by federal or

86. *Id.* at 734-39. In Pulliam v. Allen, 104 S. Ct. 1970 (1984), the Court held that judges are not absolutely immune from injunctive relief liability for their judicial conduct as well.

87. Davis v. Passman, 442 U.S. 228 (1979).

88. *E.g.,* Hernandez v. City of LaFayette, 643 F.2d 1188 (5th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982); Bruce v. Riddle, 631 F.2d 272 (4th Cir. 1980); Gorman Towers, Inc. v. Bogoslavsky, 626 F.2d 607 (8th Cir. 1980).

89. *E.g.,* Ward v. Johnson, 690 F.2d 1098 (4th Cir. 1982) (en banc) (chairman of prison disciplinary committee); United States *ex rel.* Powell v. Irving, 684 F.2d 494 (7th Cir. 1982) (parole board officials); Sellars v. Procunier, 641 F.2d 1295 (9th Cir.), *cert. denied,* 454 U.S. 1102 (1981) (parol board officials). *But see* Fowler v. Cross, 635 F.2d 476 (5th Cir. 1981) (parole board officials protected by qualified immunity).

90. See cases collected in S. NAHMOD, *supra* note 3, at § 7.08 (1984 Supp.).

state executive officials. It also showed that at least four Justices were seriously worried about the potential for disruption of government, especially in situations when the "grounds for [executive] action are doubtful, or in which the actor is timid."[91]

Four years after *Butz*, the *Butz* dissent emerged as prevailing doctrine. In *Nixon v. Fitzgerald*[92] the Supreme Court felt compelled to carve out an absolute immunity exception to qualified immunity for the President. Also, in the companion case of *Harlow v. Fitzgerald*,[93] the Court significantly modified the previously established two-part qualified immunity test.

B. Nixon v. Fitzgerald: *The President*

In 1982 the Supreme Court held, in *Nixon v. Fitzgerald*,[94] that a former President is absolutely immune from *Bivens* damages liability[95] for acts within the outer perimeter of his duties. In so doing, the Court (1) straddled the question whether this Presidential immunity is constitutionally compelled, (2) treated the President differently than it had treated the highest state executives in section 1983 cases, (3) departed in part from the functional approach in *Butz*, and (4) in effect made a special kind of immunity law applicable only to the President.

In *Nixon*, the plaintiff sued former President Nixon and others[96] for damages for violating his first amendment rights and certain implied federal statutory rights in connection with his dismissal as a management analyst from the Air Force. Plaintiff claimed that he had been dismissed in retaliation for his testimony before Congress in which he spoke of significant cost overruns on the C-5A transport plane. The district court ruled that plaintiff could proceed against the President on

91. 438 U.S. at 1527 (Rehnquist, J., dissenting).

92. 457 U.S. 731 (1982).

93. 457 U.S. 800 (1982).

94. 457 U.S. 731 (1982).

95. The Court's holding does not necessarily grant a former President absolute immunity from injunctive relief. *Cf.* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (Court threatened to enjoin the delivery of the seal to a judicial appointment of President). *But cf.* Supreme Court of Virginia v. Consumers Union, 446 U.S. 719 (1980), *cert. denied,* 103 S. Ct. 3124 (1983) (Congressmen and state legislators are absolutely immune from liability for both damages and prospective relief); Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975) (speech or debate clause affords legislators absolute immunity from judicial interference).

96. What happened to these others, two presidential aides, was addressed by the Court in the companion case of Harlow v. Fitzgerald, 457 U.S. 800 (1982).

these claims[97] and the District of Columbia Circuit Court of Appeals summarily dismissed a collateral appeal on the immunity issue, relying on *Halperin v. Kissinger*[98] for the proposition that the President is not absolutely immune.[99]

In an opinion by Justice Powell, the Supreme Court reversed and held that a President is absolutely immune from *Bivens* damages liability for acts taken within the outer perimeter of his duties. The Court reviewed federal immunity law in general, observing that certain officials are entitled to absolute immunity based on common law,[100] that others are entitled either to absolute immunity or qualified immunity as a matter of federal statutory interpretation,[101] and that still others are entitled to either absolute or qualified immunity as a matter of federal policy.[102] The Court noted that in *Butz* it had left open the question whether other federal officials could show that "public policy" required that they be protected by absolute immunity.[103]

The Court went on to hold that a former President, for reasons stemming from constitutional heritage and structure, should be protected by absolute immunity.[104] The President, first of all, has a unique status under the Constitution that distinguishes him from all other executives. Consequently, there is greater concern with diversion of his energies and interference with his effective functioning. In addition, his visibility and far-reaching decisions make him an easy target for lawsuits. Second, the interest of litigants in private suits for damages is outweighed by the interest of minimizing the dangers of judicial intrusion on the President's authority and functions. Third, while absolute immunity ordinarily extends to acts in performance of certain functions, the special nature of the President's office and functions requires that absolute immunity extend to acts within the "outer perimeter" of his official responsibility. Presidential *status* is determinative. Otherwise, attempts by courts to draw lines among different presidential functions would involve them in highly intrusive inquiries into presidential mo-

97. 457 U.S. at 740.

98. 606 F.2d 1192 (D.C. Cir. 1979), *aff'd by equally divided Court,* 452 U.S. 713 (1981).

99. 457 U.S. at 741.

100. Spalding v. Vilas, 161 U.S. 483 (1896) (Postmaster General).

101. *E.g.,* Scheuer v. Rhodes, 416 U.S. 232 (1974) (qualified immunity for state executives); Tenney v. Brandhove, 341 U.S. 367 (1951) (absolute immunity for state legislators). Both cases were brought under section 1983.

102. *E.g.,* Butz v. Economou, 438 U.S. 478 (1978).

103. 457 U.S. at 747.

104. *Id.* at 749-50.

tives. Moreover, the existence of other remedies and deterrents ensures that the President is not "above the law."[105]

In his concurring opinion, Chief Justice Burger emphasized that absolute immunity for the President "derives from and is mandated by the constitutional doctrine of separation of powers."[106] Justice White, joined by Justices Brennen, Marshall, and Blackmun dissented, arguing that there is no constitutional or policy basis for absolute immunity for the President, that the majority had improperly refused to apply the functional approach to the scope of presidential immunity, and that qualified immunity protection is adequate for the President just as it is for most federal executives.[107]

The majority did its best to avoid resting its decision solely on the Constitution.[108] In a footnote, Justice Powell, writing for the Court, stated:

> [W]e need not address directly the immunity question as it would arise if Congress expressly had created a damages action against the President of the United States . . . . Consequently, our holding today need only be that the President is absolutely immune from civil damages liability for his official acts *in the absence of explicit affirmative action by Congress*.[109]

Evidently, the Court was reluctant to constitutionalize presidential immunity law completely and preclude congressional action in the area. This reluctance is consistent with the Court's view of the possible congressional role to be played in connection with the *Bivens* prima facie case as well.[110] Until Congress acts, however, absolute presidential immunity from damages liability is the rule.

