

ANACHRONISTIC READINGS OF SECTION 1983

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Amid vehement disagreement about how section 1983 should be applied, a common, although not unanimous, story persists. Congress created a cause of action for constitutional violations by state actors but did not specify any of its contours. To find those necessary contours—such as the elements of the claim, causation, and the calculation of damages—courts look to the most analogous common-law tort in 1871 (when section 1983 was enacted) for guidance. Some have criticized this approach, arguing that the 1871 Congress intended to abrogate rules that prevent full redress for constitutional violations, such as official immunities. Others have argued that Congress intended to give federal courts the power to develop their own rules of decision.

But both the standard story and these criticisms of it are inconsistent with the historical legal context. In the light of contemporary legal practice, section 1983 would not have been understood to have created a new “cause of action,” as that term was understood in 1871. Rather, it codified rights secured by the constitution and provided a federal arena for actions seeking redress for violations of those rights. But in actions at law, federal courts were required to use the forum state’s “forms . . . of proceedings”—that is, causes of action—and to apply the non-substantive-rights-determining rules of decision of the forum state.

In other words, a plaintiff would have had to prove a constitutional violation and satisfy the requirements of a state-law cause of action. And absent clearly applicable federal statutes, courts would have looked to state law for statutes of limitations, measures of damages, survivorship rules, and even official immunities. Section 1983 did not answer basic questions about the cause of action because state law answered them.

Although later legal developments and stare decisis complicate this reading’s modern implications, section 1983 originally adopted state-level decisions about how to open officials to liability. To be sure, Congress can alter that arrangement and impose uniform rules. But until it does, understanding the real original meaning of section 1983 is critical in evaluating the current debates about whether to return to the original meaning and intent of section 1983, qualified immunity, and potential doctrinal changes.

INTRODUCTION

Larry Thompson, his now wife, and their newborn daughter lived together in a Brooklyn apartment.¹ Thompson’s sister-in-law, who suffered from mental illness, also lived with the family.² In January 2014, she called the police and alleged that Thompson was sexually abusing his one-week-old daughter.³ She then led Emergency Medical Technicians into the Thompsons’ apartment, but Thompson told them it was a mistake and sent them away.⁴ The EMTs later

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1. Thompson v. Clark, 364 F. Supp. 3d 178, 182 (E.D.N.Y. 2019).
2. *Id.* at 182–83.
3. *Id.* at 182.
4. *Id.* at 182–83.

returned with four police officers who, over Thompson's objection, forcefully entered the home.⁵ After a "brief scuffle," the officers handcuffed Thompson and took him to jail where he remained for two days.⁶ After seeing diaper rash, the EMTs took the baby to the hospital, but medical professionals found no evidence of abuse.⁷ One officer "filed a criminal complaint charging Thompson with obstructing governmental administration and resisting arrest."⁸ But three months later the government moved to dismiss the charges.⁹ Thompson sued the officers under section 1983 alleging that they violated his Fourth Amendment rights when they caused him to be seized by filing an unsupported criminal complaint.¹⁰ A divided Supreme Court decided that he did not need to establish that the dismissal of the criminal prosecution affirmatively indicated his innocence.¹¹ On remand, nine years after Thompson filed suit, the district court concluded that the officer had probable cause for the valid obstruction charge; that, alternatively, he would be entitled to qualified immunity; and that, given the obstruction charge, the lawfulness of the resisting-arrest charge was irrelevant to Thompson's seizure.¹²

Much ink has been spilled recently—both in judicial opinions and in academic journals—about civil-rights litigation under section 1983. Section 1983 states that "[e]very person who, under color of" state law, deprives any person "of any rights, privileges, or immunities secured by the Constitution . . . shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."¹³ This section has sparked debates about the legitimacy of granting immunity to state officials,¹⁴ whether courts should consider well-settled common-law principles from 1871 to fill gaps in the statute,¹⁵ and the extent to which courts can (or should) look to current state law to fill gaps.¹⁶ The answers to these questions will determine whether people like Thompson can recover for violations of their constitutional rights.

Most of these debates start from a similar point (or at least use the standard framework). That story, although not unanimous, goes something like this:

5. *Id.* at 183.

6. *Thompson v. Clark*, 596 U.S. 36, 40 (2022).

7. *Id.*

8. *Id.*

9. *See Thompson*, 364 F. Supp. 3d at 184–85.

10. *Thompson*, 596 U.S. at 40–41.

11. *See id.* at 49 (6–3).

12. *See Thompson v. Clark*, No. 14-CV-07349, 2023 WL 3570658, at *5–8 (E.D.N.Y. May 18, 2023).

13. 42 U.S.C. § 1983.

14. *See, e.g.*, William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45 (2018) [hereinafter Baude, *Is Qualified Immunity Unlawful?*]; *see also* other sources cited *infra* note 41.

15. *Compare Thompson*, 596 U.S. at 40–49, *with id.* at 49–60 (Alito, J., dissenting); *see also* sources cited *infra* note 42.

16. *See, e.g.*, Timothy Tymkovich & Hayley Stillwell, *Malicious Prosecution as Undue Process: A Fourteenth Amendment Theory of Malicious Prosecution*, 20 GEO. J.L. & PUB. POL'Y 225 (2022); *see also* sources cited *infra* note 43.

Section 1983 created a federal cause of action for constitutional violations by state actors.¹⁷ But—beyond creating that cause of action—it did not provide any substance or guidance.¹⁸ So, to some extent, the well-settled common-law rules from 1871 supply the contours of a section-1983 claim.¹⁹ And other federal law governs rules of decision and other procedural rules.²⁰

Some writings have called for reforming Supreme Court doctrine. For example, some judges and scholars have used the standard framework to argue that qualified immunity is illegitimate because it departs from the nature of the immunity that existed in 1871.²¹ Others have pushed back against this story altogether and argued that the original intent of the 1871 Congress was to supplant then-existing immunities, not codify them.²² And still others have argued that Congress intended judges to make their own policy decisions in crafting rules of decision such as official immunities.²³ Similar calls to return to the supposed original meaning of section 1983 have been made for other section-1983 doctrines as well.²⁴

But *both* the standard framework *and* the criticisms of it are inconsistent with the original understanding and context of section 1983. Most commentary has imposed our current legal understandings on the largely unchanged first half of the statutory text.²⁵ But by failing to grapple with the contemporary legal context, these interpretations overlook two crucial features of the original meaning of section 1983.

First, the original version of section 1983 would not have been understood to have created a new “cause of action” as that term was understood in 1871. In 1871, a cause of action was largely viewed as synonymous with the form of proceeding that a plaintiff needed to use to bring his action, such as a writ of trespass.²⁶ And at that time, the Process Act of 1792 (and later the Conformity Act of 1872) directed federal courts to use state-law forms of proceeding for

17. See, e.g., *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 723, 727 (1999) (Scalia, J., concurring in part and concurring in the judgment); see also sources cited *infra* note 44.

18. See, e.g., Seth F. Kreimer, *The Source of Law in Civil Rights Actions: Some Old Light on Section 1988*, 133 PENN. L. REV. 601, 604–05 (1984); see also sources cited *infra* note 48.

19. See, e.g., *Thompson*, 596 U.S. at 43; see also other sources cited *infra* note 55.

20. See 1B MARTIN A. SCHWARTZ, SECTION 1983 LITIGATION: CLAIMS AND DEFENSES § 12.01[B], at 12-6–12-7 (4th ed. 2019).

21. See, e.g., *Baxter v. Bracey*, 140 S. Ct. 1862, 1864 (2020) (Thomas, J., dissenting from the denial of certiorari).

22. See, e.g., Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*, 111 CALIF. L. REV. 201, 217, 235–36 (2023); *infra* note 62.

23. See, e.g., Hillel Y. Levin & Michael L. Wells, *Qualified Immunity and Statutory Interpretation: A Response to William Baude*, 9 CALIF. L. REV. ONLINE 40, 50–54 (2018).

24. See, e.g., *Thompson*, 596 U.S. at 49–60 (Alito, J., dissenting).

25. See, e.g., Kreimer, *supra* note 18, at 604–05.

26. See Anthony J. Bellia Jr., *Article III and the Cause of Action*, 89 IOWA L. REV. 777, 781 (2004).

actions at law and traditional English equity forms of proceeding for suits in equity.²⁷

Neither section 1983 nor any other federal law provided a form of proceeding specifically for claims arising under section 1983. The original version, like its contemporary descendant, stated that a state official was to be “liable . . . in any action at law [or] suit in equity.”²⁸ But it did not state what *kind*—or, *form*—of action or suit that would be. By contrast, another section of the same act did specify the form of action—“an action on the case”—and preempted some of the state rules that would have otherwise governed actions on the case, such as survivorship of the action and the measure of damages.²⁹ Some contemporary courts understood that section 1983 did not supply its own cause of action and rejected claims that did not fit within the traditional bills of equity, irrespective of whether there was in fact a constitutional violation.³⁰ That is, they required plaintiffs to establish a constitutional violation *and* fit that violation into the appropriate form of proceeding (or cause of action).³¹ Section 1983 did not answer basic questions about the nature of the cause of action because the state common-law (and traditional equitable) forms of proceeding already answered them.

Second, the original version of section 1983 instructed that for certain rules district courts were to first look to federal law and then to the contemporary state-law rule designed for that kind of case—that is, for that form of action or that bill.³² Even if that instruction applied to the preliminary question of which form of proceeding would be required, federal law would have simply directed courts to use state-law forms of action and traditional bills in equity. But, in any event, that language was at most a restatement of existing law—both background law and codified in the Rules of Decision Act—that non-form-of-action rules of decision were governed by state law unless there was an applicable federal statute.³³

Thus, under the original meaning, state law played a central role in section-1983 litigation. Because state law provided the form of action for actions at law, a plaintiff would have had to satisfy the requirements of the state-law form of action *and* establish a constitutional violation. In other words, a plaintiff must have proven a violation of his substantive right (the constitutional violation) and then fit that violation into the appropriate form of proceeding. And absent

27. *See* Process Act of 1792, ch. 36, § 2, 1 Stat. 275, 276; Conformity Act of 1872, ch. 255, § 5, 17 Stat. 196, 197.

28. Ku Klux Klan Act of 1871, ch. 22, § 1, 17 Stat. 13, 13. The current version uses “an” rather than “any.” 42 U.S.C. § 1983.

29. Ku Klux Klan Act of 1871 § 6.

30. *See, e.g.*, *Hemsley v. Myers*, 45 F. 283, 286–90 (C.C.D. Kan. 1891).

31. *Id.*

32. Ku Klux Klan Act of 1871 § 1; Civil Rights Act of 1866, ch. 31, § 3, 14 Stat. 27, 27.

33. *See* *Bank of Hamilton v. Dudley’s Lessee*, 27 U.S. (2 Pet.) 492, 525 (1829); *infra* note 118.

applicable federal law, state law would have provided the other non-substantive-right rules of decision. So federal courts would have looked to state law to find rules about limitations periods, the measure of damages, causation, and survivorship. And if states had granted absolute or qualified immunities to certain state officers, federal courts would have had to honor those immunities (but *only* those immunities). In other words, section 1983 operated as a form of federalism—always subject to congressional override—that adopted the results of state-level democratization of official immunities and other non-rights-determining rules of decision. But the Supreme Court upended that structure when it imposed uniform, national rules of decision for section-1983 litigation.³⁴

To be sure, how this interpretation would cash out in practice today is complicated. States abandoned the common-law forms of action in favor of code pleading,³⁵ and Congress later enacted the Rules Enabling Act in 1934, abandoning reference to state law in questions of procedure.³⁶ But a brief analysis indicates that some key aspects of section 1983's original meaning would likely persist today, such as looking to modern state-law rules of decision governing official immunities and requiring a state-law cause of action. And even so, there are limits on what state law can apply. For example, state rules would have to apply equally, and due process might require the state to provide remedies similar to those offered at common law.

This Article takes no position on the ultimate questions whether *stare decisis* should prevent the Court from returning to the original meaning,³⁷ whether the original meaning of a statute should be dispositive in interpreting statutes,³⁸ or of what rules would best promote “effective enforcement of constitutional rights against government oppression.”³⁹ But one cannot meaningfully evaluate calls to buck *stare decisis* and align current doctrine with the original meaning of section 1983⁴⁰ without understanding what the real original meaning would look like in practice today. And even if the Court does not return to that meaning, it is a vital measuring stick in evaluating debates about section 1983, congressional intent, and future reform.

34. See Jack M. Beermann, *A Critical Approach to Section 1983 with Special Attention to Sources of Law*, 42 STAN. L. REV. 51, 64 (1989) [hereinafter Beermann, *Critical Approach*] (explaining that the Supreme Court has “effectively rejected” any reference to state law).

35. G. EDWARD WHITE, *TORT LAW IN AMERICA* 8–9 (1979).

36. 28 U.S.C. § 2072.

37. See, e.g., Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity* [hereinafter Nielson & Walker, *Qualified Defense*], 93 NOTRE DAME L. REV. 1853, 1876–77 (2018).

38. See *Badgerow v. Walters*, 596 U.S. 1, 31 (Breyer, J., dissenting).

39. See Jack M. Beermann, *Common Law Elements of the Section 1983 Action*, 72 CHI.-KENT L. REV. 695, 746 (1997).

40. See, e.g., Teresa Ravenell, *Unincorporating Qualified Immunity*, 53 LOY. U. CHI. L.J. 371, 401–02 (2022).

I. THE STANDARD STORY

Section 1983 is an oft-discussed statute both in the judiciary and the academy. The legitimacy of immunity for state officials in section-1983 cases is hotly contested,⁴¹ as is whether courts should consider well-settled common-law principles in 1871 to fill gaps in section-1983 claims.⁴² And so is the extent to which courts can (or should) look to current state law to fill gaps.⁴³

These writings all start from a similar point (or at least use this standard framework) and make four steps. The first step is that section 1983 creates a cause of action for constitutional violations.⁴⁴ The cause of action spoken of in this context is the modern, transactional kind: a plaintiff has a cause of action if “in light of all legal determinants that relate to a particular transaction or occurrence, [he] is entitled to *some* form of judicial relief.”⁴⁵ That is, if the plaintiff has a judicially enforceable right, the plaintiff has a “cause of action for a remedy” whenever that right is violated.⁴⁶ In the context of section 1983, the rights are the “rights, privileges, [and] immunities secured by the Constitution and laws” of the United States.⁴⁷ Under this theory, if a plaintiff has his

41. E.g., Baude, *Is Qualified Immunity Unlawful?*, *supra* note 14; Andrew S. Oldham, *Official Immunity at the Founding*, 46 HARV. J.L. & PUB. POL’Y 105 (2023); Scott A. Keller, *Qualified and Absolute Immunity at Common Law*, 73 STAN. L. REV. 1337 (2021); Nielson & Walker, *Qualified Defense*, *supra* note 37; Aaron L. Nielson & Christopher J. Walker, *Qualified Immunity and Federalism*, 109 GEO. L.J. 229 (2020) [hereinafter Nielson & Walker, *Federalism*]; William Baude, *Is Quasi-Judicial Immunity Qualified Immunity?*, 74 STAN. L. REV. ONLINE 115 (2022); Nathan S. Chapman, *Fair Notice, the Rule of Law, and Reforming Qualified Immunity*, 75 FLA. L. REV. 1 (2023); Reinert, *supra* note 22; Jacob Harcar, *The Original Meaning of Section 1983 and Official Immunity*, 74 KAN. L. REV. (forthcoming 2024) (SSRN); *N.S. ex rel. Stokes v. Kansas City Bd. of Police Comm’rs*, 143 S. Ct. 2422, 2424 (2023) (Sotomayor, J., dissenting from the denial of certiorari); *Rogers v. Jarrett*, 63 F.4th 971, 979–81 (5th Cir. 2023) (Willett, J. concurring); *Baxter v. Bracey*, 140 S. Ct. 1862, 1864 (Thomas, J., dissenting from the denial of certiorari); *Ziglar v. Abbasi*, 582 U.S. 120, 156–160 (2017) (Thomas, J., concurring in part and concurring in the judgment); *Weary v. Foster*, 33 F.4th 260, 273–81 (5th Cir. 2022) (Ho, J., dubitante); see also Adam Liptak, *16 Critical Words That Went Missing From a Landmark Civil Rights Law*, N.Y. TIMES (May 15, 2023), <https://www.nytimes.com/2023/05/15/us/politics/qualified-immunity-supreme-court.html?smid=nytcore-ios-share&referringSource=articleShare>.

42. E.g., Tymkovich & Stillwell, *supra* note 16; *Thompson v. Clark*, 596 U.S. 36, 40–49 (2022); *id.* at 49–60 (Alito, J., dissenting); *Tlapanco v. Elges*, 969 F.3d 638, 658–60 (6th Cir. 2020) (Thapar, J., concurring); see also *Washington v. Howard*, 25 F.4th 891, 897–912 (11th Cir. 2022); *Laskar v. Hurd*, 972 F.3d 1278, 1285–95 (11th Cir. 2020); *Pierce v. Gilchrist*, 359 F.3d 1279, 1287–96 (10th Cir. 2004).

43. 42 U.S.C. § 1988(a); Tymkovich & Stillwell, *supra* note 16, at 241–42 (arguing that reference to state “secondary rules . . . is entirely proper” assuming section 1988(a) was meant to apply to section 1983); Theodore Eisenberg, *State Law in Federal Civil Rights Cases: The Proper Scope of Section 1988*, 128 U. PA. L. REV. 499, 539–41 (1980) (arguing that section 1988(a) does not apply to section 1983).

44. See, e.g., Baude, *Is Qualified Immunity Unlawful?*, *supra* note 14, at 52; Keller, *supra* note 41, at 1341–42; Reinert, *supra* note 22, at 207; Tymkovich & Stillwell, *supra* note 16, at 237; *Health & Hospital Corp. of Marion Cnty. v. Talevski*, 599 U.S. 166, 171 (2023) (asserting that “since the 1870s, [section 1983] has provided an express cause of action”); *id.* at 193 (Barrett, J., concurring) (“Section 1983 provides a cause of action”); *id.* at 196 (Thomas, J., dissenting) (“Section 1983 provides a cause of action”); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 723, 727 (1999) (Scalia, J., concurring in part and concurring in the judgment) (Section “1983 establishes a . . . cause of action.”).