It is significant that the President is treated differently in two respects from any other high level government executive. For one thing, the qualified immunity rule for state governors as established in section 1983 cases by *Scheuer v. Rhodes*[111] does not apply to the President, even though a state governor is in many respects analogous to a president. For another, all other federal and state officials who are accorded absolute immunity are nevertheless subject to a functional inquiry. Thus, judges and prosecutors are absolutely immune from damages lia-

105. *Id.* at 758.
106. *Id.* (Burger, C.J., concurring).
107. *Id.* at 764-67 (White, J., dissenting).
108. Contrast the speech or debate clause basis for congressional absolute immunity.
109. 457 U.S. at 748 n.27 (emphasis added).
110. *See Bivens*, 403 U.S. at 397.
111. *See supra* notes 29-31 and accompanying text.

bility only for their judicial and prosecutorial acts. In contrast, the President is absolutely immune from damages liability for all acts within the outer perimeter of his duties, regardless of the relation between such acts and particular executive functions.[112] Apparently the Court simply did not want to undertake the arduous line-drawing task for Presidential conduct.

Once an entitlement to absolute presidential immunity was found applicable, it was probably inevitable that the scope of that immunity could not and would not be confined. The Court's rejection in *Nixon* of a functional approach may be based on the common sense recognition that presidential functions are so broad and diverse that, unlike judging, prosecuting, and governing at the state level, they cannot be so readily compartmentalized. In addition, a case by case approach to presidential functions, in order to determine which are absolutely protected and which are not, would interfere with and distract from presidential activities, and might adversely affect the independence of presidential decision-making. The Court was also worried about the potential scope of discovery of presidential conduct which would result if a qualified immunity rule were adopted. Indeed, this concern with wide ranging inquiries into, and possible chilling effect on, executive official conduct is reflected in the Court's modification of the qualified immunity test in the companion case of *Harlow v. Fitzgerald*.[113]

For all these reasons, the Supreme Court made executive official immunity law applicable only to the President of the United States. Confronted with the spectre of a torrent of *Bivens* actions against federal executives generally, the Court drew the line at the President, finding that he was the only one to whom the predictability of absolute immunity was essential. It may not, however, make much difference, except for symbolic purposes, that the President is absolutely immune. Even if the President were only qualifiedly immune, a *Bivens* plaintiff would still have to show the President's personal involvement in the claimed constitutional violation.[114] This is a very difficult task. Furthermore, the President typically acts through his Cabinet and his aides, execu-

112. This scope of immunity standard, it will be recalled, was developed for executive officials sued for common law torts. Barr v. Matteo, 360 U.S. 564 (1959); Spalding v. Vilas, 161 U.S. 483 (1896).

113. 457 U.S. 800 (1982).

114. *Cf.* Rizzo v. Goode, 423 U.S. 362 (1976) ("personal involvement" in constitutional violation necessary for section 1983 liability). Note that in *Nixon*, the President at first took personal responsibility for Fitzgerald's discharge, but he later retracted. *Nixon*, 457 U.S. at 737.

tives who, after *Butz* and *Harlow*, are protected by only qualified immunity, even if they conspire with an absolutely immune President. Thus, a *Bivens* plaintiff who is otherwise entitled to prevail on the merits will ordinarily not be denied recovery solely by reason of presidential absolute immunity.[115]

C. Harlow v. Fitzgerald: *Second Thoughts About* Butz

In *Harlow v. Fitzgerald*,[116] the companion case to *Nixon*, the Supreme Court reaffirmed the *Butz* holding that executives generally are protected by qualified immunity. Like *Nixon*, the *Harlow* Court emphasized the costs of qualified immunity to independent decisionmaking but, constrained by *Butz* and *Scheuer*, the Court could not confer absolute immunity on all higher level federal executives. Instead, the Court did the next best thing: it substantially modified the qualified immunity test by removing the subjective part.[117] As justification for doing so, the Court reviewed the list of costs imposed on federal executives protected by the two-part qualified immunity test and, not surprisingly, found those costs excessively disruptive of executive decisionmaking.[118] The Court, by eliminating the subjective part, made qualified immunity considerably more protective of defendants and in large measure converted qualified immunity into the equivalent of absolute immunity.[119]

Harlow involved first amendment and federal statutory claims against two presidential senior aides who allegedly conspired to violate the plaintiff's rights in connection with his termination as a management analyst for the Air Force. The district court denied defendants' motion for summary judgment, ruling that they were not entitled to absolute immunity, a ruling affirmed without opinion by the District of Columbia Circuit Court of Appeals. The Supreme Court, relying extensively on *Butz*, held that the aides were protected by only qualified immunity because they could not show that public policy required ab-

115. According to the Court, any regulation of conduct function that might be served by imposing *Bivens* liability on the President can be accomplished as well by other avenues, including impeachment, political accountability, and the availability of damages and injunctive relief remedies against the President's Cabinet members and aides. 457 U.S. at 757-58.

116. 457 U.S. 800 (1982).

117. *Id.* at 817-18.

118. *Id.* at 815-18.

119. The Court transformed qualified immunity into absolute immunity in the sense that defendants will more readily be dismissed on summary judgment grounds without reaching the merits of the claim, and without any discovery.

solute immunity. The Court emphasized that in *Butz* the Secretary of Agriculture, a member of the President's Cabinet, had not been given absolute immunity even though he, like the presidential aides in *Harlow*, was directly accountable to the President.[120]

The Court also rejected a derivative immunity argument based on the holding in *Gravel v. United States*,[121] that certain legislative acts of senatorial aides are absolutely immune.[122] The argument here was that presidential aides should be absolutely immune for acts which, had they been performed by the President himself, would be absolutely protected. According to the Court, this result not only was foreclosed by *Butz* itself, but would be inconsistent with the Court's functional approach in other absolute immunity cases.[123] Although the Court refused to allow blanket absolute immunity protection for "special functions" of presidential aides, it agreed that absolute immunity might be justified for their discretionary acts in the areas of national security or foreign policy.[124] Nevertheless, this possible exception to qualified immunity was not applicable in *Harlow* because none of the acts charged by plaintiff was "within the protected area."

With *Butz* thus reaffirmed and applied to presidential aides, the Court turned to the qualified immunity test itself. Acknowledging that the qualified immunity test, when properly applied, should in theory "permit the defeat of insubstantial claims without resort to trial," the Court contended that as a practical matter the subjective part of the test often prevented such a result.[125] This stemmed from the fact that courts typically considered an official's subjective good faith as a disputed question of fact which should not be decided on motion for summary judgment. An official who had prevailed on his motion for summary judgment with respect to the objective part of the test would still have to proceed to trial, even though, according to the Court, he would in most cases ultimately prevail because the plaintiff could not show subjective bad faith.

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120. *Id.* at 808-09.

121. 408 U.S. 606 (1972).

122. *Harlow*, 457 U.S. at 809-10.

123. *Id.* at 816-18. Chief Justice Burger dissented, arguing that presidential aides who are "elbow aides" are in reality presidential alter egos who deserve absolute immunity protection. *Id.* at 824 (Burger, C.J., dissenting).

124. *Id.* at 812 n.19.

125. Recall the dissent's warning to this effect in *Butz*, 438 U.S. at 1526; *see supra* text at note 73. As examples, the Court cited Landrum v. Moats, 576 F.2d 1320 (8th Cir. 1978) and Duchesne v. Sugarman, 566 F.2d 817 (2d Cir. 1978). Harlow v. Fitzgerald, 457 U.S. at 816, n.27.