45. See Bellia, *supra* note 26, at 781.

46. *Id.*

47. 42 U.S.C. § 1983.

constitutional rights, privileges, or immunities violated, he has a cause of action under section 1983. And section 1983 is the source of that cause of action no matter the nature of the violation, the remedy sought, or the remedy to which the plaintiff is entitled.

The second step is that section 1983 (beyond creating the cause of action) does not give any substance to it.⁴⁸ Section 1983 provides that “any person” who “subjects” any private person or “causes [any such person] to be subjected” to a “deprivation of any rights, privileges, or immunities secured by the Constitution and laws” of the United States “shall be liable.”⁴⁹ That language is broad and unqualified,⁵⁰ but it is also “skeletal.”⁵¹ It “directs that [certain] rights be vindicated, yet it fails to erect any remedial structure”⁵² or offer any guidance to courts in “defining or adjudicating . . . violations” of those rights.⁵³ Sure, it directs that the offending person “shall be liable,”⁵⁴ but what is the amount or nature of that liability? How are damages measured? What about burdens of proof or standards of causation? The statute provides no answers to those questions.

Here comes the third step: to some extent, the well-settled common-law rules from 1871 applicable to the most analogous tort can supply the contours of a section-1983 claim.⁵⁵ This step has been defended under the derogation canon—which asserts that statutes in derogation of the common law should be

48. See, e.g., Tymkovich & Stillwell, *supra* note 16, at 240 (“Section 1983 remains, after all these years, an astonishingly skeletal statute. It creates a cause of action to vindicate constitutional violations but offers silence in response to questions as to defining or adjudicating these violations.”); Kreimer, *supra* note 18, at 604–05 (“Although section 1983 obviously provides a cause of action, the extent and conditions of this liability are entirely unclear. . . . The statute directs that rights be vindicated, yet it fails to erect any remedial structure.”).

49. 42 U.S.C. § 1983.

50. Ravenell, *supra* note 40, at 372, 390; see also Baude, *Is Qualified Immunity Unlawful?*, *supra* note 14, at 88 (Section 1983 “contains no explicit restrictions on monetary relief.”); Nieves v. Bartlett, 139 S. Ct. 1715, 1730 (2019) (Gorsuch, J., concurring in part and dissenting in part) (“[L]ook at [section 1983] as long as you like and you will find no reference to the presence or absence of probable cause as a precondition or defense to any suit.”).

51. Tymkovich & Stillwell, *supra* note 16, at 240.

52. Kreimer, *supra* note 18, at 605.

53. Tymkovich & Stillwell, *supra* note 16, at 240.

54. 42 U.S.C. § 1983.

55. See, e.g., *Thompson v. Clark*, 596 U.S. 36, 43 (2022) (“To determine the elements of a constitutional claim under § 1983, this Court’s practice is to first look to . . . the most analogous tort as of 1871 when § 1983 was enacted”); Nielson & Walker, *Federalism*, *supra* note 41, at 241–43 (detailing the justification for looking to 1871 state law); Tymkovich & Stillwell, *supra* note 16, at 241–42 (arguing that it is “permissible” to “ma[ke] recourse to state tort law when interpreting cases arising under § 1983 by incorporating common law immunities” even if the “substantive conclusion” that courts should do so is “dubious”); see also Baude, *Is Qualified Immunity Unlawful?*, *supra* note 14, at 50 (allowing that “perhaps Section 1983 permits . . . an unwritten immunity defense” (footnote omitted)); Keller, *supra* note 41, at 1342–43 (“tak[ing]” the common-law background “as given[]”); *Ziglar v. Abbasi*, 582 U.S. 120, 157 (2017) (Thomas, J., concurring in part and concurring in the judgment).

construed narrowly⁵⁶—as well as ordinary principles of statutory interpretation.⁵⁷ However it is defended, the basic principle is that, aside from whether there was a violation of the plaintiff's constitutional rights, the nature of the most analogous tort claim in the states in 1871 should inform the contours of a section-1983 claim.⁵⁸ These well-settled principles can be used to give practical flesh to the skeletal provision. Naturally, given the prevailing interpretation of the section 1983's "shall be liable"⁵⁹ language, no elements that conflict with the relevant constitutional or statutory right at issue can apply.⁶⁰ There is some disagreement about whether the contradiction needs to be a true contradiction or a mere incongruity,⁶¹ but the common theme is that well-settled principles for the most analogous 1871 tort can inform the elements of a section-1983 claim, bounded by the constitutional or statutory provision at issue.

This third step is not a unanimous position, at least insofar as immunities for state officers is the common-law principle at issue.⁶² Some have argued that interpreting section 1983's silence as a license to incorporate historical common-law principles cannot be justified as a matter of statutory interpretation.⁶³ Others have argued that the legislative intent behind the section was to replace the common law, so any use of 1871 common-law principles is incompatible with Congress's intent.⁶⁴

Criticism has also been launched from the other flank, where some argue that section 1983 is a "common law statute[]" that invites judicial lawmaking,

56. See Reinert, *supra* note 22, at 208–11, 211 n.56 (detailing the history); see also Harcar, *supra* note 41, at 93–99.

57. See Baude, *Is Qualified Immunity Unlawful?*, *supra* note 14, at 77–80.

58. *Thompson*, 596 U.S. at 43. Current law might also be relevant because the Court is "highly reluctant to assume that Congress intended to perpetuate a now-obsolete doctrine." See *Smith v. Wade*, 461 U.S. 30, 34 n.2 (1983).

59. 42 U.S.C. § 1983.

60. *Brooks v. City of Winston-Salem*, 85 F.3d 178, 184 n.5 (4th Cir. 1996) (refusing to apply the common-law requirement of malice for a malicious prosecution claim because "the reasonableness of a seizure . . . should be analyzed from an objective perspective"); see also Jacques L. Schillaci, Note, *Unexamined Premises: Toward Doctrinal Purity in § 1983 Malicious Prosecution Doctrine*, 97 NW. L. REV. 439, 455–56 (2002).

61. Compare *Hernandez-Cuevas v. Taylor*, 723 F.3d 91, 100–01 (1st Cir. 2013) ("adopt[ing] a purely constitutional approach" but stating that an element of a section-1983 malicious-prosecution claim is favorable termination of the earlier prosecution), with *Schillaci*, *supra* note 60, at 455 (arguing that a favorable termination requirement is not required by the Fourth Amendment); see also *Thompson v. Clark*, 794 F. App'x 140, 141 (2d Cir. 2020) (rejecting an argument that "favorable termination . . . is not a substantive element of the claim"); *Thompson*, 596 U.S. at 51–53 (Alito, J., dissenting).

62. Kreimer, *supra* note 18, at 607 ("[I]mplication from silence is a risky business."); Ravenell, *supra* note 40, at 394–96; Reinert, *supra* note 22, at 217; Harcar, *supra* note 41, at 81–82; see also Levin & Wells, *supra* note 23, at 51–54 (arguing that because section 1983 is a "common law statute[]," courts need not look to 1871 for legitimacy); E. Garrett West, *Refining Constitutional Torts*, 134 YALE L.J. (forthcoming 2025) (manuscript at 44–51) (on file with author).

63. *E.g.*, Reinert, *supra* note 22, at 217–34; Harcar, *supra* note 41, at 60–82.

64. *E.g.*, Kreimer, *supra* note 18, at 617; Ravenell, *supra* note 40, at 394–96; Harcar, *supra* note 41, at 54–60.

such as determining what immunities are appropriate.⁶⁵ Under this theory, courts need not justify their rules by reference to the 1871 common law *or* hew strictly to the text.⁶⁶ Instead, courts can create their own rules as they consider appropriate, using economic and political considerations, for example.⁶⁷

And finally, the fourth step: another provision of the United States Code—which states that it applies to section-1983 cases⁶⁸—governs some rules of decision that are external to the merits of a section-1983 claim and some other procedural rules.⁶⁹ Section 1988(a) provides that jurisdiction “shall be exercised and enforced in conformity with the laws of the United States,” unless those laws “are not adapted to the object” of section 1983 “or are deficient,” in which case the common law as modified by the state constitution and statutory law applies.⁷⁰ Because federal law contains generally applicable rules of evidence, those rules apply in section-1983 litigation.⁷¹ And the same for rules of procedure.⁷² But there are no applicable federal statutes of limitations, so section 1988(a) adopts the current statute of limitation for general personal-injury claims under state law.⁷³

Even section 1988(a), though, does not answer every question.⁷⁴ State law can apply only if it “is not inconsistent with the Constitution and laws of the United States.”⁷⁵ Do the “laws of the United States” include section 1983

65. Levin & Wells, *supra* note 23, at 50–54; *see also* Charles Tyler, *Common Law Statutes*, 99 NOTRE DAME L. REV. 669, 679–80 (2023). Garrett West, in a forthcoming article, argues that using common-law torts mixes the old conception of constitutional rights (as principles that nullify claims to official authorization) and the new conception (as imposing affirmative duties on government officials). *See* West, *supra* note 62, at 34–51. Assuming that section 1983 did create a cause of action, he advocates a wholesale adoption of the duty framework, which would abandon reference to the historical common law. *Id.* at 44–51, 58 n.296.

66. *See* Levin & Wells, *supra* note 23, at 68–70.

67. *See id.* at 45–46. Levin and Wells’s account is descriptively appealing, but it appears unlikely to be correct as an original matter. Article III was not understood to have granted lawmaking power—even when Congress passed underdetermined or vague laws and wished for courts to make that law. *See generally* Tyler B. Lindley, *Interpretive Lawmaking*, VA. L. REV. (forthcoming 2025); *see also* Micah Quigley, *Article III Lawmaking*, 30 GEO. MASON L. REV. 279 (2022). And it is even less likely that Congress, in 1871, would have understood section 1983 to have invited judicial lawmaking. *See infra* note 80.

68. *See* 42 U.S.C. § 1988(a) (specifying that it applies to “civil . . . matters conferred on the district courts by the provisions of title[] . . . 24 . . . of the Revised Statutes for the protection of all persons in the United States in their civil rights, and for their vindication”); Rev. Stat. § 1979 (1874) (an earlier version of section 1983 located in Title 24). This part of the story is not unanimous either. *See* Eisenberg, *supra* note 43, at 539–41 (arguing that section 1988(a) does not apply to section 1983).

69. *See* 42 U.S.C. § 1988(a); 1B SCHWARTZ, *supra* note 20, § 12.01[B], at 12-6–12-7 (4th ed., updated 2019).

70. *See* 42 U.S.C. § 1988(a).

71. *See* 28 U.S.C. § 2072(a); *see also* FED. R. EVID. 101.

72. *See* 28 U.S.C. § 2072(a); *see also* FED. R. CIV. P. 1.

73. *See* Bd. of Regents of Univ. of State of N.Y. v. Tomanio, 446 U.S. 478, 483–85 (1980); Tymkovich & Stillwell, *supra* note 16, at 241–42. The Supreme Court has limited reference to state law under section 1988(a) to “universally familiar aspects of litigation considered indispensable to any scheme of justice.” *Felder v. Casey*, 487 U.S. 131, 140 (1988).

74. One leading commentator described it as “obscur[e].” *See* Kreimer, *supra* note 18, at 620–21, 632.

75. 42 U.S.C. § 1988(a).

itself?⁷⁶ If so, does a broad reading of the “shall be liable” language of section 1983⁷⁷ mean that state law can never apply if it prevents the defendant from being maximally liable?⁷⁸ And what happens when neither federal law nor state law meets the qualifications in section 1988(a)? Some have argued that courts could then resort to making federal common law,⁷⁹ but it is unclear where in the text that power is given.⁸⁰ If the power comes from section 1988(a), then it must be included in the “laws of the United States” and would apply before state law.⁸¹ But that interpretation appears implausible because the same provision specifies the “common law” in relation to state law but only “law[]” in relation to federal law.⁸² And even if that interpretation were textually plausible, how would any state law ever apply, today, if federal courts were allowed to craft the perfect common-law rule before resorting to state law?

Although there is not perfect unanimity on these points, and although many questions remain unanswered, this common story persists across most of the literature and judicial decisions. Section 1983 creates a bare-bones cause of action, that cause of action can be defined by well-settled common law

76. See Kreimer, *supra* note 18, at 613.

77. 42 U.S.C. § 1983.

78. See William H. Theis, Case Commentary, *Shaw v. Garrison: Some Observations on 41 U.S.C. § 1988 and Federal Common Law*, 36 LA. L. REV. 681, 687–88 (1976) (arguing that courts should apply the rule that “better promotes protection of civil rights” and that, “on the issue of damages in civil rights cases, more is better”). But see Robertson v. Wegmann, 436 U.S. 584, 592–93, 592 n.8 (1978).

79. See Jennifer A. Coleman, 42 U.S.C. § 1983: A Congressionally-Mandated Approach to the Construction of Section 1983, 19 IND. L. REV. 665, 733 (1986); Kreimer, *supra* note 18, at 620–21; cf. Levin & Wells, *supra* note 23, at 46–47.

80. One response might be that federal courts have general lawmaking power when it comes to implementing federal statutes. See *DelCostello v. Int’l Broth. of Teamsters*, 462 U.S. 151, 159 n.13 (1983) (quoting *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 593 (1973)). But it is unlikely that, as an original matter, Article III was understood to have given courts the power to make common law, even if directed to do so by Congress. See generally Lindley, *supra* note 67; see also Quigley, *supra* note 67. And it is even less unlikely that, in 1871, section 1983 would have been understood to have granted such a power. See 1 WALTER MALINS ROSE, A CODE OF FEDERAL PROCEDURE § 13[c], at 116 (1907) (explaining that although “[i]t is not easy to draw the line,” there is an “important” “distinction” between “forbidden” “judicial legislation” and the “judicial function of interpretation”); *id.* § 6[b], at 47 (“Nor can courts make the law, but must expound it as they find it.”); CONG. GLOBE, 42d Cong., 1st Sess. 696 (1871) (statements of Sen. Thurman (D-OH) and Sen. Edmunds (R-VT)) (agreeing that “only the legislative power . . . can make a law” and that “courts . . . do not enforce laws that are not made by the [legislature] or not recognized as law by the [legislature], being the common law of the State”).

81. See 42 U.S.C. § 1988(a).

82. Professor Seth Kreimer has argued that the reference to the “common law” refers to such federal common law—or general law—because section 1988(a) does not specify the common law of any one state. See Kreimer, *supra* note 18, at 622–28. But others have argued that the text of the statute cannot bear that meaning, see Beermann, *Critical Approach*, *supra* note 34, at 62 n.76, and that localized torts were governed by local law, see Reinert, *supra* note 22, at 242–43; see also 1 ROSE, *supra* note 80, § 10[ee]–[f], at 80–81 (explaining that local law is determined by state law and collecting decisions of federal courts deferring to state law (including unwritten law) for torts and personal injury). But see Kreimer, *supra* note 18, at 622–28. At most, Kreimer’s argument would appear to support a narrower interpretation of section 1988(a) that applies only to post-judgment executions and possibly mesne process. See *infra* text accompanying notes 232–34, 246–51. In any event, many of the questions discussed in this Article are now governed by state statutes, which would supplant whatever “common law” section 1988(a) refers to.

principles in 1871, and remaining rules of decision are defined by contemporary federal or state law. But, as we will see, in the light of historical context, that story appears to be more like a Ferrari in ancient Egypt than a chariot. It transplants modern legal conceptions to 1871 when those conceptions would have been foreign to—or at least greatly disputed by—legislators, lawyers, and judges.

II. THE CONTEXT AND ORIGINAL UNDERSTANDING OF SECTION 1983

The legal world that existed when the Ku Klux Klan Act of 1871 was considered and enacted looked much different from the world in which we live today. Although the country was on the precipice of legal change—indeed, the seeds of that change had already been planted with the transition from common-law writ pleading to code pleading⁸³—the congressmen and judges who scrutinized the text of what is now section 1983 operated in a legal context that would be foreign to modern legal scholars and jurists. This unfamiliarity causes commentators to impose their modern views on section 1983—even though these views tend to distort its original understanding and effect.

One difference is the conception of a cause of action. To determine whether a plaintiff had a cause of action, one asked whether the plaintiff's claim could fit in a form of action for a certain kind of remedy. Those forms had their own procedure and requirements—some of which we would classify as substantive and some procedural. The Process Act of 1792, in turn, required federal courts to use state-law forms of action in actions at law, even when the plaintiff's right arose out of federal law.⁸⁴ Similarly, for suits in equity, federal law instructed federal courts to use the bills of equity that were in use in 1789 in English chancery courts.⁸⁵ So, to recover for any violation of a substantive right—including the rights in section 1983—a plaintiff would have needed to use (and satisfy) the applicable state-law form of action or traditional bill of equity.

Further, the Rules of Decision Act directed that state law provide the rules of decision in all actions at law absent clearly applicable federal law.⁸⁶ Even when the right at issue arose out of federal law, rules of decision that did not speak to the scope of that federal right were supplied by state law unless that state law was preempted.⁸⁷ Some rules of decision were supplied by the forms of action and so were more specifically provided for by the Process Act. But absent that act, they would have fallen under the Rules of Decision Act. On the

83. WHITE, *supra* note 35.

84. Process Act of 1792, ch. 36, § 2, 1 Stat. 276.

85. *Id.*

86. Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73.

87. *Campbell v. City of Haverhill*, 155 U.S. 610, 614–16 (1895); *see also* *Agency Holding Corp. v. Malley-Duff & Assoc., Inc.*, 483 U.S. 143, 162–63 (1987) (Scalia, J., concurring).

other hand, some rules of decision were somewhere in between the underlying substantive right and the form of action, such as statutes of limitations; those rules were similarly provided by state law.

In the light of that context, section 1983 would not have been understood to have created a new cause of action. Rather, it made the “rights, privileges, [and] immunities secured by the Constitution and [federal] laws”⁸⁸ underlying federal substantive rights and gave federal courts jurisdiction over claims concerning that right. It then left the redressability of a violation of those rights to the well-established forms of proceedings under 1792 state common law or English equity as of 1789.

A. *The Context*

1. *The Cause of Action*

In today’s legal vernacular, a plaintiff has a cause of action if he has a right that is judicially enforceable.⁸⁹ That is, if a plaintiff is entitled to any judicial remedy—legal or equitable of any kind—he has a cause of action.⁹⁰ This conception of a cause of action focuses on a specific transaction or occurrence: in the light of all the relevant facts and accompanying legal rules, can the plaintiff receive a judicial remedy?⁹¹

But this modern conception did not prevail in 1871.⁹² Instead, a plaintiff had a cause of action only if he could identify a violation of his substantive right and then fit that violation into a form of proceeding—that is, a legal writ or equitable bill.⁹³ Each form of proceeding had a specific remedy, so the “cause of action” was tied to the remedy to which the plaintiff was entitled.⁹⁴ If a plaintiff had a cause of action—that is, could fit the alleged violation into a form of

88. See 42 U.S.C. § 1983.

89. Bellia, *supra* note 26, at 795–98.

90. *Id.* at 799.

91. *Id.* at 798.

92. In analyzing what legal concepts existed and prevailed in 1871, one “cannot expect to find that there existed one absolute, universally accepted understanding.” *Id.* at 782–83. This kind of endeavor is “necessarily imprecise” because “different jurisdictions and courts are involved.” *Id.* at 783 & n.9 (quoting A.W.B. Simpson, *The Common Law and Legal Theory*, in OXFORD ESSAYS IN JURISPRUDENCE: SECOND SERIES 97 (A.W.B. Simpson ed., 1971)). Instead, the goal is to understand which concepts were more “germane” than others, “or [the] range of historical [understanding] that [might] exclude[] a particular recent usage.” *Id.* at 783.

93. *Id.* at 781; Anthony J. Bellia, Jr. & Bradford R. Clark, *The Original Source of the Cause of Action in Federal Court: The Example of the Alien Tort Statute*, 101 VA. L. REV. 609, 632 (2015). Professors Samuel Bray and Paul Miller have argued that there were no causes of action in equity but rather grievances, narratives, and remedies. Samuel L. Bray & Paul B. Miller, *Getting into Equity*, 97 NOTRE DAME L. REV. 1763, 1772–77 (2022). Nonetheless, most of the implications here apply to actions at law. And, in any event, my argument appears to apply equally well to the non-cause-of-action account of equity. See *id.* at 1796 (emphasizing the importance today of traditional equitable principles).

94. Bellia & Clark, *supra* note 93, at 631–32; 3 WILLIAM BLACKSTONE, COMMENTARIES *272–73.

proceeding—and could prove a violation of his substantive right, he would receive a remedy because the form of proceeding itself dictated and was inseparable from the remedy.⁹⁵

So a plaintiff could not come to court and say merely, “I have a right that has been violated by the defendant, and that right is judicially enforceable.” The plaintiff must have chosen a form of action or bill and pled the facts of the violation with such specificity that it was clear that the chosen form or bill fit the alleged violation.⁹⁶ And if no writ or bill could be made to fit the violation of the underlying substantive right, the plaintiff had no remedy. As Joseph Story’s influential commentaries on equity said in 1873, “[i]n the courts of common law [of] . . . America, there are certain prescribed forms of action, to which the party must resort to furnish him a remedy; and, if there be no prescribed form to reach such a case, he is remediless.”⁹⁷

Although foreign to most modern lawyers, causes of action at common law did not stand alone but had to “be deduced” from the forms of action available.⁹⁸ If there was no form, there was no cause; if there was a cause, it came from a form. And if there was no form—and therefore no cause—there was no remedy.⁹⁹

95. Bellia, *supra* note 26, at 784; F. W. MAITLAND, THE FORMS OF ACTION AT COMMON LAW: A COURSE OF LECTURES 2–4 (A. H. Chaytor & W. J. Whittaker eds., 1948).

96. See ROGER O’DONNELL, PROCEDURE AND FORMS: COMMON LAW PLEADING 211–12 (1934) (explaining the consequences of failing to plead the essential elements); 1 J.C. PERKINS, CHITTY’S TREATISE ON PLEADING AND PARTIES TO ACTIONS *229–34 (16th Am. ed., Springfield, G. & C. Merriam 1882) (explaining that sometimes a plaintiff could use *multiple* forms of actions and the strategic reasons for selecting one or the other).

97. JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 26, at 19 (F.V. Balch ed., 11th ed., Bos., Little, Brown, & Co. 1873). Story later comments that the “courts of equity are not so restrained.” *Id.* § 28, at 20. That particular statement, though, is made to contrast only the “absolute” judgments of the common law—either “for the plaintiff, or for the defendant”—with the decrees of the courts of equity which could “adjust their decrees” by adapting the remedy and joining all relevant parties. See *id.* §§ 27–28, at 19–20. Story notes still that courts of equity still “have prescribed forms of proceeding” and argues that the “striking and distinctive feature[]” of equity is the ability to “adapt” and “adjust” their *decrees* as needed. *Id.* § 28 at 20; see also 1 WILLIAM WAIT, A TREATISE UPON SOME OF THE GENERAL PRINCIPLES OF THE LAW 12–15, 26–28 (Albany, William Gould Jr., & Co. 1885) (distinguishing between legal remedies, which are “limited,” “fixed,” and “unbending,” and equitable remedies, which, although limited to “well-settled principles of equity,” could be “modified to suit all the exigencies of the case fully and circumstantially” and were “flexible”); *id.* at 23 (“[A]lthough [courts of equity] have prescribed forms of proceeding, [they] are flexible” in that they can “adjust their decrees so as to meet most, if not all, . . . exigencies” unlike the common law); 3 WILLIAM BLACKSTONE, COMMENTARIES *438–39 (discussing the flexibility of courts of equity with respect to the “mode of *relief*”). But even if the forms of proceeding in equity were more flexible than those at law, that flexibility does not undermine the fact that some appropriate equitable form of proceeding was necessary.

98. MAITLAND, *supra* note 95, at 6; 3 WILLIAM BLACKSTONE, COMMENTARIES *117 (citing Bracton for the proposition that the forms of action were “fixed and immutable, unless by authority of parliament”).

99. See 1 WAIT, *supra* note 97, at 22 (“In all strictly common-law courts, there are certain prescribed forms of action to which the party must resort to furnish him a remedy; and, if there be no prescribed form to reach such a case he is remediless; for these courts do not entertain jurisdiction except in certain actions . . .”).

To be sure, judges and scholars commonly stated that there was “no right without a remedy.”¹⁰⁰ Some of those statements were merely aspirational;¹⁰¹ some have been taken out of context and do not support the modern interpretation;¹⁰² and some were cynical, to the effect that if a plaintiff had no remedy (read, form of action), then the defendant had committed no wrong.¹⁰³ But those statements did not reflect the actual status of law through at least the middle of the nineteenth century.¹⁰⁴ Courts recognized that in many circumstances there was no remedy, at least no judicial remedy.¹⁰⁵

Recall Thompson’s suit against the New York City police officers. To have a cause of action at common law in the nineteenth century, Thompson would have needed to identify a substantive right (his common-law right to be free from prosecution without probable cause) and then find a form of action (action on the case¹⁰⁶). The form must have alleged that the officer caused the original prosecution, that the charge was without probable cause and made with malice, that the proceedings ended in Thompson’s favor, and that Thompson

100. See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 147 (1803).

101. See, e.g., *id.*; see also CHARLES M. HEPBURN, *THE HISTORICAL DEVELOPMENT OF CODE PLEADING IN AMERICA AND ENGLAND* §§ 20–21, at 20–22 (Cincinnati, W.H. Anderson & Co. 1897) (“In theory, of course, the courts were always able to find a remedy whenever a substantive right was violated; but, in fact, it was often a doubtful question whether the plaintiff ha[s] any remedy, and if so, what. The maxim *ubi jus, ibi remedium* had important qualifications even after it became current; in the beginnings of our jurisprudence it had no proper application at all.”).

102. See Bellia, *supra* note 26, at 836–46 (discussing several decisions and providing greater context for understanding them within the writ system).

103. MATTLAND, *supra* note 95, at 4–5 (“Lastly [a plaintiff] may find that, plausible as his case may seem, it just will not fit any one of the receptacles provided by the courts and he may take to himself the lesson that where there is no remedy there is no wrong.”).

104. See Tyler B. Lindley, *Remedial Limits, Constitutional Adjudications, and the Balance of Powers* [hereinafter Lindley, *Remedial Limits*], 58 WAKE FOREST L. REV. 655, 697 & n.232 (2023); Bellia, *supra* note 26, at 790, 836–46; HEPBURN, *supra* note 101; 1 WAIT, *supra* note 97, at 35 (“[I]t may be said, as a general rule, that there is . . . no right without a remedy . . . Yet, there are injuries for which the law does not furnish any remedy.”); *id.* at 8 (“Where the common law does not give a right of action for a tort, the court cannot supply the defect and furnish a remedy.”); see also 1 JOSEPH CHITTY, *A PRACTICAL TREATISE ON PLEADING AND ON THE PARTIES TO ACTIONS AND THE FORMS OF ACTIONS* *83–86 (New York, Robert M’Dermut, 1809) (asserting the “general principle that if the law confer a *right*, it will also confer a *remedy by action*,” but conceding that there are exceptions “where there are no legal grounds to proceed upon in a court of law” and where the action is “novel[]” or “materially var[ies]” from established forms); 1 WILLIAM BLACKSTONE, *COMMENTARIES* *138–39 (explaining that where there is an “uncommon injury” or other “infringement” of rights which the “ordinary course of law is too defective to reach,” citizens can petition the government for redress in other ways); THEODORE F. T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 680 (5th ed. 1956) (“The lawyers had a maxim that they would tolerate a ‘mischief’ (a failure of substantial justice in a particular case) rather than an ‘inconvenience’ (a breach of legal principle).”).

105. See Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1778–79 (1991); see also *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 164 (1803) (conceding that “there may be . . . cases” in which there is not a remedy but arguing that the “theory of this principle [that *no right has a remedy*] will certainly never be maintained”); Lindley, *Remedial Limits*, *supra* note 104, at 697–98; Bellia, *supra* note 26, at 790; 1 WAIT, *supra* note 97, at 8, 35.

106. See 2 WAIT, *supra* note 97, at 105.

was damaged.¹⁰⁷ If the facts could not support those specific allegations, then Thompson would have had no remedy, regardless of whether his right to be free from prosecution without probable cause had been violated.

2. *The Judiciary Act of 1789*

In this legal context, the First Congress addressed the power of newly formed federal courts. The Judiciary Act of 1789¹⁰⁸ addressed two key questions: it limited what kinds of writs federal courts could issue, and it codified the principle that in all actions at law federal courts would look to state law for rules of decision absent applicable federal law. Both provisions bear on what law would have applied in actions arising under section 1983.

With respect to writs in federal court, Congress implemented a stop-gap measure in the act that “ordain[ed] and establish[ed]” “inferior Courts.”¹⁰⁹ The Anti-Federalists were concerned that the federal judiciary would expand itself, particularly in equity, which would threaten the right to a jury trial (because equity did not require a jury), extend the reach of the federal government more generally, and trample on the authority of state governments to deal with issues generally considered to be within their purview.¹¹⁰ Section 14 of the Judiciary Act, the predecessor to the modern All Writs Act,¹¹¹ gave federal courts the power to issue two specific writs—*scire facias* and *habeas corpus*—and “all other writs not specially provided for by statute.”¹¹² But that residual grant of power had two important constraints: first, the issuance of the writ must have been “necessary for the exercise of their respective jurisdictions,” and second, it must have been “agreeable to the principles and usages of law.”¹¹³ The writs authorized included the writs tied to a particular form of action.¹¹⁴ And because the form of actions defined the causes of action, section 14 “authorized federal courts to employ only recognized legal causes of action” in cases over which they otherwise had jurisdiction.¹¹⁵ So the Judiciary Act prevented from recognizing causes of action (that is, forms of proceeding) that were not legislatively enacted or had not been traditionally recognized.

107. See JOSEPH H. KOFFLER & ALISON REPPY, *HANDBOOK OF COMMON LAW PLEADING* 194–95 (1969).

108. Judiciary Act of 1789, ch. 20, 1 Stat. 73.

109. See U.S. CONST. art. III, § 1.

110. See Bellia & Clark, *supra* note 93, at 638, 645–46.

111. See 28 U.S.C. § 1651(a).

112. Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73.

113. *Id.*

114. See Bellia & Clark, *supra* note 93, at 643–44.

115. *Id.* at 644. It was initially unclear whether that requirement was measured by “traditional common law principles or [by] state law,” see *id.* at 644 n.158, but the Supreme Court later clarified that either the common law or state law could satisfy section 14. See *infra* notes 165–66 and accompanying text.

With respect to the applicability of state law, section 34 of the Judiciary Act, known as the Rules of Decision Act, declared that the “laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply.”¹¹⁶ In the eighteenth and nineteenth centuries it was well understood that by default the law of the forum jurisdiction applied. Of course, in our federalist system, each forum has two sets of laws: federal and state. And the Supremacy Clause directs that the “Constitution, and the Laws of the United States which shall be made in Pursuance thereof[,] . . . shall be the supreme Law of the Land” by which “the Judges in every State shall be bound.”¹¹⁷ But that clause leaves unanswered what federal courts are to do when there is no applicable constitutional provision or law enacted under the Constitution. Even without the Rules of Decision Act, state law would have applied in those circumstances because state rules of decision governed in federal court, supplanted only by applicable supreme—that is, federal—law.¹¹⁸

Justice Antonin Scalia argued that the Rules of Decision Act also imposed a clear-statement rule.¹¹⁹ Under this theory, Congress “create[d] a presumption against implicit pre-emption[,] which [presumption] must be rebutted by affirmative congressional action.”¹²⁰ So, “congressional silence” on a rule of decision “is ordinarily insufficient to pre-empt state statutes.”¹²¹ But regardless of whether the Rules of Decision Act was merely “declarat[ory]”¹²² or required Congress to *clearly* preempt state rules of decision, it was not originally understood to be a substantive alteration of ordinary legal principles.

Erie Railroad Co. v. Thompkins is not to the contrary.¹²³ *Erie* concluded only that the Rules of Decision Act, in part, ensured that the normal rule—that state

116. Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73.

117. U.S. CONST. art. VI, para. 2.

118. See, e.g., *Bank of Hamilton v. Dudley’s Lessee*, 27 U.S. (2 Pet.) 492, 525 (1829) (“The laws of the states . . . would be . . . regarded [as rules of decision in the courts of the United States] independent of that special enactment . . .”); *McCluny v. Silliman*, 28 U.S. (3 Pet.) 270, 276–77 (1830) (“It is a well settled principle [that] . . . the law of the forum . . . operates upon all who submit themselves to its jurisdiction.”); *Hawkins v. Barney’s Lessee*, 30 U.S. (5 Pet.) 457, 464 (1831) (explaining that the Rules of Decision Act “has been uniformly held to be no more than a declaration of what the law would have been without it”); 1 ROSE, *supra* note 80, § 12[a], at 104; see also *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 162–63 (1987) (Scalia, J., concurring in the judgment) (collecting sources).

119. See *Malley-Duff*, 483 U.S. at 161–63 (Scalia, J., concurring in the judgment).

120. *Id.* at 163.

121. *Id.* at 162.

122. *Hawkins*, 30 U.S. (5 Pet.) at 464.

123. In the early 1980s, the Supreme Court declared in the middle of a five-paragraph footnote that the Rules of Decision Act applied only to diversity cases. See *DelCostello v. Int’l Broth. of Teamsters*, 462 U.S. 151, 159 n.13 (1983). The Court relied on an out-of-context statement from *Erie*, see *Erie R. Co. v. Tompkins*, 304 U.S. 64, 72–73 (1938), and a law review article criticizing the then-existing practice of applying general common law in place of unwritten state law, see Charles Warren, *New Light on the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 81–88 (1923) [hereinafter Warren, *New Light*]. But neither source supports the proposition. See *Malley-Duff*, 483 U.S. at 164 n.2 (Scalia, J., concurring in the judgment). *Erie* did not purport to

law applied absent preemptory federal law—was followed in diversity cases.¹²⁴ It did not purport to *cabin* the application of the Rules of Decision to diversity cases. Nor did it change the longstanding principle that, even irrespective of that act, “the law of the forum” (that is, the state in which the court sits) applies whether the substantive right arises out of state law, is “created by congressional legislation,” or is “enforceable only in the federal courts.”¹²⁵

Recall, again, Thompson’s case. Assume that his underlying substantive right was secured by the Fourth Amendment. Any dispute about the scope of his substantive right would be answered by reference to the Fourth Amendment, which would preempt any state law on the question. But absent additional federal law, non-substantive-right rules of decision—such as damages or limitations period—would have been supplied by state, not federal, law.

3. *The Process Acts*

Five days after enacting the Judiciary Act of 1789, Congress provided federal courts with more specific guidance on which forms of proceeding to use.¹²⁶ In a series of acts, Congress tied federal courts to the common-law forms of proceeding available in 1792 in the state in which the federal court sat and to the equitable forms of proceeding available in English chancery courts in 1789.¹²⁷ Unless federal law mandated the use of a specific form of proceeding, all litigation in federal court—including litigation arising under federal claims of right—was to be conducted using the applicable state-law or traditional equitable form of proceeding.¹²⁸

Recall that section 14 of the Judiciary Act “provided federal courts with general authority to adjudicate traditional common law causes of action.”¹²⁹ Section 2 of the Process Act of 1789 provided that “until further provision shall be made, and except where . . . statutes of the United States . . . otherwise provide[], the *forms of writs and executions*, . . . in suits at common law, shall be the same in each state respectively as are now used or allowed in the supreme courts of the same.”¹³⁰ This section “narrowed Section 14[] [of the Judiciary Act’s]

disrupt the traditional interpretation. And Professor Charles Warren’s article merely traced the history and purpose of the Rules of Decision Act to conclude that the “laws of the several states,” Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73, 92, included state common law in addition to state statutory law. *See* Warren, *New Light*, *supra*, at 84–88. For a survey of modern interpretations of the Rules of Decision Act, see Jonathan F. Mitchell, *Stare Decisis and Constitutional Text*, 110 MICH. L. REV. 1, 51–54 (2011).