Consequently, the Court did away with the subjective, "malice" part of the test, and held that "government officials performing discretionary functions generally are shielded from liability insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[126] Reflecting its general concern with intrusive discovery,[127] as well as its apparently skeptical view of the merits of the case before it,[128] the Court declared that discovery should not be permitted unless the law, at the time a defendant acted, was clearly settled. Only if the law was clearly settled could a defendant be required to know that his conduct was unlawful and the plaintiff be allowed to proceed with discovery and the lawsuit. In a very real sense, therefore, *Harlow* represents a return to the dictum in *Pierson v. Ray*[129] that an executive "is not charged with predicting the future course of constitutional law."

Harlow and *Nixon* emphasize the costs of defending against constitutional tort litigation. *Nixon* provides the widest possible margin for error by establishing that the absolute immunity rule applies even to presidential misconduct that was known to the President to be clearly unconstitutional when it occurred. While not going so far, *Harlow*'s modified qualified immunity test still considerably increases the margin for error of other executives by allowing them to be dismissed from a suit on summary judgment motion shortly after the onset of litigation when clearly settled law is not shown. As I argue later, *Navarette*'s restrictive application of clearly settled law should not be the norm.[130] But if it turns out to be, then in many, if not most, cases when executives have violated constitutional rights, they will in effect be absolutely immune. They will not be subject to discovery, and the merits of the claims against them will not be reached. More importantly, the net effect may well be the underprotection of constitutional rights. Before this is considered, it will be useful to discuss briefly the Court's approach to statutory interpretation as reflected in *Harlow*.

126. 457 U.S. at 818.

127. "In suits against a President's closest aides, discovery of this kind frequently could implicate separation-of-power concerns." *Id.* at 817 n.28.

128. Both defendants argued, the Court noted, that years of "exhaustive discovery" had failed to implicate them in wrongful conduct. *Id.* at 803-04.

129. 386 U.S. at 557.

130. However, such a restrictive application was confirmed in Davis v. Sherer, 104 S. Ct. 3012 (1984). *See infra* note 168.

III. STATUTORY INTERPRETATION, COST-BENEFIT ANALYSIS AND PREDICTABILITY

A. The Myth of Statutory Interpretation

On its face, section 1983 indicates that no immunities are available to defendants against whom a prima facie case has been made. Nevertheless, since the absolute state legislator immunity decision in *Tenney v. Brandhove*,[131] the Court has dealt with section 1983 immunity issues as statutory interpretation questions to be resolved against the common law background which existed in 1871, the year section 1983 was enacted. The Court looks at the common law immunity background for the particular official, asks whether that background is consistent with the purposes of section 1983, and decides accordingly. Typically, the common law immunity background carries over to section 1983. In this way, for example, state legislators, judges, and prosecutors were given absolute immunity,[132] while police officers were given qualified immunity.[133] Occasionally, though, the common law immunity background is not conclusive as, for example, for state executives.[134] In either event, section 1983 purposes are examined.

Before *Harlow*, therefore, the Court addressed section 1983 immunity in statutory interpretation terms. It was becoming increasingly clear, however, that policy analysis divorced from statutory interpretation—in the sense of discovering legislative intent or purpose—frequently predominated. The reasons were several. Once the Supreme Court considered the common law background in a particular case to be relevant to the existence *vel non* of some non-absolute immunity, section 1983's language provided no further guidance on the immunity question. Also, section 1983's legislative history was of little or no help on the issue of scope of immunity.[135] Indeed, Justice O'Connor made

131. 341 U.S. 367 (1951).

132. Stump v. Sparkman, 435 U.S. 349 (1978) (judges); Imbler v. Pachtman, 424 U.S. 409 (1976) (prosecutors); Pierson v. Ray, 386 U.S. 547 (1967) (judges); Tenney v. Brandhove, 341 U.S. 367 (1951) (state legislators).

133. Pierson v. Ray, 386 U.S. 547 (1967).

134. Scheuer v. Rhodes, 416 U.S. 232 (1974).

135. This is so unless that legislative history is interpreted as comprehending the "background of tort liability" in 1871 which could then be used as a source. The Court may have thought it was doing this in *Pierson* for police officers, but it was not. A close reading of the opinion discloses no discussion of the state of the law of police officer privilege in 1871. The Court's references were to the contemporary doctrine of police officer privilege. *Pierson*, 386 U.S. at 557. Furthermore, even if there had been some reference to 1871, it would not have been very helpful. The Court's canon of construction appears to rely on the *absence* of any express congressional intent to abolish com-

such an observation about section 1983 remedy issues in arguing openly that the proper standard for an award of punitive damages under section 1983 is primarily a question of policy for the Court to resolve.[136] Justice Brennan contended that section 1983's 1871 common law background should not be used to freeze its development.[137] *Butz* itself, while paying lip service to section 1983 qualified immunity as an issue of statutory interpretation, hedged somewhat and spoke also—as it had to, because a *Bivens* action was involved—of weighty policy considerations of a functional nature cutting in favor of all constitutional tort defendants.[138]

If there was any doubt that the scope of section 1983 qualified immunity is primarily a function of judicial policy making, it was dispelled in *Harlow*. The *Harlow* Court made no attempt to explain the change in qualified immunity as a matter of statutory interpretation.[139] It is true, of course, that *Harlow*, like *Butz*, is a *Bivens* action. Therefore, strictly speaking, *Harlow* might not apply to section 1983 actions. But the Court, in a terse footnote which characterized this possibility as "untenable,"[140] left little doubt that *Harlow*'s modified qualified immunity test does apply to section 1983 cases as well as to *Bivens* cases.[141]

A frank policy-oriented approach to qualified immunity frees the Court to fashion whatever qualified immunity test it wishes. On the one hand, this provides judicial flexibility to make changes, as shown by *Harlow*. On the other, it provides the opportunity to cut back on the effective scope of section 1983 by expanding the protection of qualified immunity.[142] Because section 1983's language and legislative history[143]

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mon-law immunity doctrine, *i.e.*, congressional silence. *See, e.g.*, Tenney v. Brandhove, 341 U.S. 367 (1951). Needless to say, congressional silence can be readily manipulated. *Cf.* Patsy v. Board of Regents, 457 U.S. 496, 500 (1982) (exhaustion of administrative remedies not required for section 1983 actions; "tenor of the [1871] debates" supported conclusion, but admittedly Congress never addressed the issue in 1871).

136. Smith v. Wade, 103 S. Ct. 1625, 1658-59 (1983).

137. *Id.* at 1628 n.2.

138. 438 U.S. at 496-504.

139. Whether the statutory interpretation inquiry is characterized as one into legislative intent or legislative purpose, see P. BREST & B. LEVINSON, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 81-82 (2nd ed. 1983), the Court in *Harlow* did not speak in statutory interpretation terms at all.

140. 457 U.S. at 818 n.30.

141. The circuits have so understood *Harlow*. *See, e.g.*, Ward v. Johnson, 690 F.2d 1098 (4th Cir. 1982) (en banc); Saldana v. Garza, 684 F.2d 1159 (5th Cir. 1982), *cert. denied,* 103 S. Ct. 1253 (1983). *See also* Wolfel v. Sanborn, 691 F.2d 290 (6th Cir. 1982).