124. *See Erie*, 304 U.S. at 72–73.

125. *See Campbell v. City of Haverhill*, 155 U.S. 610, 614–15 (1895).

126. *See Bank of the U.S. v. Halstead*, 23 U.S. (10 Wheat.) 51, 57 (1825) (explaining that section 14 of the Judiciary Act of 1789 had given the judiciary a wide “latitude of discretion” that was “modific[d] and limit[ed]” by the 1789 Process Act).

127. *See Bellia & Clark*, *supra* note 93, at 647–53.

128. *See id.* at 641–42.

129. *See id.* at 641.

130. Process Act of 1789, ch. 21, § 2, 1 Stat. 93, 93–94 (emphasis added).

broad terms.”¹³¹ The 1789 Process Act also provided that the “forms and modes of proceedings in causes of equity . . . and . . . admiralty . . . shall be according to the course of the civil law.”¹³² The act was to “continue in force [only] until the end of the next session of Congress, and no longer.”¹³³ But Congress extended it in 1790¹³⁴ and 1791.¹³⁵

The next year, Congress enacted the Process Act of 1792, which did not have a sunset provision.¹³⁶ There were three main changes,¹³⁷ each of which corresponded to a feature of the Process Acts more generally. But none of the changes altered the primary effect of the 1789 Act: federal courts could not create or recognize new causes of action; rather they were to borrow legal forms of action from state law and use equitable bills consistent with traditional equity practice.¹³⁸

First, the 1792 Act specified that, in legal actions, “the forms of writs, executions and other process” as well as the “forms and modes of proceeding . . . shall be the same as are now used” in the state in which the federal court sat.¹³⁹ But the style of writs, executions, and other process (that is, how the documents were formatted) were not to be borrowed from state law but would be governed by section 1 of the Act.¹⁴⁰ This language “strengthened the directive that federal courts apply state . . . causes of action” in actions at law as they existed in 1792.¹⁴¹ Congress consciously chose to “tether[] federal courts to the forms of writs” and actions “that prevailed in state courts” “[r]ather than adopt[ing] a uniform system of writs” and actions for federal courts.¹⁴²

Because a plaintiff could not bring an action at law—and had no cause of action—unless he could fit the violation of his substantive right into a form of action, he had to comply with state-law forms of action as of 1792. If a plaintiff had his rights (whether granted by federal or state law) violated and sought to recover damages in federal court, he had to find a state-law form of action that fit that violation.¹⁴³ And if state law did not recognize that form of action, or if

131. *See* Bellia & Clark, *supra* note 93, at 650.

132. Process Act of 1789 § 2.

133. *Id.* § 3.

134. Process Act of 1790, ch. 13, 1 Stat. 123.

135. Process Act of 1791, ch. 8, 1 Stat. 191.

136. *Compare* Process Act of 1791, ch. 8, 1 Stat. 191, 191 (“An act to regulate processes in the courts of the United States, shall be, and the same hereby is continued in force, until the end of the next session of Congress, and no longer.”), *with* Process Act of 1792, ch. 36, 1 Stat. 275 (providing no such sunset provision).

137. *See* Bellia & Clark, *supra* note 93, at 652–54.

138. *See id.* at 659.

139. Process Act of 1792, ch. 36, § 2, 1 Stat. 275, 276.

140. *See id.* § 1, 1 Stat. at 275–76.

141. Bellia & Clark, *supra* note 93, at 652; *see also id.* at 652–53 nn. 201–02 (collecting sources).

142. *Id.* at 648–49.

143. *Id.* at 648.

the alleged violation of the plaintiff's right did not fit the sought-after form, the plaintiff's action would ordinarily fail on that ground.¹⁴⁴

This language (“the forms of writs” and “forms and modes of proceeding”¹⁴⁵) included both—in our understanding—some rules of procedure and some of substance,¹⁴⁶ but it did not incorporate all questions of procedure.¹⁴⁷ On questions of procedure, section 17 of the Judiciary Act still governed: the “courts of the United States [had] power . . . to make and establish all necessary rules for the orderly conducting business in [those] courts.”¹⁴⁸ But because section 17 barred courts from promulgating rules that were “repugnant to the laws of the United States,”¹⁴⁹ federal courts could not promulgate rules that contradicted the Process Acts’ directive to adopt state-law rules of procedure that were embedded in the form of action.

Second, the 1792 Process Act directed federal courts to use traditional “forms and modes of proceeding” in equity and admiralty cases.¹⁵⁰ The 1789 Act had directed them to “follow ‘the course of the civil law.’”¹⁵¹ The meaning of the phrase “civil law” was ambiguous and its application in practice so unclear that one commentator described the text as having “all the indications of something done in haste.”¹⁵² The 1792 Act’s new language sanctioned federal courts’ use of traditional forms and modes of proceeding in equity jurisdiction and limited courts to those traditional practices.¹⁵³

Third, Congress provided certain exceptions to these general rules. First, federal courts now had the authority to make “alterations and additions” to the forms of proceeding as they “deem[ed] expedient.”¹⁵⁴ And, similarly, the Supreme Court could promulgate “regulations” that it thought “proper.”¹⁵⁵

144. *Id.*

145. Process Act of 1792 § 2, 1 Stat. at 276.

146. *See* Bellia & Clark, *supra* note 93, at 652–53.

147. *See e.g.*, Rev. Stat. § 911 (1874) (specifying the proper form of sealing of writs); *id.* § 918 (granting authority to circuit and district courts to make certain procedural rules).

148. Judiciary Act of 1789, ch. 20, § 17, 1 Stat. 73, 83.

149. *Id.*; *see also* Bellia & Clark, *supra* note 93, at 650 & n.189.

150. Process Act of 1792 § 2, 1 Stat. at 276.

151. Bellia & Clark, *supra* note 93, at 651 (quoting Process Act of 1789, ch. 21, § 2, 1 Stat. 93, 94).

152. 1 JULIUS GOEBEL, JR., HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801, at 534 (Paul A. Freund ed., 1971). Courts interpreted the 1789 Process Act’s command as requiring compliance with “that body of law derived from Roman law,” but they were unfamiliar with and hostile to that body of law. Bellia & Clark, *supra* note 93, at 649. So they treated “existing chancery practice” as “substantial compliance.” 1 GOEBEL, *supra*, at 580; *see also* SUP. CT. R. VII, 5 U.S. (1 Cranch) xv, xvi (1791) (promulgating a rule adopting chancery practices); Bellia & Clark, *supra* note 93, at 651. Some federal courts even looked to state equity practices (where the state had equity) as evidence of the general rules of equity. *See* Bellia & Clark, *supra* note 93, at 649, 651 & nn.183, 196 (collecting sources).

153. *See* Bellia & Clark, *supra* note 93, at 653 & n.205 (citing *Bains v. The James & Catherine*, 2 F. Cas. 410, 450 (C.C.D. Pa. 1832) (No. 756) (Baldwin, Circuit Justice)).

154. Process Act of 1792 § 2, 1 Stat. at 276.

155. *Id.*

Second, in the case of conflict between the Judiciary Act and the Process Act, the Judiciary Act controlled.¹⁵⁶

So, far from becoming obsolete, section 14 of the Judiciary Act limited the discretion given federal courts in the Process Act of 1792 by prohibiting any change that would have allowed courts to use forms of action that were not “agreeable to the principles and usages of law.”¹⁵⁷ At first, some courts “‘underst[ood] those general principles and those general usages’ to be such as are ‘found not in the legislative acts of any particular state, but in that generally recognised and long established law.’”¹⁵⁸ But the Supreme Court later clarified that “the principles and usages of law” included state law, even if that law departed from the common law.¹⁵⁹

“[C]ourts exercised their limited power to alter or amend state forms of proceeding in two circumstances.”¹⁶⁰ First, the Supreme Court promulgated rules for federal courts’ equity jurisdiction.¹⁶¹ Second, federal courts sometimes adopted new “state forms of proceeding that emerged after 1792.”¹⁶² But this adoption was not automatic. Only “[w]hen the application of outdated state forms of proceeding proved inconvenient or unfair” did courts consider whether it would be appropriate to “employ more current state forms of proceeding.”¹⁶³ For example, the Supreme Court affirmed a circuit court’s decision to adopt a post-Process Act Kentucky statute that made real property subject to execution in addition to personal property.¹⁶⁴ Even then, however, federal courts did not create new forms of action.¹⁶⁵

Adopting state law was not always popular, especially among early Supreme Court justices. Justice Chase in particular thought that if “the practice of the several States were, in every case, to be adopted, [the Court] should be involved

156. *Id.*

157. Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 82; Bellia & Clark, *supra* note 93, at 654.

158. Bellia & Clark, *supra* note 93, at 654 n.209 (quoting *United States v. Burr*, 25 F. Cas. 187, 188 (C.C.D. Va. 1807) (No. 14,694) (Marshall, Circuit Justice)) (alteration in original).

159. *Bank of the U.S. v. Halstead*, 23 U.S. (10 Wheat.) 51, 56 (1825). *Halstead* also rejected the argument that the Judiciary Act of 1789’s limitations to forms that were “agreeable to the principles and usages of law” constrained the Process Act’s application to only those state forms of proceeding that were consistent with the common law. *Id.* (emphasis omitted).

160. Bellia & Clark, *supra* note 93, at 655.

161. *Id.*; 1 ROSE, *supra* note 80, § 802, at 702–04.

162. Bellia & Clark, *supra* note 93, at 655.

163. *Id.*

164. *Halstead*, 23 U.S. (10 Wheat.) at 64–65.

165. Some courts were even concerned that their discretion did not extend far enough to allow them to adopt the forms of proceedings of newly admitted states or to adopt a system for Louisiana, both of which were eventually provided for by statute. Bellia & Clark, *supra* note 93, at 655; *Fullerton v. Bank of the U.S.*, 26 U.S. (1 Pet.) 604, 612–13 (1828) (explaining that the 1792 Process Act “could have no operation in” Ohio because it “was not received into the Union until 1802”); Process Act of 1828, ch. 68, § 1, 4 Stat. 278, 279–81 (governing states admitted after the Process Act of 1789); Process Act of 1842, ch. 109, 5 Stat. 499 (updating the 1828 Act for states admitted since 1828); Act of May 26, 1824, ch. 181, § 1, 4 Stat. 62, 63–64 (governing Louisiana); *see also* Act of Jan. 29, 1861, ch. 20, § 4, 12 Stat. 128, 128 (interpreted in *Smith v. Cockrill*, 73 U.S. 756, 757–59 (1867), as incorporating the 1828 Act for newly admitted Kansas).

in an endless labyrinth of false constructions, and idle forms.”¹⁶⁶ Although Justice Chase repeatedly opposed adopting state laws and practice,¹⁶⁷ the Supreme Court recognized that the law required federal courts to adopt state forms of proceedings.¹⁶⁸

Federal courts also confronted difficulty when states abandoned the forms of action and adopted various forms of the code pleading system.¹⁶⁹ Many courts concluded that the Process Act of 1792 did not allow federal courts to adopt the code pleading system as part of updating the forms of proceeding.¹⁷⁰ Instead, in code pleading states, the old forms of action persisted in federal court, even as states courts abandoned them.¹⁷¹

4. *The State of the Law in 1871*

With that background in mind, how would litigation in federal court have worked in 1871? The forms of action (that is, causes of action) available to plaintiffs for actions at law were, under the Process Act, the forms of proceedings applicable to similar cases under state law in 1792. That is, plaintiffs in federal court needed to fit the alleged violation of their substantive rights into a state-law form of action.¹⁷² If they could not find a state-law form that provided them a remedy, they likely could not have brought an action in federal court, even if their substantive right had been violated.¹⁷³ Further, federal litigation was governed by state rules of decision that were neither part of the form

166. *Brown v. Van Bramm*, 3 U.S. (3 Dall.) 344, 346 n.a (1797). The full report of the discussion at oral argument is enlightening. Justice Patterson commented that he “shall certainly consider [him]self bound in some cases . . . by the practice of the State Courts” and asked for more “practical exposition” on that question. *Id.* Justice Chase immediately responded that he “shall be governed . . . by what the common law says . . . without regarding the practice of the State.” *Id.* Although the Court ultimately decided the case on state-law grounds, *id.* at 356, Justice Chase concurred only in the judgment and based his opinion “on common law principles,” not “the laws and practice of the state,” *id.* at 356 n.*.

167. 1 GOEBEL, *supra* note 152, at 580; *see also id.* at 580 n.123 (collecting sources).

168. *See Halstead*, 23 U.S. (10 Wheat.) at 56.

169. Not all states that adopted code pleading disposed of the forms of action, at least as a way of defining substantive remedies. *See, e.g.*, *Joseph Dessert Lumber Co. v. Wadleigh*, 79 N.W. 237, 238 (Wis. 1899). And contemporary code pleading looked much more like the traditional common-law system than our modern notice pleading. *See O'DONNELL*, *supra* note 96, at 16–18; 1 CARTER P. POMEROY, *ESTEE'S PLEADINGS, PRACTICE, AND FORMS* § 179, at 99–100; (San Fran., Bancroft-Whitney Co., 3d ed. 1886); *see also* HEPBURN, *supra* note 101, at x–xiii (bemoaning this fact); Samuel L. Bray, *The Parable of the Forms*, 93 ST. JOHN'S L. REV. 623, 624–25 (2019); 1 WAIT, *supra* note 97, at 9.

170. *See* Charles Warren, *Federal Process and State Regulation*, 16 VA. L. REV. 546, 558–60 (1930).

171. Congress eventually required conformity to the state forms of proceedings as they existed at the time the action was brought. *See* Conformity Act of 1872, ch. 255, § 5, 17 Stat. 196, 197.

172. *See, e.g.*, *Bank of the U.S. v. Carneal*, 27 U.S. (2 Pet.) 543, 543, 547 (1829) (Story, J.) (explaining that a claim for money had and received was properly brought in the form of assumpsit because state law allowed it, and that a writ of scire facias was properly issued because it was authorized by state statute); *Sears v. Eastburn*, 51 U.S. (10 How.) 187, 189 (1850).

173. *See, e.g.*, *Mandeville & Jameson v. Joseph Riddle & Co.*, 5 U.S. (1 Cranch) 290, 298–99 (1803) (reversing a lower-court decision because state law did not allow an assignee to “maintain an action of *indebitatus assumpsit*” against a remote assignor).

of action nor defined by the underlying substantive right.¹⁷⁴ Both these principles applied whether the substantive right arose under state or federal law.¹⁷⁵

In some instances, federal law codified a right and specified the form of proceeding to be used to vindicate that right. In those cases, federal law dictated which state-law form of action a plaintiff had to use, and it defined the scope and nature of the substantive right. But federal law would not have governed all the rules related to that form of action or even the non-substantive-right, non-form-of-action rules of decision.¹⁷⁶

For example, the Patent Act of 1790 specified that in actions to recover for patent infringement, the infringer “shall forfeit and pay” damages to the aggrieved party, such damages to “be recovered in an action on the case founded on this act.”¹⁷⁷ That is, the Patent Act specified that patent holders were to bring a state-law action on the case and that the underlying substantive right would be governed by the Patent Act itself.¹⁷⁸ But even though the substantive right came from the Patent Act, the Supreme Court applied the state-law non-substantive-right rules of decision that applied to actions on the case.¹⁷⁹ When it addressed whether such actions on the case would be subject to the same statute of limitations as other actions on the case brought in the same state, it concluded that “the fact that [C]ongress ha[d] created the right” *did not* “limit the defenses to which the defendant would otherwise be entitled.”¹⁸⁰ Instead, Congress had merely “creat[ed] a new right” and “provid[ed] a [federal] court for the enforcement of such right.”¹⁸¹ So, the Court concluded, it “must . . . presume that [C]ongress intended that the remedy should be enforced in the manner common to like actions within the same jurisdiction.”¹⁸²

More than 80 years later, in the same act as section 1983, Congress enacted a similar provision. Section 6 of the Ku Klux Klan Act of 1871 provided that

174. See 1 ROSE, *supra* note 80, §§ 10[m], 12[a], at 89–91, 104–05 (explaining that the Rules of Decision Act required federal courts to look to state law for statutes of limitations even though such limitations do not affect the underlying substantive right).

175. See *Jones v. Vanzandt*, 13 F. Cas. 1054, 1055–56 (C.C.D. Ohio 1849) (No. 7,503) (McLean, Circuit Justice) (applying state survivorship rules applicable to actions of trespass on the case even where the claim of right was “founded on the act of [C]ongress and the [C]onstitution of the United States”); *Campbell v. City of Haverhill*, 155 U.S. 610, 614–16 (1895) (applying state law under the Rules of Decision Act even though the substantive right arose under federal law); *McCluny v. Silliman*, 28 U.S. (3 Pet.) 270, 278 (1830) (concluding that the plaintiff’s claim—which arose under federal law and was brought as an action on the case under state law—was barred by a state statute of limitations because, although “the plaintiff ha[d] selected the appropriate remedy [form],” the “statute bar[red]” the remedy); see also 1 ROSE, *supra* note 80, § 10[m], at 90 (collecting decisions for the proposition that “[t]he period of limitation on causes of action created by Congress and enforceable only in Federal courts, is governed by the local statute unless Congress otherwise prescribe[s]”).

176. See, e.g., *Campbell*, 155 U.S. at 614–16.

177. Patent Act of 1790, ch. 7, § 4, 1 Stat. 109, 111.

178. See *id.*

179. *Campbell*, 155 U.S. at 616.

180. *Id.* (emphasis added).

181. *Id.*

182. *Id.*

anyone who knew about certain conspiracies and failed to exercise reasonable diligence in preventing the conspiracy from achieving its aims “shall be liable . . . for all damages caused.”¹⁸³ But, unlike section 1983, section 6 went further. It specified the form of action—“an action on the case”—and gave federal courts jurisdiction over such claims.¹⁸⁴ Then, Congress preempted some of the state-law non-substantive-right rules of decision that otherwise would have applied under the Process Act: joinder of parties, survivorship of actions, and a damages cap for survivor actions.¹⁸⁵ Congress also provided a non-substantive-right rule of decision that limited the time to bring an action to one year.¹⁸⁶

This kind of express preemption would have been unnecessary if the phrase “shall be liable” had preempted state-law non-substantive-right rules of decision.¹⁸⁷ But a congressional grant of substantive rights and declaration of liability, standing alone, would not have silently superseded the Process Act of 1792 or the Rules of Decision Act. Absent specific federal statutory provisions that preempted state substantive law, that state law would have applied.

For suits in equity, the decision tree was slightly different. The Process Act of 1792 told federal courts to use the bills of equity that were widely accepted in courts of chancery in 1789.¹⁸⁸ Although many Anti-Federalists were concerned about equity’s flexibility, equity was more rigid than the modern story would have us believe,¹⁸⁹ and the Seventh Amendment prevented intrusion on common law.¹⁹⁰ And although the Supreme Court provided rules of practice, those rules had to be consistent with the principles and usages of the law of writs (including writs of injunction).¹⁹¹ So courts sitting in equity jurisdiction were not at liberty to innovate in the way legal realists of today desire or the Anti-Federalists of yesterday feared.

183. Ku Klux Klan Act of 1871, ch. 22, § 6, 17 Stat. 13, 15.

184. *Id.*

185. *Id.*; cf. 1 ROSE, *supra* note 80, § 902, [a], at 842–44 (explaining that the Conformity Act (a successor to the Process Act of 1792) “impose[d] . . . the general duty of following the local law respecting the proper parties . . . and the joinder, substitution and misjoinder of parties”).

186. Ku Klux Klan Act of 1871, § 6, 17 Stat. at 15.

187. In addition to section 6 and the Patent Act, the Copyright Act of 1790 similarly stated that “any persons” who unlawfully used another’s copyrighted materials “shall be liable to suffer and pay to the . . . [author] all damages occasioned by such injury.” Copyright Act of 1790, ch. 15, § 6, 1 Stat. 124. So, it was not uncommon to impose liability and nonetheless subject that liability to generally applicable state law, including defenses. In another example, Congress preempted state law and narrowed the Process Act by providing that, notwithstanding state law to the contrary, “property taken or detained . . . under authority of any revenue law of the United States” was not subject to the writ of replevin. *See* Act of Mar. 2, 1833, Pub. L. 22-, § 2, 4 Stat. 632, 633; 1 ROSE, *supra* note 80, § 908.

188. Process Act of 1792, ch. 36, § 2, 1 Stat. 275, 275.

189. Bellia & Clark, *supra* note 93, at 633; 3 WILLIAM BLACKSTONE, COMMENTARIES *432–34; PLUCKNETT, *supra* note 104, at 192–93; 1 WAIT, *supra* note 97, at 17, 26–28; *see also* Andrew S. Oldham & Adam I. Steene, *The Ex Parte Young Cause of Action: A Riddle Wrapped in a Mystery, Inside an Enigma 6–7* (June 14, 2023) (unpublished manuscript) (SSRN) (collecting sources).

190. *See* Oldham & Steene, *supra* note 189, at 6.

191. *See* Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81.

B. *The Original Understanding*

Section 1983 was a lightly debated section of the Ku Klux Klan Act of 1871.¹⁹² Instead, much of the debate on the bill itself focused on section 3, which allowed the President to marshal the national military when state officials were unwilling or unable to suppress “outrages,” and section 4, which allowed the President to suspend the writ of habeas corpus in states that failed to suppress outrages.¹⁹³

Until 1961, litigation under section 1983 was minimal. The Bill of Rights was not incorporated against the states, the Supreme Court had not yet held that state officials could be liable for unconstitutional actions that also violated state law (most constitutional violations were not sanctioned by state law),¹⁹⁴ and section 1983 became less important after Congress established general federal question jurisdiction.¹⁹⁵ In 1961, the Supreme Court held that a person acted “under color of” state law even where state law prohibited the conduct and provided the victim a remedy.¹⁹⁶ At that time, the Supreme Court was also incorporating many of the rights enumerated in the Bill of Rights against states.¹⁹⁷ And Congress had already enacted federal question jurisdiction (with an amount-in-controversy requirement) in 1875,¹⁹⁸ and it removed the amount requirement in 1963.¹⁹⁹

Nearly a century after section 1983’s enactment, when renewed attention was focused on it, judges and commentators imposed a modern view of the law—which was largely realist and rejected the formalism that played a central role in 1871—on the 90-year-old statute. By viewing section 1983 through the legal lenses that prevailed in 1871, this Article seeks to understand how courts

192. See *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 68 (1989).

193. Ku Klux Klan Act of 1871, ch. 22, §§ 3–4, 17 Stat. 13, 14.

194. *Monroe v. Pape*, 365 U.S. 167, 187 (1961); Baude, *Is Qualified Immunity Unlawful?*, *supra* note 14, at 65–66.

195. See *infra* note 370 and accompanying text.

196. See *Monroe*, 365 U.S. at 187. Judges and scholars disagree about whether *Monroe v. Pape*’s interpretation of “under color of” is correct. Compare, e.g., *Crawford-El v. Britton*, 523 U.S. 574, 611 (1998) (Scalia, J., joined by Thomas, J., dissenting), with, e.g., Baude, *Is Qualified Immunity Unlawful?*, *supra* note 14, at 62–69. Although the question is outside the scope of this Article, it has some textual support. See *State v. City of Des Moines*, 65 N.W. 818, 823 (Iowa 1896) (quoted in *McCain v. City of Des Moines*, 174 U.S. 168, 174–75 (1899)) (“‘Color of law’ does not mean actual law. ‘Color [of law]’ . . . means ‘mere semblance of legal right.’” (quoting *Color of law*, J. KENDRICK KINNEY, A LAW DICTIONARY AND GLOSSARY 166 (Chi., Callaghan & Co., 1893)); CONG. GLOBE, 42d Cong., 1st Sess. 568 (1871) (statement of Sen. Edmunds (R-VT)) (apparently distinguishing between rights “assailed by any State law” and those assailed “under color of any State law”); *id.* app. at 86 (Rep. Storm (D-PA)); *id.* app. at 313 (Rep. Burchard (R-IL)) (stating that section 1983 “[a]fford[s] an injured party redress in the United States courts against any person violating his rights as a citizen under claim or color of State authority”); cf. *Color of Office*, 1 JOHN BOUVIER, A LAW DICTIONARY 293 (Phila., J.P. Lipincott & Co., 14th ed. 1878) (“A pretence of official right to do an act made by one who has no such right.”).

197. See *McDonald v. City of Chi.*, 561 U.S. 742, 764 n.12 (2010) (collecting decisions).

198. Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470.

199. Act of Dec. 1, 1980, Pub. L. 96-486, § 2, 94 Stat. 2369, 2369–70 (codified at 28 U.S.C. § 1331).

in 1871 would have understood section 1983 to work in practice. To be clear, my thesis does not require a reevaluation of *Monroe v. Pape* or incorporation. The source of the cause of action and non-substantive-rights rules of decision would be the same no matter the scope of the substantive right defined in section 1983.

1. *Text and Structure*

Section 1983 was enacted as section 1 of the Ku Klux Klan Act of 1871.²⁰⁰ That section contained two distinct parts. The first part, which remains the first half of section 1983, read:

[A]ny person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress²⁰¹

This part was unique in that it did not purport itself to define any substantive rights but codified preexisting rights already defined and guaranteed by the Constitution. It then stated that those who violate those rights “shall . . . be liable” in the proper proceeding.²⁰²

The second part of section 1 discussed the nature of that proceeding:

[S]uch proceeding to be prosecuted in the several district or circuit courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the act of [April 9, 1866], entitled “An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication”; and the other remedial laws of the United States which are in their nature applicable in such cases.²⁰³

So original jurisdiction was to be in federal court. And any appeal, review, or other remedies in like cases, arising under either the Civil Rights Act of 1866 or other “remedial laws of the United States which are in their nature applicable,” were to be applied to these proceedings.²⁰⁴

That Civil Rights Act contained this provision:

The jurisdiction in civil and criminal matters hereby conferred on the district and circuit courts of the United States shall be exercised and enforced in

200. Ku Klux Klan Act of 1871, ch. 22, § 1, 17 Stat. 13.

201. *See id.*

202. *Id.*; *see also* 1 SCHWARTZ, *supra* note 20, § 1.05[B], at 1-24.

203. Ku Klux Klan Act of 1871 § 1.

204. *Id.*

conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where such laws are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offences against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of the cause, civil or criminal, is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern said courts in the trial and disposition of such cause²⁰⁵

So, if jurisdiction over the case was provided by section 1983, that jurisdiction was to be exercised and enforced in conformity with the laws of the United States, but only if those laws were “suitable” or were not “deficient” in “furnish[ing] suitable remedies.”²⁰⁶ If not, “the common law,” including the constitution and statutes of the state in which the federal court sat, “extended to . . . such cause” and “govern[ed] said courts in the trial and disposition of such cause.”²⁰⁷

a. Operative Provision

Situated in the context set out in Part II.A, the first part of section 1983 cannot be said to have created a cause of action. To have a cause of action, a plaintiff must have been able to fit the violation of his constitutional²⁰⁸ rights into some form of proceeding. The statute neither specified any particular form of proceeding nor created a new form of proceeding, instead referring to preexisting “action[s] at law, suit[s] in equity, [and] other . . . proceeding[s].”²⁰⁹

This part of section 1983 is more accurately viewed as codifying preexisting constitutional rights, such that the substantive right underlying the form of proceeding comes from section 1983—at least as “a prism through which many different [rights] may pass.”²¹⁰ But in federal court in 1871, identifying a violation of right was not enough to sustain a cause of action. The plaintiff still needed to have a form of action (in actions at law), and that form of action had to be found in state law if federal law did not provide one.²¹¹ Nothing in section 1983 altered that background principle.

205. Civil Rights Act of 1866, ch. 31, § 3, 14 Stat. 27.

206. *Id.*

207. *Id.*

208. The Revised Statutes of 1874 later added rights, privileges, or immunities secured by federal statutory law. *See* Rev. Stat. § 1979 (1874). But that addition did not change the key language discussed here.

209. *See* Ku Klux Klan Act of 1871, ch. 22, § 1, 17 Stat. 13.

210. *See* 1 SCHWARTZ, *supra* note 20, § 1.05[B], at 1-24 (quoting *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 723–24 (1999) (Scalia, J., concurring in part and concurring in the judgment)).

211. Even if federal law specified which state-law form of action to use, the state rules applicable to that kind of action would have still presumptively governed. *See supra* note 175 and accompanying text. Federal law, theoretically, could have created its own form of action, unmoored from state forms of action. But I have found no statute that did this, and it appears that the Process Acts—which do not contain an exception

Some commentators have focused on the “shall . . . be liable” language in section 1983 to argue that it not only creates a cause of action but also creates unqualified liability for any constitutional violation.²¹² But that reading does not fully account for the context in which section 1983 was enacted or its remaining text. Both the original and current version qualify that broad statement by stating that an individual shall “be liable . . . in an[y] action at law, suit in equity, or other proper proceeding.”²¹³ That language is agnostic as to the specific action, suit, or other proceeding. And actions at law, suits in equity, and other proceedings in federal court had well-established rules and requirements, including the Process Act.

So, to bring an action at law to remedy a violation of the “rights, privileges, or immunities secured by the Constitution of the United States,”²¹⁴ a plaintiff would have still had to fit that violation into a state law form of action because the “forms of writs . . . and the forms and modes of proceeding in suits in those of common law shall [have] be[en] the same as” those used in state courts under state law in 1792.²¹⁵ And to bring a suit in equity, a plaintiff must have been able to properly bring a traditional bill because the “forms of writs . . . and the forms and modes of proceeding . . . in those of equity” must have been “according to the principles, rules and usages which belong[ed] to courts of equity” in 1792.²¹⁶

To see this interpretation more clearly, compare section 6 of the same act. That section applied to those who knew that a conspiracy described in section 2 was about to accomplish its aims and had the ability to prevent or help prevent those wrongs.²¹⁷ If those people “neglect[ed] or refuse[d]” to help, and the wrongs were done, section 6 provided that they “shall be liable to the person injured . . . for all damages caused by any such wrongful act which . . . reasonable diligence could have prevented.”²¹⁸ After imposing the duty²¹⁹ and thereby

for forms of proceedings created by federal law—ended any desire to create federal forms of action. See Bellia & Clark, *supra* note 93, at 647–49.

212. See, e.g., Ravenell, *supra* note 40, at 395 (discussing section 1983’s “guaranteed liability”); see also Reinert, *supra* note 22, at 216, 241 (arguing that the “notwithstanding” clause prohibits any state law from limiting liability). For more on Professor Reinert’s argument, see *infra* notes 225–34 and accompanying text.

213. Ku Klux Klan Act of 1871 § 1; 42 U.S.C. § 1983.

214. Ku Klux Klan Act of 1871 § 1.

215. Process Act of 1792, ch. 36, § 2, 1 Stat. 275 (emphasis added).

216. *Id.*; see also Bellia & Clark, *supra* note 93, at 653 & n.205; 2 ROBERT DESTY, A MANUAL OF PRACTICE IN THE COURTS OF THE UNITED STATES § 435, at 1100 (San Fran., Bancroft-Whitney Co., M. A. Folsom, ed., 9th ed. 1899) (collecting cases). It is not entirely clear what “other proper proceeding” means, as Louisiana civil-law proceedings could be fit into either law or equity. See *Livingston v. Story*, 34 U.S. (9 Pet.) 632, 654–58 (1835); *id.* at 660–62 (opinion of McClean, J.). But perhaps they were “special proceedings,” which were “not, under the common law and equity practice, either an action at law or a suit in chancery.” *Action*, in 1 W.L. CRAWFORD, ENCYCLOPEDIA OF PLEADING AND PRACTICE 112 (William M. McKinney ed., Northport, Edward Thompson Co., 1895). These proceedings included mandamus, certiorari, quo warranto, and partition. See *id.* at 112–15; 1 WAIT, *supra* note 97, at 68–69.

217. Ku Klux Klan Act of 1871 § 6.

218. *Id.* (emphases added).

219. See CONG. GLOBE, 42d Cong., 1st Sess. 807 (1871) (statement of Rep. Garfield (R-MA)) (stating that section 6 “ma[kes] the duty of all citizens to aid in repressing these outrages”).

conferring a right,²²⁰ section 6—like the Patent Act of 1790—specified that damages were to be recovered in “an action on the case.”²²¹ It then specified that “any number” of individuals could “be joined as defendants”; that the action must have been “commenced within one year”; and that the legal representative of an individual killed by the wrong or who later died would “have [the] action” but be limited to \$5,000 in damages for the benefit of the victim’s widow or next of kin.²²² The joinder rule, survivorship rules, and calculation of damages (including the damage cap) would have otherwise come from the rules governing the state-law form of action.²²³ And the relevant state-law limitations period would have applied under background law and the Rules of Decision Act. Section 6 supplanted those rules, but section 1 did not, the natural implication of which is that state law was to provide those rules in actions under section 1.

Let’s look again at Thompson’s action against the New York City police officers. Even assuming the officers had violated his constitutional rights such that section 1983 applied, Thompson would have needed a state-law form of action to get into federal court. As discussed, his most likely form of action would have been an action on the case for malicious prosecution.²²⁴ If he could fit the violation of his rights into that state law form, he would have had a cause of action in federal court. The next two sections address what non-substantive-right, non-form-of-action rules would have governed Thompson’s hypothetical case.

In 1874, Congress approved and made positive law the Revised Statutes of 1874, which reorganized and categorized all statutes that had been enacted before December 1, 1873.²²⁵ The changes to section 1983 were mostly minor.²²⁶ One of them was to remove the phrase “any such” state law “notwithstanding.”²²⁷ That change recently sparked an article by Professor Alexander Reinert about the clause’s designed effect on state laws that prevent plaintiffs from

220. *Cf. Right*, 2 JOHN BOUVIER, A LAW DICTIONARY 483 (11th ed., Phila., George W. Childs 1862) (“Right is the correlative of duty, for, wherever one has a right due to him, some other must owe him a duty.”).

221. Ku Klux Klan Act of 1871 § 6; *see also* CONG. GLOBE, 42d Cong., 1st Sess. 756 (1871) (statement of Sen. Edmunds) (describing the amendment by the joint committee to add that language as “pointing out the form of remedy”); 1 ROSE, *supra* note 80, § 902, [a], at 842–44.

222. Ku Klux Klan Act of 1871 § 6.

223. *See infra* notes 392–98 and accompanying text.

224. *See supra* note 106 and accompanying text.

225. *See* Act of June 20, 1874, ch. 333, 18 Stat. 113.

226. For example, the jurisdictional grant and reference to the Civil Rights Act of 1866 were moved to a centralized location for all Reconstruction-era civil-rights provisions. Rev. Stat. §§ 563(12), 629(16), 722 (1874). The revisor also added “and laws” after “the Constitution” such that the rights references included rights secured by statute, changed the target from “any person” to “every person,” limited the protections to “citizen[s] of the United States,” and made other grammatical changes. *See* Rev. Stat. § 1979 (1874).