142. If one posits a statute such as section 1983 which on its face creates a far-reaching cause of action whose wisdom or utility a majority of the Justices question, then one effective way of

do not address specific immunity issues, a major role for policy was perhaps inevitable. The important question is what policy. As the Court regularly has asserted, section 1983's language and legislative history, if nothing else, make clear that section 1983 is designed both to deter unconstitutional conduct and to compensate for harm caused.[144] These purposes, as well as the fourteenth amendment values they reflect, should be taken into account in any qualified immunity policy determinations. It now remains to be seen whether *Harlow*'s modified qualified immunity test is properly sensitive to these values.[145]

B. Cost-Benefit Analysis

Harlow's change in the qualified immunity test demonstrates the Court's increased sensitivity to the costs to *defendants* of defending against constitutional tort litigation,[146] at the same time showing the Court's lack of concern for the financial and psychological costs to constitutional tort *plaintiffs* of conducting such litigation. It also reflects, in

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limiting the coverage and scope of that cause of action is to broaden the coverage and scope of various defenses.

143. Interpreting statutes by the selective use of legislative history has been compared to "looking over a crowd and picking out your friends." Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term,* 68 IOWA L. REV. 195, 214 (1983) (quoting a conversation with Judge Harold Leventhal). To the extent this is true for section 1983 interpretation, it is the unfortunate legacy both of the Court's use of congressional silence about absolute legislator immunity in Tenney v. Brandhove, 341 U.S. 367 (1951), and of the Court's ambiguous use of the "background of tort liability" in Pierson v. Ray, 386 U.S. 547 (1967).

Such difficulties involving section 1983 interpretation may be part of a larger problem involving statutory interpretation in the Supreme Court. *Compare* Note, *Intent, Clear Statements and the Common Law: Statutory Interpretation in the Supreme Court,* 95 HARV. L. REV. 892 (1982) *with* Wald, *supra*.

144. Carey v. Piphus, 435 U.S. 247 (1978); Mitchum v. Foster, 407 U.S. 225, 238-39 (1972).

145. That is, an approach that neither rejects these values nor significantly understates them. Enforcing fourteenth amendment values, as mandated by section 1983, must not be eroded by judicial policy making in the area of qualified immunity which is divorced from those values.

146. As distinct from the costs of being sued and the costs of an adverse judgment. *See* P. SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS 60 (1983). The distinction is important for the purposes of this Article. The modified qualified immunity test was not as such designed by the Court to reduce the costs of being sued, *i.e.,* those costs stemming from the filing of the suit itself. In contrast, the availability of absolute immunity significantly reduces the filing of such suits against certain defendants. Similarly, the modified qualified immunity test was not viewed by the Court as reducing the likelihood of adverse judgments in light of *Harlow*'s assertion that under the prior two part test, most defendants who had prevailed on the objective part through motion would win on the subjective part at trial. Rather, as will be seen, modifying the qualified immunity test was directed at reducing the costs of defending against constitutional tort litigation. This being true, however, it is clear that if the modified test works as planned by the Court, fewer constitutional tort cases will be filed, thereby reducing these two other costs.

part, the Court's own continuing split over the proper scope of section 1983 liability, a split ranging from local government liability through punitive damages to standing to seek injunctive relief.[147]

The Court's list of costs in *Harlow*, set out in order to justify eliminating the subjective part of the qualified immunity test, is particularly instructive and merits analysis. The Court first spoke of what it called general costs, or the individual and social costs of exposure of innocent defendants to the risks of trial. These included the following: (1) the expenses of litigation; (2) the diversion of official energy from pressing public issues; (3) the deterrence of able citizens from accepting public office; and (4) the chilling effect on the discharge of official duties.[148]

As to these general costs, several features are noteworthy. First, the Court assumed that these are borne by the innocent. While this may be true, they are borne by the guilty as well. Second, these costs are virtually identical to the costs discussed in some of the Court's absolute immunity cases.[149] The Court never before spoke of these costs in a qualified immunity setting to justify a change in qualified immunity, but only to explain why absolute immunity should apply rather than qualified immunity.[150] In earlier cases, once qualified immunity was found to be appropriate, general costs, to the extent they were present, were considered unavoidable and to be borne by defendant officials, their government employers, and the public at large.

The Court next spoke of what it called the special costs of the subjective part of the qualified immunity test. It noted that executive discretionary decisions are influenced by a decision-maker's experiences, values, and emotions. It then observed that: (1) subjective intent can rarely be decided by summary judgment; (2) there is no clear end to relevant evidence; (3) discovery is often wide ranging, including the deposing of professional colleagues as well as numerous other persons;

147. City of Los Angeles v. Lyons, 103 S. Ct. 1660 (1983) (5-4 decision) (separate, independent standing inquiries for section 1983 damages and injunctive relief actions); Smith v. Wade, 103 S. Ct. 1625 (1983) (5-4 decision) (punitive damages liability for individuals even without actual malice); Owen v. City of Independence, 445 U.S. 622 (1980) (5-4 decision) (no section 1983 immunity for local governments).

148. 457 U.S. at 816.

149. *E.g.*, Imbler v. Pachtman, 424 U.S. 409 (1976) (absolute prosecutorial immunity from damages liability).

150. In Imbler v. Pachtman, 424 U.S. 409 (1976), the Court did not question general cost (3). The Court has, of course, referred to general costs (3) and (4) in cases holding that qualified immunity, and not absolute liability, is applicable. *E.g.*, Wood v. Strickland, 420 U.S. 308, 313-22 (1975); Pierson v. Ray, 386 U.S. 547, 553-55 (1967).

and (4) such inquiries into state of mind can cause disruption of government.[151] This list of general and special costs led the Court to do away with the subjective part of the test, because, in its view, federal courts were not otherwise able to weed out frivolous claims prior to trial.[152] By so doing, the Court may have considerably increased the margin for error of defendants in section 1983 and *Bivens* cases.

There are, however, serious questions about the Court's list and its use of these costs. It is always easy for a court to list costs implicated in a course of conduct or activity—here, liability for constitutional torts—that it wishes to discourage.[153] Also, it is beyond dispute that to some extent, these general and special costs do exist. Indeed, section 1983 and *Bivens* liability are supposed to have an effect on executive decision-making. But the Court discussed no data showing that the costs to government officials of the two-part test in fact had a significant adverse effect on executive decision-making. Additionally, the Court did not appear to consider all of the costs of modifying the qualified immunity test. Because the two-part test had an additional hurdle, it would seem to follow that defendants were more often held liable under the two-part test than they will be under the modified objective test.[154] Consequently there will be more situations under the modified test than there were under the prior two-part test in which defendants violate constitutional rights with no remedy for plaintiffs. These unremedied violations impose costs on society which have not been, and perhaps cannot be, measured satisfactorily. Such costs include disrespect for authority, disrespect for the constitution and laws generally, the erosion of fourteenth amendment values, and the prospect that some executives might be undeterred in connection with fourteenth amendment compliance.[155] There are also, of course, costs to the indi-

151. *Harlow*, 457 U.S. at 816. Note that state of mind inquiries are frequently relevant to the *prima facie* case as well. *See generally* S. NAHMOD, *supra* note 3, at ch. 3.

152. 457 U.S. at 816-19. A similar concern with possible harassment suits against executives and overdeterrence is addressed in Cass, *Damage Suits Against Public Officers,* 129 U. PA. L. REV. 1110, 1153-74 (1981).

153. *Cf.* United States v. Leon, 104 S. Ct. 3405, 3430 (1984) (Justice Brennan's cost-benefit analysis observation, *supra* note **).

154. Circuit court decisions in which defendants failed the subjective part of the test include *e.g.,* Wolfel v. Sanborn, 666 F.2d 1005 (6th Cir. 1982), *cert. denied,* 452 U.S. 916 (1981); Williams v. Board of Regents of University System of Georgia, 629 F.2d 993 (5th Cir. 1980), *cert. denied,* 452 U.S. 926 (1981); Flores v. Pierce, 617 F.2d 1386 (9th Cir. 1980); Crowe v. Lucas, 595 F.2d 985 (5th Cir. 1979), *cert. denied,* 455 U.S. 907 (1982).

155. These costs are also relevant to the argument made later in this Article that the objective test should not be rigidly applied in a pro-defendant manner.

vidual, such as the actual harm caused and the feeling of being victimized.

A related criticism of the Court's approach may be made by considering the *benefits* of the prior two-part test. When the *Harlow* Court was deciding whether to change the prior test by calculating its costs, it should also have calculated its benefits, as well as the benefits of the modified test. Only in this way could the costs and benefits of the prior test and the modified test have been compared for the purpose of deciding which test was better overall, resulting in greater social benefit. This is not to suggest that such cost-benefit analysis is or should be determinative, or even that it is possible for it to be meaningful when dealing with constitutional compliance. After all, as the Court has asserted in other contexts, there are higher substantive values in our constitutional scheme than efficiency, even if calculable.[156] Indeed, it has been urged that even procedure has value independent of efficiency.[157] Nevertheless, if the Court is going to play the cost-benefit game, it should abide by the rules.

The *Harlow* opinion bears a striking resemblance to Justice White's opinion for the Court in *U.S. v. Leon*,[158] and his earlier separate opinion in *Illinois v. Gates*,[159] setting out the argument that the exclusionary rule is a judicially created remedy for fourth amendment violations which is to be evaluated by a cost-benefit analysis. Unlike the exclusionary rule, though, and unlike *Bivens* actions, section 1983 is a congressional creation for the protection and vindication of fourteenth amendment rights. Congress has already made the decision that as a

156. Immigration and Naturalization Serv. v. Chadha, 103 S. Ct. 2764, 2780-81 (1983) (holding unconstitutional the congressional legislative veto and stating: "[I]t is crystal clear from the records of the convention, contemporaneous writings and debates, that the Framers ranked other values higher than efficiency.") *See also* Stanley v. Illinois, 405 U.S. 645 (1972). The Court stated:

> Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.

Id. at 656.

157. *See* Laycock, *Due Process and Separation of Powers,* 60 TEX. L. REV. 875 (1982); Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge*: Three Factors in Search of a Theory of Value,* 44 U. CHI. L. REV. 28 (1970). *See also* Schweiker v. McClure, 456 U.S. 188, 194 (1982) (fairness as value); McNabb v. United States, 318 U.S. 332, 347 (1943) ("The history of liberty has largely been the history of observance of procedural safeguards.").

158. 104 S. Ct. 3405 (1984). *See infra* note 160.

159. 103 S. Ct. 2317, 2340-44 (1983). *See also* Posner, *Rethinking the Fourth Amendment,* 1981 S. CT. REV. 49 (exclusionary rule over deters).

general matter the benefits of fourteenth amendment compliance outweigh the costs of such compliance. Thus, judicially overstating costs and understating benefits in order to limit this congressional remedy against individual defendants is indefensible. Nevertheless, *Harlow* reflects the Court's determination to run this risk of underprotecting fourteenth amendment rights, rather than overprotecting them at the possible expense of independent executive decision-making.[160]

As will be seen next, an analysis of the objective part of the qualified test reinforces this view. Whatever one thinks of the advisability of doing away with the subjective part of the test,[161] the clearly settled law part of the test has the independent potential for dramatically reducing the scope of liability for executives. This is so because many constitutional rules and their application turn out not to be clearly settled for liability purposes. Under *Harlow*, defendants on summary judgment motion frequently will be dismissed without a consideration of the merits. This being the case, the Court has, in a constitutional tort context, limited individual liability by converting qualified immunity into the equivalent of absolute immunity.

C. Settled Law, Predictability and Process Factors

The settled law component is closely related to the costs of defending against constitutional tort litigation. As the margin for error of constitutional tort defendants is reduced, the general and special costs of litigation described by the *Harlow* Court will tend to increase. Conversely, when the margin for error is increased, then these costs of litigation will tend to decrease. Although *Wood*'s duty to know settled law initially might have suggested that the margin for error should be

160. Compare *United States v. Leon*, where the Court held that there should be a "good faith" exception to the fourth amendment's exclusionary rule when a search warrant is obtained from a "detached and neutral magistrate." If the Court ultimately goes beyond *Leon* to adopt generally a "good faith" test for the exclusion of evidence obtained by police in violation of the fourth amendment, whether with or without a search warrant, then what the Court considers to be improper judicial interference with police officer decision-making will be reduced even more. Also, the deterrent effect of both constitutional tort liability and the exclusionary rule will be significantly reduced as well. Thus, there will be no available remedy in most cases when a police officer violates a citizen's fourth amendment rights, unless that violation is egregious. For a discussion of remedies in an exclusionary rule setting, see Barnett, *Resolving the Dilemma of the Exclusionary Rule: An Application of Restitutive Principles of Justice*, 32 EMORY L.J. 937 (1983).

161. If one believes that every defendant who passes the objective part of the test will also pass the subjective part, and that every defendant who fails the subjective part will also fail the objective part, then the subjective part will be viewed as superfluous.

reduced for defendants,[162] *Navarette* quickly corrected that impression by turning *Wood* on its head and using it against plaintiffs.[163] *Navarette*, it will be recalled, dealt with settled law in three related respects: Was there a settled constitutional rule at the time of the challenged conduct? If so, should defendants have known of this rule? Finally, if they should have known of the rule, should they have known that their conduct violated this rule?

In *Navarette*, the Court never got past the first hurdle for the defendants. Refusing to extrapolate from existing case law, the Court held that at the time of the challenged conduct there was no first amendment right of inmates to send mail. The Court's message as to the meaning of settled law was clear: the margin for error of defendants should be significant. In addition, the *Harlow* Court found that even when clearly settled law exists "out there," there may be exceptional circumstances when an official is under no obligation to know of its existence—a second hurdle.[164] The scope of this exception remains unclear, although it may refer to situations where a particular defendant may not have had meaningful access to legal advice.[165] Moreover, the law application condition—a third hurdle—requires that defendants know settled law as applied to their situation in order to be liable. This creates further play in the joints of the settled law requirement.[166] The Court may have intended that not only must there be a settled constitutional rule of general applicability, but there must also be a relevant prior case on point holding unconstitutional the same kind of conduct as that challenged.[167] Indeed, this intention was recently confirmed by

162. *See supra* notes 32-38 and accompanying text. For criticism of such a reading see Cass, *supra* note 152, at 1153.

163. *See supra* notes 39-49 and accompanying text.

164. 457 U.S. at 819. However, as Justice Brennan, joined by Justices Marshall and Blackmun, stated in his concurring opinion, the new standard "would not allow the official who *actually knows* that he was violating the law to escape liability for his actions, even if he could not reasonably have been expected to know what he actually did know." *Id.* at 821 (Brennan, J., concurring) (emphasis in original).

165. *See, e.g.*, Barnett v. Housing Authority of City of Atlanta, 707 F.2d 1571 (11th Cir. 1983); Treen v. White, 693 F.2d 45 (8th Cir. 1982).