227. *Id.*

recovering maximal damages, such as qualified immunity.²²⁸ Reinert argues that the “notwithstanding” clause preempts any state law that inhibits liability against a state actor for a constitutional violation.²²⁹

Reinert’s argument is unpersuasive in the light of the historical context,²³⁰ but his interpretation of the “notwithstanding clause” appears to be mistaken. He reads the clause to apply to *any* state law that could inhibit the “shall be liable” clause.²³¹ But the notwithstanding clause specifies that liability can attach notwithstanding “any *such*” law—that is, notwithstanding the law under color of which the constitutional violation was committed.²³² The two laws referenced by section 1983 are the same law, not one law under which the violation was committed and another law that operates as a limit on monetary liability.²³³ Reinert’s interpretation also conflicts with how legislators discussed that phrase in the debates.²³⁴

228. See Reinert, *supra* note 22, at 234–41; see also Patrick Jaicomo & Anya Bidwell, *Recalibrating Qualified Immunity: How Tanzin v. Tanvir, Taylor v. Riojas, and McCoy v. Alamu Signal the Supreme Court’s Discomfort with the Doctrine of Qualified Immunity*, 112 J. CRIM. L. & CRIMINOLOGY 105, 122 n.118 (2022); Patrick Jaicomo & Anya Bidwell, *Unqualified Immunity and the Betrayal of Butz v. Economou: How the Supreme Court Quietly Granted Federal Officials Absolute Immunity for Constitutional Violations*, 126 DICK. L. REV. 719, 730 n.65, 735 n.87 (2022).

229. Reinert, *supra* note 22, at 234–41.

230. Reinert’s thesis appears to be influenced by his conception of the historical context, as he asserts that “Congress’s intent” was to eliminate “any immunity grounded in state law” in section 1983’s “*cause of action*.” See *id.* at 238 (emphasis added).

231. See *id.* at 167, 178.

232. See Ku Klux Klan Act of 1871, ch. 22, § 1, 17 Stat. 13 (emphasis added). Judge Willett, in his concurrence advancing Reinert’s argument, drops the word “such” altogether when not directly quoting section 1. See *Rogers v. Jarrett*, 63 F.4th 971, 980 (5th Cir. 2023) (Willett, J., concurring) (“*notwithstanding any state law to the contrary*”; “*liability notwithstanding any state law to the contrary*”). “[S]uch” makes clear that the notwithstanding clause applies to a specific state law, not any state law. Indeed, section 1 includes another “such” in the jurisdictional provision: “such proceeding to be prosecuted in the several district or circuit courts of the United States.” See Ku Klux Klan Act of 1871 § 1 (emphasis added). There, “such” indicates that only the proceedings described above can be brought in federal court, not *any* proceeding.

233. My interpretation does not foreclose the possibility that an official can act “under color of” multiple state laws at the same time. *Contra Harcar*, *supra* note 41, at 11 & n.41. Rather, it maintains that the notwithstanding clause refers to whatever law or laws under color of which an official acts, and that it is a stretch to say that state officials act “under color of” state-law immunity.

234. See, e.g., CONG. GLOBE, 42d Cong., 1st Sess. 416 (1871) (statement of Rep. Biggs (D-DE)) (explaining that a remedy is given for unconstitutional conduct “State authorization in the premises to the contrary *notwithstanding*” (emphasis added)). Reinert’s argument has two additional problems. First, his interpretation conflicts with section 1988(a), which does not textually contain the limit on state law he believes section 1983 does. He resolves this conflict by asserting that section 1983’s supposed limitation trumps section 1988(a)’s non-limitation, see Reinert, *supra* note 22, at 240–41, but it is unclear why. Second, even if Reinert’s interpretation is correct, the Revised Statutes were adopted by Congress as positive law. See Act of June 20, 1874, ch. 333, § 8, 18 Stat. 113 (providing that the Revised Statutes should be “legal evidence” of the law); Rev. Stat. § 5596 (1874) (repealing all statutes enacted before December 1, 1873). It appears that Reinert’s only response is that the original clause “still speaks powerfully to Congress’s intent.” See Reinert, *supra* note 22, at 238. But it is unclear what relevance that supposed evidence of intent has when Congress also removed that language and how that intent can override that deletion.

b. *Jurisdiction and Cross-Reference*

The second half of section 1 of the Ku Klux Klan Act gave more detail for the proceedings envisioned in federal court. On top of granting federal jurisdiction, that part extended the “other remedies” applicable in like cases arising under the Civil Rights Act of 1866 or under “other remedial laws of the United States” to section 1983.²³⁵ Applying the well-known canon of *esjusedem generis*,²³⁶ those “other remedies” might extend only to remedies similar to “appeal[s]” and “review upon error,” such as the execution of judgments.²³⁷ This reading would leave untouched the Process Act’s application to section 1.

Conversely, under a broader reading, those “remedial laws of the United States”²³⁸ might have included the Process Act of 1792, which specified the remedies—that is, the forms of proceeding—that federal courts could provide in actions at law and suits in equity.²³⁹ So, even if the latter half of section 1 touched on the form of proceeding in federal court, it would have simply required adherence to the Process Act.

c. *The Civil Rights Act of 1866*

Section 1’s reference to the provisions in like cases under the Civil Rights Act of 1866 could have applied to three sections of that act. First, section 10 of the Civil Rights Act gave a right of appeal to the Supreme Court for “all questions of law.”²⁴⁰ Second, section 5 imposed a “duty” on “all marshals . . . to obey and execute all warrants and *precepts* issued under” the Act, gave the marshals power to overcome public opposition, and imposed a fine of \$1,000 to be paid to the victim in case of a marshal’s refusal or neglect.²⁴¹ “[P]recepts” could be read broadly enough to include all writs—including ones issued in civil cases²⁴²—or narrowly to criminal warrants and other similar criminal-law

235. Ku Klux Klan Act of 1871 § 1.

236. See ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* § 32, at 199–213 (2012).

237. See Ku Klux Klan Act of 1871 § 1; cf. CONG. GLOBE, 42d Cong., 1st Sess. 751 (1871) (statement of Rep. Shellabarger (R-NY)) (discussing a proposed amendment to section 6 and using “remedy” to refer to the people from whom one could collect a judgment and the available methods of enforcing judgments, such as mandamus, attachment, and execution). Some remedial laws generally required conformity to state practice. See *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 44 (1825). But over time, Congress provided many federal rules for the execution of judgments. See 2 ROSE, *supra* note 80, §§ 1865, 1868–73, at 1489–93; 1 *id.* § 925[d], at 883–84.

238. Ku Klux Klan Act of 1871 § 1.

239. See *Remedy*, 2 BOUVIER, *supra* note 196, at 436 (14th ed.) (defining remedy as “[t]he means employed to enforce a right or redress an injury” and explaining which remedy was applicable by listing the form of proceeding (emphasis added)); *accord Remedy*, 2 BOUVIER, *supra* note 220, at 442–44 (11th ed.).

240. Civil Rights Act of 1866, ch. 31, § 10, 14 Stat. 27.

241. Civil Rights Act of 1866 § 5 (emphasis added).

242. See *Precept*, 2 BOUVIER, *supra* note 196, at 360 (14th ed.) (defining precept as “[a] writ directed to the sheriff, or other officer, commanding him to do something”); *accord Precept*, 2 BOUVIER, *supra* note 220, at 365 (11th ed.). Section 5 also uses the phrase “warrants and *other process*,” see Civil Rights Act of 1866 § 5

precepts.²⁴³ But no matter the scope of “precepts,” both section 10 and section 5 could fit comfortably within a narrow, *ejusdem generis*-inspired reading of section 1 of the Ku Klux Klan Act.

The third potentially applicable section is now found in section 1988(a). Section 3 of the Civil Rights Act granted federal jurisdiction to civil and criminal cases arising out of the first section of that act, which guaranteed freedmen the same common-law rights as white persons.²⁴⁴ It then specified how that jurisdiction was to be “exercised and enforced”: according to the laws of the United States unless they are not suitable to, are not adapted to, or are deficient in carrying out the laws of the United States, in which case state common law (including applicable state statutory and constitutional alterations) was to be applied.²⁴⁵

But questions of its scope remain.²⁴⁶ One contemporary decision explained that the phrase “exercised and enforced” “manifestly has reference not to the extent or scope of jurisdiction, *or to the rules of decision*, but to the forms of process and remedy.”²⁴⁷ Again, however, even if this section applied to the forms of proceeding,²⁴⁸ it would have simply directed courts first to the Process Act and state forms of proceeding in actions at law and then to the modified common law of the state as it presently existed. So, with respect to the forms of proceeding, both options point in a similar direction: the Process Act referred first to 1792 state forms but updated as appropriate; the Civil Rights Act would have merely made that updating mandatory.

This conclusion tends to support to a *narrower* reading of section 1988(a)—that it applies only to procedural questions (which were in part governed by federal law²⁴⁹) and enforcing judgments. The provision itself specifies that, in criminal matters, the relevant state law includes the “infliction of punishment

(emphasis added), and process was similarly broad, *see Process*, 2 BOUVIER, *supra* note 196, at 379 (14th ed.) (“The means of compelling a defendant to appear in court, after suing out the original writ, in civil, and after indictment, in criminal, cases.”); *accord Process*, 2 BOUVIER, *supra* note 220, at 387 (11th ed.).

243. The section specifies warrants (indeed, in the final clause it says warrants, without more), even though the term “precepts” includes warrants, and it describes the wrong alleged to have been committed in such cases as an “offense.” *See* Civil Rights Act of 1866 § 5.

244. Civil Rights Act of 1866 §§ 1, 3.

245. Civil Rights Act of 1866 § 3. Although some have questioned whether this provision was intended to apply to section 1983 at all, *see* Eisenberg, *supra* note 43, at 539–41, the Revised Statutes of 1874 made its applicability explicit. *See* Rev. Stat. § 722 (1874).

246. One contemporary Supreme Court justice said that, “[e]xamined in the most favorable light, the provision is a mere jumble of Federal law, common law, and State law, consisting of incongruous and irreconcilable regulations” *Tennessee v. Davis*, 100 U.S. 257, 299 (1879) (Clifford, J., dissenting).

247. *In re Stupp*, 23 F. Cas. 296, 299 (No. 13,563) (C.C.S.D.N.Y. 1875) (emphasis added); *see also* 1 ROSE, *supra* note 80, § 29, at 200.

248. Process was sometimes used in distinction with proceedings. *See, e.g.*, Process Act of 1792, ch. 36, § 2, 1 Stat. 275 (differentiating between “forms of . . . process” and “forms . . . of proceeding”).

249. *See* 1 ROSE, *supra* note 80, § 900[f] (describing some non-form-of-proceeding questions of procedure provided for by federal statutes).

on the party found guilty,” a post-judgment execution.²⁵⁰ And the narrow interpretation fits better with the original cross-reference in section 1 of the Ku Klux Klan Act in which the term “other remedies” was paired with the “rights of appeal” and “review upon error.”²⁵¹ But under any reading of what is now section 1988(a), the forms of proceeding would have come from state law (for actions at law) or traditional equity practice (for suits in equity).

As for non-form-of-proceeding, non-substantive-right rules of decision, section 1988(a) likely would not have been understood to have overridden the Rules of Decision Act.²⁵² But even if section 1988(a) did cover the same ground as the Rules of Decision Act, it would have operated in much the same way. By requiring reference first to federal law, it might have referred to the Rules of Decision Act itself.²⁵³ Even if not, just as the Rules of Decision Act directed federal courts to apply state law only where it applied (that is, where there was no applicable federal law), section 1988(a) directed federal courts to look to state law only when there was no *adequate* federal law.²⁵⁴ So section 1988(a) imposed a rule that is even more slanted to state law: even when there is applicable federal law, federal courts are to apply state law if the federal law is deficient.²⁵⁵ “[I]f the section [wa]s an attempt to provide the substantive law to be administered or the rule of decision in the cases referred to, it would seem ineffective in denying the general principles by which the Federal courts must be governed.”²⁵⁶

One final note on section 1988(a). Some courts and commentators have posited that the limitation on state law—that it be “not inconsistent with the Constitution and laws of the United States”²⁵⁷—precludes not only unconstitutional and preempted laws but also rules that are inconsistent with the generally defined and judicially divined purposes of section 1983.²⁵⁸ But Congress imposed a lower standard for federal law—which was inapplicable when it was not “suitable to carry [section 1983] into effect”—and higher standard for state law—which was applicable when “inconsistent with the . . . laws of the United States.”²⁵⁹ And even if this interpretation were correct, federal courts could not

250. See Civil Rights Act of 1866 § 3.

251. See *supra* note 237 and accompanying text.

252. This interpretation calls into question the Supreme Court’s stated justification (although not the result) for borrowing contemporary state statutes of limitations for section-1983 cases. See *Bd. of Regents of Univ. of State of N.Y. v. Tomanio*, 446 U.S. 478, 483–85 (1980).

253. Cf. *supra* note 239 and accompanying text.

254. 42 U.S.C. § 1988(a).

255. *Id.*

256. 1 ROSE, *supra* note 80, § 29, at 201.

257. 42 U.S.C. § 1988(a).

258. See, e.g., Coleman, *supra* note 79, at 733; Kreimer, *supra* note 18, at 632.

259. Civil Rights Act of 1866, ch. 31, § 3, 14 Stat. 27.

craft their own rules.²⁶⁰ Instead, there would simply be no law to apply and the party seeking the benefit of such a rule would lose.²⁶¹

To see this interpretation in operation, let's return to Thompson's case. As discussed above, he would have needed to allege a constitutional violation and fit that violation into a state-law form of action (here, an action on the case for malicious prosecution). But some rules of decision existed in between the underlying substantive right and the form of action, such as statutes of limitation. Those rules of decision would likely have been provided by contemporary state law under the Rules of Decision Act absent federal law on the question. But even if the Civil Rights Act did apply (now section 1988(a)), it also would have directed courts to refer to state law in much the same way. So Thompson's claim would have been subject to the New York statute of limitations for similar actions.²⁶²

* * *

Like the Patent Act at issue in *McCluny*,²⁶³ section 1983, as originally understood, codified preexisting substantive rights and gave federal courts jurisdiction to adjudicate proceedings seeking to vindicate those rights. Unlike the Patent Act, though, section 1983 did not specify a particular form of proceeding. Instead, it referred to "action[s] at law, suit[s] in equity, or other proper proceeding[s]." ²⁶⁴ But there were no freestanding actions at law, suits in equity, or other proper proceedings in federal courts, and even where federal law defined the scope of the substantive right, the Rules of Decision Act or the Civil Rights Act provided that state rules of decision would apply in the absence of an applicable federal statute. Reading the text of section 1983 in context, then, one could not understand it to have created a new form of action—that is, cause of action—or to have supplanted state-law rules of decision.

260. See *supra* notes 67, 80. *Contra* 1B SCHWARTZ, *supra* note 20, § 13.02[B], at 13-11–13.18.1 (collecting cases and discussing the applicability of state survivorship rules); Kreimer, *supra* note 18, at 632; Coleman, *supra* note 79, at 733.

261. *Cf.* *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 163 n.3 (1987) (Scalia, J., concurring in the judgment) (explaining that in the absence of an applicable federal or state statutory limitations period, federal causes of action have none). *Contra* Kreimer, *supra* note 18, at 621 n.93 (calling this result in the section-1983 context an "embarrassment" and rejecting an interpretation that might lead to it).

262. The Process Act of 1792 required conformity to the forms of action available in 1792, § 2, but New York adopted code pleading in 1848, see N.Y. Laws, ch. 380 (1848). So the federal court would have had to engage in analogical reasoning and find the code-pleading action most analogous to the relevant common-law form of action.

263. See *McCluny v. Silliman*, 28 U.S. 270 (1830).

264. Ku Klux Klan Act of 1871, ch. 22, § 1, 17 Stat. 13.

d. What Section 1983 Accomplished

None of this is to minimize what section 1983 accomplished. It “thr[ew] open the doors of the United States courts” for litigants,²⁶⁵ particularly newly freed Americans and sympathetic Republicans.²⁶⁶ To be sure, even without section 1983, plaintiffs could have brought state-law forms of actions when their constitutionally secured rights were violated, had unconstitutional state laws set aside, and even been able to appeal to the Supreme Court.²⁶⁷ But the essence of section 1983 was to allow plaintiffs to bypass *state courts* altogether. In federal court, friendly federal officers would serve process, protect plaintiffs during court proceedings, and enforce judgments.²⁶⁸ A federal forum was more likely to give plaintiffs a fair jury as the Ku Klux Klan Act itself added requirements for jurors and provided federal judges with means to prevent Klan members and sympathizers from serving on juries in section-1983 litigation.²⁶⁹ In federal court, a plaintiff was more likely to meet an unbiased judge.²⁷⁰ Federal jurisdiction also provided plaintiffs with a court sympathetic to constitutional supremacy—particularly in regard to the Reconstruction amendments—without having to take an appeal to the Supreme Court.²⁷¹ Section 1983 transformed how constitutional rights were enforced in the American legal system.²⁷²

2. Legislative Commentary

“Although there were sharp and heated debates, the discussion of [section] 1 of the [Ku Klux Klan Act], which contained the present section 1983, was not extended.”²⁷³ Instead, legislators fought about the underlying facts

265. See CONG. GLOBE, 42d Cong., 1st Sess. 376 (1871) (statement of Rep. Lowe (R-KS)). There was no general federal question jurisdiction at the time, and many legislators worried about expanding jurisdiction. See, e.g., *id.* at 395 (statement of Rep. Rice (D-IL)); *id.* at 352 (statement of Rep. Beck (D-KY)).

266. CONG. GLOBE, 42d Cong., 1st Sess. app. 68 (1871) (statement of Rep. Shellabarger (R-NY)) (stating that the act “open[ed] the United States courts”); *id.* (explaining that section 1983 “provides a civil remedy . . . to all people” not just “persons whose former condition may have been that of slaves”).

267. See William Baude et al., *General Law and the Fourteenth Amendment*, 76 STAN. L. REV. (forthcoming 2024) (manuscript at 22, 57) (SSRN).

268. See *supra* notes 241–43 and accompanying text.

269. Ku Klux Klan Act of 1871 § 5.

270. See *infra* notes 301–03 and accompanying text.

271. Cf., e.g., CONG. GLOBE, 42d Cong., 1st Sess. app. 120 (1871) (statement of Sen. Blair (D-MO)) (stating his preference that the President use military force to undo Reconstruction and that the people peacefully resist).