166. This is demonstrated by cases ruling for defendants on such law application grounds. *E.g.*, Saldana v. Garza, 684 F.2d 1159, 1164-65 (5th Cir. 1982), *cert. denied*, 103 S. Ct. 1253 (1983); Withers v. Levine, 615 F.2d 158 (4th Cir.), *cert. denied*, 449 U.S. 849 (1980).

167. Such a rigid approach appears to have been used in Knell v. Bensinger, 522 F.2d 720 (7th Cir. 1975) and in Shirley v. Chagrin Falls Exempted Village Schools of Bd. of Educ., 521 F.2d 1329 (6th Cir. 1975), *cert. denied*, 424 U.S. 913 (1976).

the Court in *Davis v. Scherer*,[168] a 1984 decision, which, like *Navarette*, found no relevant clearly settled law.

168. 104 S. Ct. 3012 (1984). In *Davis*, decided in July, 1984, the Court again demonstrated that it would apply the clearly settled law component in a pro-defendant manner. The Court also held that a defendant who otherwise passes the *Harlow* qualified immunity test regarding clearly settled *constitutional* law does not lose his or her qualified immunity for violating clearly settled *state* law.

Davis involved a 1983 suit brought by a former Florida highway patrol employee—discharged because of an employment conflict of interest—against officials of the highway patrol for damages for their alleged violation of his procedural due process rights in not providing him with a formal prompt pre or post termination hearing. The district court found for plaintiff on the ground that the defendants had violated clearly settled state law even though plaintiff's due process rights had not been clearly established at the time he was discharged in 1977. Hence, the defendants' belief in the legality of their conduct was unreasonable. The Fifth Circuit affirmed, but the Supreme Court reversed in an opinion by Justice Powell.

The Court began by conceding that the plaintiff's due process rights were violated, but it rejected plaintiff's argument that those rights were clearly established in 1977. The Court simply observed that the Fifth Circuit in 1981 had held that "the State had violated no clearly established due process right when it discharged a Civil Service employee without *any* pretermination hearing." *Id.* at 3018. As to the Supreme Court's own prior due process precedents, which earlier established that some kind of a hearing was required when a property interest may be deprived, Justice Powell asserted that those precedents did not deal with "minimally acceptable procedures for termination of employment." *Id.* at 3019. In *Davis*, the plaintiff had been informed several times of his employer's objections to his second job and even had presented his reasons to his employer. Also, the official, who had decided to discharge the plaintiff, had those reasons and other information before him. Thus, the plaintiff's due process rights to a formal pretermination or prompt post termination hearing were not clearly established in 1977.

The Court had somewhat more difficulty with plaintiff's second argument that the defendants' violation of their own personnel regulations—which clearly required a complete investigation and an opportunity for the employee to respond in writing—undercut the defendants' qualified immunity even though those regulations were not the basis of the plaintiff's claim. While this contention had "some force," the Court expressed concern that such an approach would render government officials liable in an "indeterminate amount for violation of any constitutional right . . . merely because their official conduct also violated some statute or regulation." *Id.* at 3020. Also, state law-related matters could not always be resolved on summary judgment.

Justices Brennan, Marshall, Blackmun and Stevens dissented on the qualified immunity issue in a manner consistent with the argument presented in this Article. They focused on whether the plaintiff's due process rights had been clearly established in 1977 when he was discharged. The question was "whether governing case or statutory law would have given a reasonable official cause to know, at the time of the relevant events, that those acts or omissions violated the plaintiff's rights." *Id.* at 3022 (Brennan, J., concurring in part and dissenting in part). Plaintiff was never told prior to his discharge that his retention of a second job was grounds for termination. This violated the Court's own clearly established requirements of "meaningful notice and a reasonable opportunity to be heard," regardless of the Fifth Circuit's "dubious and cursory" per curiam opinion to the contrary in 1981. Indeed, other prior Fifth Circuit precedent was consistent with the Supreme Court's clearly established due process requirements. Finally, the dissenters suggested that "the presence of a clear-cut regulation obviously intended to safeguard public employees' constitutional rights certainly suggests that [defendants] had reason to believe they were depriving [plaintiff] of due process." *Id.* at 3025. While the violation of such a regulation would

All of these hurdles amount to a *de facto* requirement that a defendant be at least *reckless* with regard to the application of relevant constitutional law.[169] Otherwise, he or she should be dismissed on motion for summary judgment. Analogously, the Court has imposed similar defendant state of mind requirements on plaintiffs in certain defamation cases in order to minimize the "chilling effect" on first amendment rights.[170] These hurdles also suggest that the Court has begun to line up the qualified immunity test with its rules of retroactivity.[171] While a detailed examination of such rules is beyond the scope of this Article, the three factor test set out in the leading civil case on retroactivity, *Chevron Oil Co. v. Huson*,[172] makes clear that some, if not all, of these

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not necessarily be determinative of the qualified immunity issue, it should be "relevant" to the *Harlow* analysis.

Davis warrants several conclusions. First, a majority of the Court intended that *Harlow's* (and *Wood's*) clearly settled law component be applied in a pro-defendant manner. The Court unfortunately insisted that there be little or no ambiguity in relevant case law as a condition to finding clearly settled law; a case on point appears necessary. Unlike the dissenters, they would admit no duty to extrapolate from pre-existing case law. Second, the Court would not consider the violation of a clearly established state law to be relevant to the *Harlow* analysis, when constitutional rights are involved and when the state law is not related to the section 1983 cause of action. In short, once there is no clearly settled constitutional law violated by a defendant, there is no liability for compensatory damages even if clearly settled state law was violated.

169. The word "reckless" is used because in many respects it is a realistic description of the settled law requirement. A defendant who acts contrary to settled law (i) typically will have some reason to doubt that he or she is acting legally or (ii) will at least know that he or she does *not* know what the relevant law is. Such states of mind have long been characterized at common law as "reckless," *e.g.*, Sovereign Pocohontas v. Bond, 120 F.2d 39 (D.C. Cir. 1941) (misrepresentation), although in the defamation setting the Supreme Court has limited the definition of "reckless" to the first meaning. *See* St. Amant v. Thompson, 390 U.S. 727 (1968). *See also* RESTATEMENT (SECOND) OF TORTS § 526 (1976).

170. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (private persons; negligence and actual damages required); New York Times v. Sullivan, 376 U.S. 254 (1964) (public officials; knowing or reckless falsehood required). *But cf.* Herbert v. Lando, 441 U.S. 153 (1979) (defamation plaintiff allowed to inquire into media defendants' state of mind despite possible "chilling effect" on editorial process).

171. Such rules have been applied in criminal cases, *e.g.*, Mackey v. United States, 401 U.S. 667 (1971); Linkletter v. Walker, 381 U.S. 618 (1965), and in non-criminal cases, *e.g.*, Cipriano v. City of Houma, 395 U.S. 701 (1969); Great Northern Ry. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358 (1932). There may even be due process limitations on the retroactive application of unforeseeable statutory interpretations. *Cf.* Shuttlesworth v. Birmingham, 394 U.S. 147 (1969) (permit requirement for parade violates first amendment because it lacked definite, objective standards).

Note that the Court's retroactivity rules can also be applied to the *prima facie* case in favor of governmental defendants who are not protected by qualified immunity. *See, e.g.*, Aufiero v. Clarke, 639 F.2d 49 (1st Cir.), *cert. denied*, 452 U.S. 917 (1981).

172. 404 U.S. 97 (1971).

factors will now be applied in constitutional tort qualified immunity cases as well.

In *Chevron*, the Supreme Court was confronted with the applicability of its limitations decision in *Rodrigue v. Aetna Casualty and Surety Co.*[173] to a personal injury suit filed several years before *Rodrigue* under the Outer Continental Shelf Lands Act ("Lands Act").[174] When the *Chevron* suit was filed, the prevailing federal rule in such suits made general admiralty law, including laches, applicable. However, during *Chevron*'s pretrial discovery proceedings, the Court in *Rodrigue* held that state limitations law was applicable to such suits. The plaintiff's suit was then dismissed by the district court, under the applicable Louisiana one-year limitation period.

In its decision on this issue, the Supreme Court held that *Rodrigue* should not be applied retroactively to the suit before it. It set out a three factor test for cases dealing with the nonretroactivity question:

> [1] [T]he decision to be applied nonretroactively must establish a new principle of law either by overruling clear past precedent on which litigants may have relied or by deciding an issue of first impression whose resolution was not clearly foreshadowed. [2] '[T]he merits and demerits in each case [must be weighed] by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.' [3] [T]he inequity imposed by retroactive application [must be weighed] for '[w]here a decision of this Court could produce a substantial inequitable result if applied retroactively, there is ample basis in our cases for avoiding the injustice or hardship by a holding of nonretroactivity.'[175]

In holding that *Rodrigue* was not to be applied retroactively, the Court emphasized as to the first factor that *Rodrigue* was a case of first impression in the Supreme Court under the Lands Act. It overturned a long line of decisions holding that admiralty law was applicable to personal injury actions under the Lands Act. Further, the Court emphasized that from the time the plaintiff in *Chevron* was injured and until he instituted his lawsuit, "[i]t cannot be assumed that he did or could foresee that this consistent interpretation of the Lands Act would be overturned. The most he could do was to rely on the law as it then was."[176] As to the second factor, the Court, reasoning that the primary

173. 395 U.S. 352 (1969).
174. 43 U.S.C. § 1331-1343 (1976).
175. 404 U.S. at 106-07 (citations omitted).
176. *Id.* at 107.

purpose of absorbing state law as federal law in the Lands Act "was to aid injured employees by affording them comprehensive and familiar remedies," observed that "retroactive application of the Louisiana Statute of Limitations to this case would deprive the [plaintiff] of any remedy whatsoever." It concluded: "To abruptly terminate this lawsuit that has proceeded through lengthy and, no doubt, costly discovery stages for a year would surely be inimical to the beneficent purpose of the Congress."[177]

Finally, with respect to the third factor, the Court stressed the drastic and inequitable result that would occur if the plaintiff's suit were barred retroactively by *Rodrigue*. After all, the plaintiff had not "slept on his rights," his "potential redress for his allegedly serious injury" was entitled to protection, and he had gone through lengthy and costly discovery.[178]

One function of the *Chevron* test, as reflected especially in the first and third factors, is to provide fairness to a party whom a change in the law has surprised. Another function, however, is closer to an important legal process concern: can those regulated live with the rule contemplated? More specifically, is the rule understandable and can it be complied with?[179] A major purpose of rules of constitutional tort liability in particular is to encourage officials to conform their conduct to such rules. If the relevant constitutional rule and its application were not clear at the time the official acted, it makes little sense for regulation of conduct purposes to impose liability. Consequently, a pro-defendant reading of *Harlow* and settled law appears warranted.

This is too simplistic, however. First, it ignores the compensation function of constitutional tort liability. Also, and more fundamentally, understanding the rule, and the ability to comply with it, may be important process values, but they must be evaluated in connection with the substantive purpose desired.[180] Indeed, if this were not so, an absolute constitutional tort *liability* rule with no immunities whatever would further the value of understanding the rule, while an absolute *immunity*

177. *Id.* at 108.

178. *Id.*

179. This concern has been described as including the factors of comprehensibility and conformability. *See* Henderson, *Process Constraints in Tort*, 67 CORNELL L. REV. 901, 911-15 (1982). Comprehensibility refers to the clarity of the relevant rule, and conformability refers to the ability to comply with it. Other process constraints, verifiability and manageability, are not as directly related to this Article. *See generally* H. HART & A. SACKS, THE LEGAL PROCESS (Tent. ed. 1958).

180. *See also* Henderson, *supra* note 179.

rule would further both values.[181] Each kind of rule would also be predictable. To make this point differently, consider that all private persons are subject to tort liability for unreasonable conduct as determined after the fact by a jury. At common law, tort liability is not limited to clearly unreasonable conduct; liability results if the conduct is found to be unreasonable, even if reasonable persons might differ. If there is a margin for error of potential tort defendants—meaning all of us—it is rather slim. We all take our chances that a factfinder, second-guessing our conduct, may find that we acted unreasonably. But this is so despite the argument that the reasonable person standard may be too vague to be comprehensible[182] and that it is sometimes applied in situations when a defendant in fact can not conform to it.[183] Common law negligence, therefore, has considerable potential to over-deter or over-regulate because of the inherent ambiguity in the reasonable person standard.

Yet, after *Harlow*, this may no longer be true for constitutional tort liability, and one may legitimately wonder why. Officials in the course of daily routine admittedly deal with more people than ordinary citizens do and thus their exposure to personal liability may be greater. This should cut the other way, though, because they can do more damage.[184] It is also probable (or at least not improbable) that for various reasons many executives have devised "a strategy of personal risk minimization"[185] which may argue for a wide margin for error in order to encourage independent decision-making. But the risk of defending against constitutional tort litigation is only one of many reasons for such a strategy, if it exists, and there is no assurance that a wide margin for error will have the desired effect.[186] It would be preferable, despite *Harlow* and *Navarette*,[187] to give settled law a more flexible application, as some courts have done,[188] and not rule for defendants as a mat-

181. *See* Nixon v. Fitzgerald, 457 U.S. 731 (1982); *supra* notes 90-113 and accompanying text.

182. The short answer, as Prosser gives it, is that "the infinite variety of situations which may arise makes it impossible to fix definite rules in advance for all conceivable human conduct." W. PROSSER, LAW OF TORTS 150 (4th ed. 1971).

183. The classic torts example in Vaughan v. Menlove, 132 Eng. Rep. 490 (1837) (reasonable intelligence and knowledge required even for persons of abnormally low intelligence and little knowledge).

184. This point is made in *Scheuer v. Rhodes* in connection with the differences between higher and lower level executives.

185. P. SCHUCK, *supra* note 145, at 68. *See also* Cass, *supra* note 152.

186. Little is known about this strategy. P. SCHUCK, *supra* note 146, at 68.

187. *See also* Davis v. Scherer, 104 S. Ct. 3012 (1984), *supra* note 167.

188. *E.g.,* King v. Higgins, 702 F.2d 18 (1st Cir. 1983); Scott v. Davis, 691 F.2d 634 (3rd Cir.

ter of law, so that in the appropriate circumstances executives might be found to have breached duties to extrapolate from then existing law as to both the existence of general constitutional rules and their application. Indeed, the dissenters in *Wood* who argued against *Wood*'s duty to know settled law contended that there is and can be very little, if any, settled constitutional law.[189] Their point was a good one, even though their conclusion was not. Rather, their argument actually cuts in favor of such extrapolation when the situation warrants it.[190]

Consequently, an executive's margin for error should not be as wide as the Court in *Harlow* and *Navarette* may have wanted to make it. Now that the subjective part of the qualified immunity test is gone,[191] it is more important than ever to be sensitive to the need to encourage compliance with the fourteenth amendment despite the risk of overdeterrence. The out of pocket costs of such compliance should be borne by the defendants or their employers, the relevant government bodies. These costs are as much legitimate costs of government as other employment costs, especially in the absence of any clear indication that government decision-making is being seriously hampered. Otherwise, if individual constitutional tort liability is undercut by expansion of the scope of individual immunity, there will be even less incentive for constitutional compliance than there is now.