272. At least one legislator was not so optimistic. See, e.g., CONG. GLOBE, 42d Cong., 1st Sess. 820 (1871) (statement of Sen. Sherman (R-OH)) (asking “[w]hat is the use of suing” violators and citing problems of identification, unsympathetic juries, and organized perjury, but acknowledging a federal judge as the “only advantage”).

273. *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 68 (1989); see also CONG. GLOBE, 42d Cong., 1st Sess. 331 (1871) (statement of Rep. Morgan (D-OH)); *id.* app. at 86 (statement of Rep. Storm (D-PA)); *id.* app. at 113 (statement of Rep. Farnsworth (R-IL)); *id.* app. at 310 (statement of Rep. Maynard (R-TN)) (“I

surrounding the influence of the Klan in the South and the instances of violence against the persons and property of freedmen and Republicans.²⁷⁴ They also discussed at length the provisions that allowed the President to mobilize the United States military domestically and suspend the writ of habeas corpus.²⁷⁵ But what they did—and did not—say about section 1983 and their common assumptions can tell us something about their understanding of section 1983.

To be sure, the Supreme Court does not consider legislative history to be conclusive as to the meaning of an enacted text, and it might not even be relevant at all when the text is unambiguous.²⁷⁶ But understanding how the legislators at the time spoke about concepts can help clarify how it would have been interpreted and applied by judges.²⁷⁷ And to the extent legislative intent is considered relevant for interpreting text,²⁷⁸ legislative history and debates could speak to that intent.²⁷⁹

The debate surrounding section 1 coalesced around four main themes relevant here. First, both Democratic and Republican legislators agreed that section 1 affected preexisting cases that would have otherwise been brought in state court using state-law forms of action.²⁸⁰ Second, both sides agreed that section 1's justification rested on the inadequacy of state courts in adjudicating these cases.²⁸¹ Third, it was an unspoken (with a couple notable exceptions) assumption that section 1 gave jurisdiction to federal courts over many preexisting causes of action, not just one *new* cause of action.²⁸² And fourth, consistent with their strategy in debating other sections of the act, Democratic legislators sought to make drastic accusations about the effect of section 1.²⁸³ But, reading those politically motivated statements in the light of contemporary legal context and together with the discussion of other sections, it becomes clear that these assertions did not represent a consensus view.

suppose there is not much objection to [section 1], from the fact that so far there has been very little said about it.”)

274. See, e.g., CONG. GLOBE, 42d Cong., 1st Sess. 657–60 (1871).

275. See, e.g., *id.* at 331 (statement of Rep. Morgan (D-OH)) (focusing on “the third and fourth sections” due to “time” constraints).

276. See *Milner v. Dep’t of the Navy*, 562 U.S. 562, 572 (2011).

277. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 38 (Amy Gutmann ed., 1997).

278. See *Milner*, 562 U.S. at 572.

279. *But see* CONG. GLOBE, 42d Cong., 1st Sess. 650 (1871) (statement of Sen. Anthony (R-RI)) (“There have not been half a dozen Senators listening to the debate for the last three days.”).

280. See, e.g., *id.* app. at 86 (statement of Rep. Storm (D-PA)); *id.* app. at 153 (statement of Rep. Garfield (R-OH)).

281. See, e.g., CONG. GLOBE, 42d Cong., 1st Sess. 653 (1871) (statement of Sen. Osborn (R-FL)); *id.* at 760 (statement of Sen. Sherman (D-OH)).

282. See, e.g., *id.* at 807 (statement of Rep. Garfield (R-OH)); *id.* at 216 (statement of Sen. Thurman (D-OH)).

283. See, e.g., *id.* at 365 (statement of Rep. Arthur (D-KY)); *id.* at 385 (statement of Rep. Lewis (D-KY)); *id.* app. at 217 (statement of Sen. Thurman (D-OH)).

First, the debate started from a common point that section 1 transferred to federal court jurisdiction over cases that would have otherwise been brought in state court. This assumption is inconsistent with the idea that section 1983 “create[ed] a species of tort liability” that did not previously exist,²⁸⁴ as there was extensive debate about whether, because if state courts were already adjudicating those same cases, section 1 was necessary.

For example, one Northern Democrat argued that the Fourteenth Amendment made state courts the forum for these cases: “Is there any power conferred [in the Privileges and Immunities and Due Process Clauses], unless it be to go into the courts for redress against a violation of these rights?”²⁸⁵ A Southern Democrat argued that “[t]he first section of the bill . . . vests in the Federal courts jurisdiction to determine the individual rights of citizens of the same State; a jurisdiction which of right belongs only to the State tribunals.”²⁸⁶ Representative Kerr, a Democrat from Indiana who led the opposition to the bill in the House of Representatives, described section 1 as “a covert attempt to transfer another large portion of jurisdiction from the State tribunals, to which it of right belongs, to those of the United States.”²⁸⁷ Instead, he argued, the Privileges and Immunities Clause “is better enforced by its own vigor and by judicial decisions than by legislation . . . [as] it has been so enforced, [in] good faith, completely, adequately, without resistance or popular discontent.”²⁸⁸ And Senator Thurman, a Democrat and former justice of the Supreme Court of Ohio, said that it was “impol[itic]” to “giv[e] that forum [federal court] that jurisdiction, instead of leaving it where it has been left with safety for so many years, in the hands of the State courts.”²⁸⁹ Other statements were made to the same effect.²⁹⁰

Some legislators focused on the Supreme Court’s appellate jurisdiction over such state-court cases. Another Northern Democrat explained that the “questions [in section 1] could all be tried . . . in the State courts, and by a writ of error [under the Judiciary Act] . . . could be brought before the Supreme Court for review.”²⁹¹ He then complained that “the first section of this bill d[id] not allow that right. It t[ook] the whole question away at once and forever . . .”²⁹² Representative Kerr argued that the Fourteenth Amendment “needs no legislation to enforce it” because it could be enforced in the normal course in state

284. *See Imbler v. Pachtman*, 424 U.S. 409, 417 (1976).

285. CONG. GLOBE, 42d Cong., 1st Sess. 331 (1871) (statement of Rep. Morgan (D-OH)).

286. *Id.* at 429 (statement of Rep. McHenry (D-KY)).

287. *Id.* app. at 50 (statement of Rep. Kerr (D-IN)).

288. *Id.* app. at 47.

289. *Cf. id.* app. at 220 (statement of Sen. Thurman (D-OH)) (objecting to section 2 (now section 1985) for the same reasons he objected to section 1).

290. *See, e.g., id.* at 366 (statement of Rep. Arthur (D-KY)) (arguing that section 1 “absorbs the entire jurisdiction of the States . . . as to civil rights and remedies”).

291. *Id.* app. at 86 (statement of Rep. Storm (D-PA)).

292. *Id.*

court and the Supreme Court.²⁹³ Representative Garfield, a Republican from Ohio, supported section 1, arguing that although enforcement in state court with review by the Supreme Court was normally sufficient, the circumstances warranted giving plaintiffs the option of bringing those same cases in federal court.²⁹⁴ Many others said similar things.²⁹⁵

Second, the debates are filled with assertions that the state courts were inadequate in adjudicating these cases. One problem was that the Ku Klux Klan “system [was] ingeniously devised . . . to control the State courts and local authorities by perjury and fraud.”²⁹⁶ Another problem arose from jurors whom Congress feared “constantly and as a rule refuse[d] to do justice” in cases involving Blacks.²⁹⁷ Juries were filled with people from the “neighborhood,” “[un]able to rise above prejudices or bad passions or terror.”²⁹⁸ Without means to detect Klan members and keep them off juries, “State courts . . . [we]re utterly powerless” to stop them.²⁹⁹ “[I]t was impossible . . . to get grand juries to indict” or “petit juries to convict”; “juries would weigh the evidence and decide all doubts, and make doubts in favor of the defendants.”³⁰⁰

On top of perjury and biased jurors, law enforcement officers and judges often shirked their responsibilities. “The Klans [we]re powerful enough to defy the State authorities. In many instances they [we]re the State authorities.”³⁰¹ It was feared that judges were “put under terror” or had “sympathies . . . identified with those” people in the area.³⁰² And in other cases, judges did not respect the validity of the Reconstruction amendments or give them full effect.³⁰³

293. *See id.* app. at 47 (statement of Rep. Kerr (D-IN)).

294. *See id.* app. at 153 (statement of Rep. Garfield (R-OH)).

295. *See, e.g., id.* at 396 (statement of Rep. Rice (D-IL)); *id.* at 578–79 (statement of Sen. Trumbull (I-R-IL)); *id.* at 661 (Rep. Vickers (D-MD)); *id.* app. at 259 (statement of Rep. Holman (D-IN)). To be sure, some legislators (particularly Democrats) mistakenly assumed that section 1 applied to suits between private citizens. *See, e.g., id.* app. at 88 (statement of Rep. Storm (D-PA)); *id.* app. at 91 (statement of Rep. Duke (D-VA)); *see also id.* app. at 216–17 (statement of Sen. Thurman (D-OH)) (discussing section 1’s potential applicability to common carriers). But not all statements were infected by that mistake, and others explicitly said that section 1 required state action. *See, e.g., id.* at 750 (statement of Rep. Shellabarger (R-NY)). Further, no statement distinguished between suits founded on state action and suits founded on private action, which would have been natural if only the suits founded on private action could have then been brought in state court.

296. *Id.* at 321–22 (statement of Rep. Stoughton (R-MI)).

297. *Id.* at 334 (statement of Rep. Hoar (R-MA)).

298. *See id.* at 460 (statement of Rep. Coburn (R-IN)).

299. *See id.* at 653 (statement of Sen. Osborn (R-FL)) (explaining that the juror-oath provision in section 5 was necessary to prevent federal courts from becoming powerless like the state courts).

300. *See id.* at 760 (statement of Sen. Sherman (D-OH)).

301. *Id.* app. at 72 (statement of Rep. Blair (R-MI)); *see also id.* at 334 (statement of Rep. Hoar (R-MA)) (posing a hypothetical in which sheriffs refuse to serve writs for freedmen and cannot be removed from office or be held accountable in court).

302. *Id.* at 460 (statement of Rep. Coburn (R-IN)).

303. *See id.* at 332 (statement of Rep. Morgan (D-OH)) (exhorting southern states to “respect[]” the Fourteenth and Fifteenth Amendments); *accord id.* app. at 49 (statement of Kerr (D-IN)); *see also id.* app. at 185 (statement of Platt (R-VA)) (explaining how southern states “appoint[ed] . . . in every judicial position

Even when judges, law enforcement, and juries did strive to fulfill their roles, local mobs overran state justice systems.³⁰⁴ One example was told of a Judge Pryor in Kentucky who was prevented from “admit[ting] colored witnesses” under state law and so sought to transfer the case to federal court under the Civil Rights Act.³⁰⁵ But a “band of armed men went to the jail . . . and rescued” the prisoner to prevent his transfer to federal custody.³⁰⁶ In sum, “the [s]tate courts [we]re notoriously powerless to protect life, person, and property”³⁰⁷

Because Congress could not fix the state systems of justice directly, it “re-sort[ed] to its own agencies to carry its own authority into execution.”³⁰⁸ Federal courts were seen by Republicans as superior in carrying out the *ordinary* course of justice.³⁰⁹ They were further from “local influence,” judges were more independent, jurors came from a broader area, and marshals had “more power than” sheriffs and “the aid of the General Government.”³¹⁰ The debates did not reveal any concern with the substance of state law, which was largely considered adequate at the time.³¹¹ Rather, legislators were concerned with the enforcement (or lack thereof) of that law.

Third, legislators appear to have understood that section 1 did not create a cause of action but was a “declaration of rights” and a method of obtaining redress through which many causes of action could be brought.³¹² It did not create a new form of action but was “to be enforced by the courts through the *regular and ordinary processes* of judicial administration, and in no other way.”³¹³ Section 1 “thr[ew] the protection of the courts of the United States over” citizens’ constitutional rights such that citizens could “bring [their] action for

mere partisans, prejudiced and unfriendly to the white and black Republicans” such that “no Republican, white or black, . . . can secure as plaintiff or defendant anything like equal justice”).

304. *See id.* at 460 (statement of Rep. Coburn (R-IN)) (discussing the limited power of local sheriffs in the face of “banded and combined resistance”).

305. *See id.* app. at 273 (statement of Rep. Porter (D-VA)).

306. *See id.*

307. *See id.* at 322 (statement of Rep. Stoughton (R-MI)). Democrat legislators objected to this underlying assumption. *See, e.g., id.* at 361 (statement of Rep. Swann (D-MD)); *id.* app. at 180 (statement of Rep. Voorhees (D-IN)); *id.* app. at 216 (statement of Sen. Thurman (D-OH)).

308. *Id.* at 376 (statement of Lowe (R-KS)); *see also id.* app. at 182 (Rep. Mercur (R-PA)) (explaining that federal intervention was necessary because there was no recognized “bill in equity to compel specific performance”).

309. *See, e.g., id.* at 476 (statement of Rep. Dawes (R-MA)).

310. *Id.* at 460 (statement of Rep. Coburn (R-IN)).

311. *Contra* Kreimer, *supra* note 18, at 616 (arguing that it is “an incongruous historical vision to picture the Reconstruction Congress establishing the local law of the recently-rebelling states as the linchpin of an avowedly nationalist enforcement program”); Reinert, *supra* note 22, at 239 (embracing Kreimer’s position and anachronistically asserting that “[i]t would have been passing strange . . . for the very same Congress to permit liability under [s]ection 1983 to be limited by *judge-made law* created by state court judges” (emphasis added)).

312. *See* CONG. GLOBE, 42d Cong., 1st Sess. 697–98 (1871) (statement of Sen. Edmunds (R-VI)).

313. *Id.* at 698 (emphasis added). For legislative discussion on specifying the form of action or creating a new one, see *infra* notes 326–27 and accompanying text.

redress” in federal court—that is, their *preexisting* action.³¹⁴ In fact, Democrats objected that this jurisdiction was granted “without regard to . . . [the] character of claim”—that is, no matter the nature of the violation or the form of action used.³¹⁵

But some statements made this understanding explicit. For example, Senator Thurman explained that he believed section 1 was constitutional but imprudent.³¹⁶ In describing it, he said, “This section relates wholly to civil suits. It creates *no new cause of action*. Its *whole effect* is to give to the Federal Judiciary that which now does not belong to it.”³¹⁷ This statement has been largely ignored,³¹⁸ but considering the legal context, it makes perfect sense. Representative Maynard, a Republican from Tennessee, made it similarly explicit: “[Section 1] simply declares in substance that whoever interferes with” citizens’ constitutional rights “shall not be exempt from responsibility to the party injured when he brings suit for redress either at law or in equity” even “though [the wrong] may be done under State law or State regulation.”³¹⁹ And another representative stated that if jurisdiction over those causes “is now wanting, it should be conferred.”³²⁰

Throughout the debate, legislators used the terms “remedy,”³²¹ “civil remedy,”³²² “civil action,”³²³ and “right[] of action,”³²⁴ but those terms did not mean that section 1 created a new cause of action, untethered from the normal rules.³²⁵ Instead, those statements referred to the right to bring a non-criminal action in federal court, subject to the normal rules governing litigation in federal court.³²⁶ Legislators knew how to refer to a certain form of action or a particular

314. See *id.* at 807 (statement of Rep. Garfield (R-OH)).

315. See *id.* at 337 (statement of Rep. Whitthorne (D-TN)).

316. See *id.* app. at 216 (statement of Sen. Thurman (D-OH)).

317. *Id.* (emphases added).

318. See, e.g., Reinert, *supra* note 22, at 238–39.

319. CONG. GLOBE, 42d Cong., 1st Sess. app. at 310 (1871) (statement of Rep. Maynard (R-TN)).

320. *Id.* app. at 313 (statement of Rep. Burchard (R-IL)).

321. See, e.g., *id.* at 419 (statement of Rep. Bright (D-KY)) (“I pass the first section of the bill providing for civil remedies.”); *id.* at 476 (statement of Rep. Dawes (R-MA)) (explaining that the “first remedy . . . is a resort to the courts of the United States”); *id.* at 416 (statement of Rep. Biggs (D-KY)) (“[A] civil remedy is to be had *by proceedings* in the Federal courts . . .” (emphasis added)).

322. *Id.* at 477 (statement of Rep. Dawes (R-MA)) (explaining that section 1 gave “a civil remedy in the United States courts”).

323. *Id.* at 482 (statement of Rep. Wilson (R-IN)) (stating that section 1 gave “a remedy *by civil action*” (emphasis added)); *id.* at 799 (statement of Rep. Smith (R-NY)) (“Congress has the power to make the perpetrators liable to a civil action for damages.”); *id.* app. at 79 (statement of Rep. Perry (R-OH)) (“The first section provides redress *by civil action* in the Federal courts . . .” (emphasis added)).

324. *Id.* app. at 215 (statement of Sen. Johnston (D-VA)) (stating that section 1 “grants rights of action in the Federal courts” and equating that with “permit[ting] people to sue in the courts of the United States”).