In this respect it is regrettable that the immunities available to constitutional tort defendants have an all or nothing aspect. That is, if a defendant prevails on immunity, the plaintiff bears all the costs of the constitutional violation. If a plaintiff prevails on immunity (after prevailing on the prima facie case) the defendant bears all the costs of the constitutional violation. This all or nothing aspect is analogous to the effect of contributory negligence at common law.[192] However, unlike

1982); Maxwell v. Mason, 668 F.2d 361 (8th Cir. 1981); Logan v. Shealy, 660 F.2d 1007 (4th Cir. 1981), *cert. denied,* 455 U.S. 942 (1982); Seguin v. Eide, 645 F.2d 804 (9th Cir. 1981); Johnson v. Duffy, 588 F.2d 740, 745 (9th Cir. 1978); Buise v. Hudkins, 584 F.2d 223 (7th Cir. 1978), *cert. denied,* 440 U.S. 916 (1979); Ware v. Heyne, 575 F.2d 593 (7th Cir. 1978); Little v. Walker, 552 F.2d 193 (7th Cir. 1977), *cert. denied,* 435 U.S. 932 (1978); Wagle v. Murray, 546 F.2d 1329 (9th Cir. 1976), *vacated on other grounds and remanded,* 431 U.S. 935 (1977); Slate v. McFetridge, 484 F.2d 1169 (7th Cir. 1973).

189. Wood v. Strickland, 420 U.S. 308, 329 (1975).

190. Compare those negligence cases where defendants are treated as if they did know, or at least were under an obligation to find out, certain information. W. PROSSER, LAW OF TORTS 157-61 (4th ed. 1971).

191. For the questionable argument that *Harlow* did not eliminate the subjective part of the qualified immunity test, see McElveen v. County of Prince William, 725 F.2d 954 (4th Cir. 1984).

192. *See generally* W. PROSSER, *supra* note 190, at § 65.

the development of comparative negligence to ameliorate this harshness,[193] a comparative fault approach seems to have little to offer to constitutional tort liability analysis. Constitutional tort plaintiffs are seldom, if ever, at fault in any meaningful sense.[194] Consequently, we must live with the disadvantage of an all or nothing result.

CONCLUSION

The Supreme Court appears to be amending section 1983 and cutting back on *Bivens* actions by the use of various strategies to limit liability.[195] Expanding the functional approach of *Butz*, conferring absolute immunity on the President, and changing the qualified immunity test in *Harlow* demonstrate this development as applied to individual liability. It is no secret that some of the Justices, perhaps a majority, are not happy with what constitutional torts have become. Also, a majority of the Court may believe that governmental liability, such as it is, is sufficient protection for citizens in most cases; individual liability may therefore be considered unnecessary unless extreme misconduct is involved. This latter belief may similarly be reflected in the suggestion by Justice White[196] that the exclusionary rule should be done away with altogether because the better approach to police officer compliance with the fourth amendment is for governments to train police officers and to adopt per se rules.[197]

Whatever the validity of this belief in an exclusionary rule context or

193. *Id.* § 67. *See generally* V. SCHWARTZ, COMPARATIVE NEGLIGENCE (1974).

194. On the other hand, it might be possible to limit the defendant's liability by reference to his or her *own* degree of fault. A defendant against whom the law was *clearly* settled (i.e., reasonable persons could not differ) would bear all the violation costs. A defendant against whom the law was *reasonably* settled (i.e., reasonable persons could differ) would bear a lesser percentage of those costs as decided by the factfinder. And a defendant in favor of whom the law was clearly settled (i.e., reasonable persons could not differ) would bear none of the violation costs.

It is unlikely, though, that the Court which decided *Harlow* would adopt this kind of approach. While tending to reduce the costs of an adverse judgment, this approach would not reduce the *general* costs of defending against constitutional tort litigation mentioned in *Harlow* because more cases would survive defense motions for summary judgment. For the same reason, the *special* costs of concern to the Court in *Harlow* would be increased under this approach to the extent that state of mind inquiries are relevant to the prima facie case in different situations. *See generally* S. NAHMOD, *supra* note 3, at ch. 3. Moreover, this approach would require even greater sophistication from fact finders and law-appliers than the distinction between gross and ordinary negligence does. Under this approach, additional distinctions would have to be drawn among degrees of ordinary negligence. It thus appears unworkable.

195. *See supra* note 17 and accompanying text.

196. Illinois v. Gates, 103 S. Ct. 2317, 2340-44 (1983).

197. *Id.* at 2340. As noted earlier, the Court in United States v. Leon, 104 S. Ct. 3405 (1984),

elsewhere, it is misplaced in the constitutional tort context. For one thing, local governments are liable only for their unconstitutional official policies or customs.[198] Respondeat superior liability is not available.[199] For another, states[200] probably cannot be sued successfully for damages caused by their unconstitutional official policies or customs. Further, the federal government is only liable for certain constitutional torts under the Federal Tort Claims Act.

Conversely, it might be suggested that governments are in reality already held accountable to a considerable extent, if only indirectly, through insurance and indemnification agreements.[201] If this is so, then limiting individual liability through excessively pro-defendant applications of the modified qualified immunity test will make matters even worse for governmental accountability for constitutional violations. Such pro-defendant applications may also result in the expenditure of greater governmental resources for determining whether constitutional rules were previously settled rather than for deciding what the current constitutional rules are or should be in the first place. In view of the Court's increasing concern in qualified immunity cases with costs, this misallocation of resources appears especially ironic.[202]

There is, finally, an additional irony about the clearly settled component of the qualified immunity test. Courts will often be able to avoid the merits of a constitutional tort plaintiff's cause of action by assuming *arguendo* that even if there was a constitutional violation, the law at the time was not clearly settled; thus, the defendant is not liable for damages. If this approach becomes prevalent, plaintiffs will have increasing difficulty discovering clearly settled law in subsequent cases.[203]

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created a "good faith" exception to the fourth amendment's exclusionary rule when a search warrant is obtained from a magistrate.

198. Monell v. Department of Social Services, 436 U.S. 658 (1978).

199. *Id.* at 691-95.

200. Quern v. Jordan, 440 U.S. 332 (1979). The statement is surely accurate for suits in federal court. However, because *Quern* relied in part on the eleventh amendment, it is not clear that section 1983 suits cannot be brought against a state in its own courts.

201. *See generally* P. SCHUCK, *supra* note 146.

202. There has already been extensive litigation in the circuits dealing with the impact of *Harlow*. *See, e.g.,* Harris v. Young, 718 F.2d 620 (4th Cir. 1983) (courts struggling with clearly settled law component of *Harlow*). *See generally* S. NAHMOD, *supra* note 3, at ch. 8 (1984 Supp.).

203. In United States v. Leon, 104 S. Ct. 3405 (1984), Justice White viewed as unwarranted this concern with freezing the development of fourth amendment doctrine in connection with a "good faith" exception to the exclusionary rule. *See also supra* note 160.

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