325. One legislator emphasized the “strange, unusual, and hitherto unknown proceeding.” See *id.* at 337 (statement of Rep. Whitthorne (D-TN)). But that statement referred to federal jurisdiction over cases between citizens of the same state with different procedural rules and no amount-in-controversy requirement. See *id.*

326. *Id.* at 697 (statement of Sen. Edmunds (R-VT)); see also *id.* at 571 (statement of Sen. Stockton (D-NJ)) (explaining section 1 placed the “proceedings to obtain” “redress . . . in the Federal courts”). For

kind of remedy. In arguing that Congress had power to enforce a negative prohibition in the Constitution, the sponsor of the bill referenced the Fugitive Slave Act and explained that “[w]ay back in 1793, [Congress] made *an action of debt* maintainable in the courts of the United States” and “gave the civil *action of debt* for the loss of the slave.”³²⁷

Fourth, some Democrats—consistent with their debate strategy³²⁸—exaggerated the effect of section 1, but those assertions were inconsistent with the relevant legal context and the understanding of other legislators. Three of those statements concerned the supposed lack of immunity for judges and legislators under section 1.³²⁹ Some commentators have argued that these statements, combined with the fact that “[n]one of the proponents [of section 1983] spoke a word of assurance, leav[es] the implication that opponents had accurately understood the legislation.”³³⁰ But that implication appears to be unwarranted in context, and those statements alone³³¹ are not good evidence of the original understanding or intent of section 1.

contemporary definitions of these terms that support this interpretation, see *Remedy*, 2 BOUVIER, *supra* note 196, at 436 (14th ed. 1878); *Civil Action*, 1 BOUVIER, *supra* note 196, at 276 (“An action which has for its object the recovery of private or civil rights or compensation for their infraction.”); *Civil Remedy*, *id.* at 277–78; *Remedy*, 2 BOUVIER, *supra* note 220, at 442–44 (11th ed. 1862); *Civil Action*, 1 BOUVIER, *supra* note 220, at 232; *Civil Remedy*, *id.* at 232 (“This term is used in opposition to the remedy given by indictment in a criminal case”); HENRY JOHN STEPHEN, A TREATISE ON THE PRINCIPLES OF PLEADING IN CIVIL ACTIONS 8 (Phila., Abraham Small 1824) (explaining that the “original writ[s] . . . limit[ed] and defin[ed] the right of action”); 1 POMEROY, *supra* note 169, § 558, at 276 (explaining that the “remedy” against a sheriff was an “action on the case, or an action for money had and received”). In fact, some legislators apparently believed that section 1 was merely a jurisdiction-transferring statute. *E.g.*, CONG. GLOBE, 42d Cong., 1st Sess. app. at 313 (1871) (statement of Rep. Burchard (R-IL)) (“If jurisdiction is now wanting, it should be conferred.”); *id.* app. at 215 (statement of Sen. Johnston (D-VA)) (“[Section 1] proposes to . . . permit people to sue in the courts of the United States.”).

327. CONG. GLOBE, 42d Cong., 1st Sess. app. at 70 (1871) (statement of Rep. Shellabarger (R-NY)) (emphases added).

328. *See, e.g., id.* at 351 (statement of Rep. Beck (D-KY)) (stating that the king of Prussia “will have to demand an increase of his power if he expects to rank in absolute authority with the President”).

329. *See id.* at 365 (statement of Rep. Arthur (D-KY)); *id.* at 385 (statement of Rep. Lewis (D-KY)); *id.* app. at 217 (statement of Sen. Thurman (D-OH)). The first legislator to raise the point, Democratic Representative Arthur from Kentucky, asserted that federal courts would be unscrupulous and willing to accept lies about state officials. *See id.* at 365 (statement of Rep. Arthur (D-KY)). So it is unclear whether he thought that section 1983 made state officials liable for good-faith conduct or that such officials would in fact be found liable in federal court despite the law.

330. *See* Reinert, *supra* note 22, at 239; *id.* at 239 nn.249–50 (collecting sources); Harcar, *supra* note 41, at 58–60.

331. Some commentators have argued that section 1983 was intended to abrogate official immunities because it was modelled after a criminal provision in the Civil Rights Act of 1866, which abrogated immunities. *See, e.g.,* Reinert, *supra* note 22, at 238–39; Harcar, *supra* note 41, at 54–55, 61–62. I cannot fully address those arguments here, but federal criminal prosecutions were not subject to the same rules of state-law referral to which civil actions were subject. *See* 2 DESTY, *supra* note 216, § 241, at 808–12; 1 ROSE, *supra* note 80, § 5[d], at 44–45. And because federal law required the application of state-law immunities (in some circumstances), section 1983—unlike its criminal counterpart—would be subject to the presumption against implied repeals. *Contra* Harcar, *supra* note 41, at 94. So it is plausible that a criminal provision would not allow for immunities even while a parallel civil provision did.

First, Democratic legislators throughout the debates made dramatic accusations and unscrupulously attacked the bill and Republican legislators.³³² And Republicans often refused to respond to these accusations and attacks (at least in the debates).

Second, the two representatives who raised the concern did so on the third and fourth full days of debate.³³³ Nearly another full week passed before the House voted on the bill.³³⁴ But no other representative raised the issue, which would be odd if the bill was, in fact, understood to have removed civil immunity from all state officials. Even after the House sent the bill to the Senate, only one senator raised the question, and not until the last full day of debate in the Senate.³³⁵ And that senator's statement was much more agnostic about the effect of section 1.³³⁶

Third, the two statements in the House were made during special sessions convened for debate—one on a Friday evening and the other on a Saturday afternoon.³³⁷ The special sessions for debate were sparsely attended,³³⁸ an unlikely forum for an important attack on section 1 and perhaps the reason no Republican legislators reassured them.

Senator Thurman's statement in the Senate debates was not of the same character. He asked whether state judges were "to be liable in an action" and whether section 1 upset "the old maxim of the law, that a judge for any judgment he gives can only be liable to impeachment" and "to be reversed."³³⁹ He then said, "Whether it [the abrogation of judicial immunity] is the intent or not I know not, but it is the language of the bill . . ."³⁴⁰ This interpretation appears to rest on a mistaken premise about the nature of the Act, revealed by Senator Thurman's separate discussion about section 6.³⁴¹

Discussing the action permitted under an earlier version of section 6, Senator Thurman complained that "there [wa]s no limitation of action at all."³⁴²

332. See, e.g., CONG. GLOBE, 42d Cong., 1st Sess. 658 (1871) (statement of Sen. Blair (D-MO)) (responding to Republican Senator Stewart from Nevada that a group of citizens "must have been very bad indeed to have disgraced" Nevada).

333. Compare *id.* at 317 (statement of Rep. Shellabarger (R-NY)) (reporting the bill on March 28, 1871), with *id.* at 365 (statement of Rep. Arthur (D-KY)) (March 31, 1871), and *id.* at 385 (statement of Rep. Lewis (D-KY)) (April 1, 1871).

334. See *id.* at 522 (House vote on the Ku Klux Klan Act of 1871 on April 7, 1871).

335. See *id.* app. at 216 (statement of Sen. Thurman (D-OH)) (April 13, 1871).

336. See *id.* app. at 217.

337. See *id.* at 364 (introducing the evening session starting at 7:00 PM); *id.* at 376 (introducing a special Saturday afternoon session "for debate only").

338. See, e.g., *id.* at 650 (statement of Sen. Anthony (R-RI)) ("There have not been half a dozen Senators listening to the debate for the last three days.").

339. *Id.* app. at 217 (statement of Sen. Thurman (D-OH)).

340. See *id.* So, although this statement might speak to how section 1 would have been understood, it is not evidence of congressional intent.

341. It also contradicts his earlier statement that section 1 "creates no new cause of action." *Id.* app. at 216.

342. *Id.* at 770–71.

“We have no . . . [f]ederal statute of limitations,” he said, and the “acts that apply the limitations of the State law . . . would [not] apply to this bill”³⁴³ Similarly, he argued that an earlier version required bystanders to intervene *successfully*: “I see no such obligation [of due diligence] made by the statute, and the common law does not apply to the case because the action is not given at common law, but is a purely statutory creation.”³⁴⁴

The first statement contradicts how the Supreme Court treated statutes of limitations, and the second statement does not undermine this Article’s thesis. The Rules of Decision Act (and the background law the act codified) was well understood to apply to claims of right arising under federal law.³⁴⁵ So, even though section 6’s “action . . . [wa]s a purely statutory creation,”³⁴⁶ the state rules applicable to actions on the case would have governed such actions.³⁴⁷ And after section 1 was enacted, the Supreme Court confirmed that state statutes of limitations applied even to claims founded on federal rights.³⁴⁸ Senator Thurman’s second statement was correct: The common law cannot alter a statutorily created substantive right, and Congress eventually clarified that due diligence—not success—was required.³⁴⁹

House Republicans appear to have understood that state law would apply, undermining Democratic statements about immunities. In discussing the final version of section 6, a Democratic Representative asked how courts were “to measure damages for presumed neglect.”³⁵⁰ A Republican Representative responded that because it would be “an action of tort,” damages would be “in the sound discretion of the jury.”³⁵¹ Soon after, the House sponsor of the bill interjected to modify that statement. In New York, he said, “if the death of a party shall be occasioned there shall still be a right of action.”³⁵² But section 2 (targeting the conspirators themselves) “g[ave] no right of action where a death occur[red]” because the general rule—which applied absent statutory preemption—was that actions against persons did not survive.³⁵³ To cure this “defect,” a right of survivorship was put into section 6 so that an action could be maintained under section 6 even if the action was brought in a jurisdiction where—

343. *Id.* at 771.

344. *See id.*

345. *See supra* notes 116–25, 176–82 and accompanying text.

346. CONG. GLOBE, 42d Cong., 1st Sess. 771 (1871) (statement of Sen. Thurman (D-OH)).

347. *See supra* notes 174–82 and accompanying text.

348. *Campbell v. City of Haverhill*, 155 U.S. 610, 614–16 (1895).

349. *See Act of Apr. 20, 1871, ch. 22, 17 Stat. 13, § 6 (1871) (codified as amended at 18 U.S.C. § 1986); see also Robert J. Kaczorowski, Reflections on Monell’s Analysis of the Legislative History of § 1983*, 31 URB. LAW. 407, 411–12 (1999).

350. CONG. GLOBE, 42d Cong., 1st Sess. 804 (1871) (statement of Rep. Cox (D-NY)).

351. *Id.* (statement of Rep. Poland (R-VT)).

352. *Id.* at 805 (statement of Rep. Shellabarger (R-NY)).

353. *See id.*; *see also* 1 POMEROY, *supra* note 169, § 1765, at 644; 2 WAIT, *supra* note 97, at 471; Charles H. Street, *Survival of Actions*, in 21 ENCYCLOPEDIA OF PLEADING AND PRACTICE 309, 312–13, 325–27 (William M. McKinney ed., Edward Thompson Co. 1899).

unlike New York—actions did not survive.³⁵⁴ That is, “where death ensue[d],” recovery could be had “in all cases, either under the second section”—if the state had a survivorship rule like New York’s—“or under [section 6]”—wherein federal law provided that the action survived.³⁵⁵ So the House sponsor understood that non-substantive-right rules of decision would come from state law absent specifications to the contrary.³⁵⁶

3. *Court Decisions*

Although often dismissed as reflective of anti-Reconstruction sentiment, early decisions under section 1983 reflected this same understanding.³⁵⁷ Consider *Hemsley v. Myers*, an appellate decision from the Circuit Court of the District of Kansas in 1891.³⁵⁸ Hemsley had filed a bill in equity against state officials to enjoin an allegedly unconstitutional prosecution.³⁵⁹ The district court granted the injunction, but the circuit court reversed.³⁶⁰

Judge Caldwell explained that “[t]he bill [wa]s bad on three grounds.”³⁶¹ First, it “fail[ed] to state a case cognizable in equity” because the plaintiff had “no property rights [that would have] be[en] affected” by the prosecution, there was no irreparable harm (he could “be fully and completely compensated for his loss . . . by an action at law”), and an “appeal [of a conviction] to the supreme court of the United States” was “sufficient legal redress.”³⁶² Second, “the uniform current of authorities in England . . . and in this country” was “settled” that a “court of equity possesse[d] no . . . power” to “enjoin criminal proceedings.”³⁶³

Third, a federal statute prohibiting enjoining “proceedings in any court of a state,” now known as the Anti-Injunction Act, prohibited the bill.³⁶⁴ Although the plaintiff argued that it had “been repealed or abrogated, either wholly or partially,” by section 1983, Judge Caldwell explained that section 1983 did “not repeal, limit, or restrict the previously existing rules affecting the relations of the state and the United States courts” in this respect.³⁶⁵ Neither, according to

354. See CONG. GLOBE, 42d Cong., 1st Sess. 805 (1871) (statement of Rep. Shellabarger (R-NY)).

355. See *id.*

356. *Contra, e.g.*, Thompson v. Clark, 596 U.S. 36, 42–44 (2022) (well-settled rules of *general* common law as of 1871, irrespective of state law).

357. *But see, e.g.*, Wadleigh v. Newhall, 136 F. 941, 946 (C.C.N.D. Cal. 1905).

358. *Hemsley v. Myers*, 45 F. 283 (C.C.D. Kan. 1891).

359. *Id.* at 283–86.

360. See *id.* at 285–86.

361. *Id.* at 286.

362. *Id.* at 286–87.

363. *Id.* at 287.

364. See *id.* at 289 (quoting Rev. Stat. § 720 (1874)).

365. *Id.* at 289–90; see also *Aultman & Taylor Co. v. Brumfield*, 102 F. 7, 12–15 (C.C.N.D. Ohio 1900). The relationship between section 1983 and the Anti-Injunction Act was contested. See *Tuchman v. Welch*, 42 F. 548, 558 (C.C.D. Kan. 1890) (Anti-Injunction Act partially repealed). Much later, the Supreme Court

Judge Caldwell, did it “abolish the distinction between law and equity, or change the rules of pleading or *mode of proceeding in any respect*.”³⁶⁶ Because section 1983 declared that the mode of proceeding “shall be by ‘an action at law, or a suit in equity,’” the “proper proceeding” was determined by the “well-understood rules of pleadings.”³⁶⁷ In sum, “[n]o new mode of proceeding [was] enacted, and no new right created.”³⁶⁸ Judge Caldwell then added, “As it now stands,” section 1983 “may be properly denominated a ‘declaratory’ statute,” and such statutes do not “affect[] . . . in the slightest degree” the “powers, relations, and jurisdiction of the state and the United States courts with reference to each other.”³⁶⁹

Other cases indirectly reflect this understanding. Some decisions talk about section 1983 in relation to jurisdiction but not as a cause of action.³⁷⁰ If section 1983 was not understood to have created a separate cause of action, then it makes sense that section 1983 would be mentioned most often as a jurisdictional hook. And it gives another reason why section 1983 was mentioned so sparsely until *Monroe v. Pape*—the grant of general federal-question jurisdiction in 1875 made section 1983 less important.

held that section-1983 cases fell within the Anti-Injunction Act’s “authorized by law” exception but that background principles of equity could still preclude such an injunction. *Mitchum v. Foster*, 407 U.S. 225, 242–43 (1972). So, if the rule did operate “independently of the statute,” *Hemsley*, 45 F. at 289, the result would remain the same. *Cf. Baines v. City of Danville*, 337 F.2d 579, 591 (4th Cir. 1964) (en banc), *abrogated by Mitchum v. Foster*, 407 U.S. 225 (1972).

366. *Hemsley*, 45 F. at 290 (emphasis added).

367. *See id.* (quoting Rev. Stat. § 1979 (1874)).

368. *Id.*

369. *Id.* Judge Caldwell’s inclusion of the “jurisdiction” of the federal courts is curious given that section 1983 transferred cases to federal court. But by 1890, Congress had enacted general federal question jurisdiction, albeit with a small amount-in-controversy requirement. *See* Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470 (codified as amended at 28 U.S.C. § 1331(a)). So the statement is not as odd as it first sounds. Judge Caldwell’s “declaratory” interpretation has been downplayed as a narrow reading under which courts “failed to impose any effectual remed[ies].” *See, e.g., Aziz Z. Huq, Judicial Independence and the Rationing of Constitutional Remedies*, 65 DUKE L.J. 1, 16 & n.65 (2015). But his reading is consistent with the description given by the chief sponsor of the bill in the Senate. CONG. GLOBE, 42d Cong., 1st Sess. 697–98 (1871) (statement of Sen. Edmunds (R-VT)) (The first section “is a *declaration* of rights and a . . . redress for wrongs” (emphasis added)). Neither can *Hemsley* be thrown into the dustbin of history for its “judicial antipathy” or anti-Reconstruction sentiment. Ravenell, *supra* note 40, at 379 (quoting Comment, *Civil Rights Act: Emergence of an Adequate Federal Civil Remedy?*, 26 IND. L.J. 361, 363 (1951)). The case arose in Kansas, which at the time was split between the Republican and the economic Populist parties. *See* D. Scott Barton, *Party Switching and Kansas Populism*, 52 HISTORIAN 453, 458–67 (1990). And Judge Caldwell was a former Union Colonel and Republican State Representative from Iowa who was nominated to the federal bench in Arkansas by Abraham Lincoln, supported Reconstruction and military efforts in Arkansas, merited consideration as the Republican party’s nominee for President and Vice President in 1896, and did not “shirk[] from his duties in enforcing the Fourteenth Amendment.” *See* Richard S. Arnold & George C. Freeman, III, *Judge Henry Clay Caldwell*, 23 U. ARK. LITTLE ROCK L. REV. 317, 318–21, 324, 348–49 (2001).

370. *See, e.g., Brawner v. Irvin*, 169 F. 964, 966, 968 (C.C.N.D. Ga. 1909); *Nw. Fertilizing Co. v. Hyde Park*, 18 F. Cas. 393, 393–94 (C.C.N.D. Ill. 1873); *Bertonneau v. Bd. of Dir.*, 3 F. Cas. 294, 295 (C.C.D. La. 1878).

In addition, the Supreme Court's decision in *Ex parte Young*³⁷¹ is strong (albeit indirect) evidence that section 1983 was not understood to have created a new federal cause of action against state actors. There, the Court recognized a freestanding equitable cause of action to enjoin unconstitutional actions by state officials.³⁷² But if section 1983 created a cause of action, why would the plaintiffs have needed a separate cause of action?³⁷³ The answer appears to be that even within the domain of section 1983, plaintiffs needed to identify a traditional bill in equity that would authorize their requested relief.

Finally, several commentators have pointed to *Myers v. Anderson*,³⁷⁴ which rejected a state actor's argument that lack of malice was available as a defense under section 1983, as evidence that section 1983 did not allow for immunity,³⁷⁵ but that decision cannot be read so far. In *Myers*, the plaintiffs alleged that the defendants had unconstitutionally abridged their right to vote by enforcing a state statute.³⁷⁶ The defendants "seriously pressed" the argument that malice must be alleged, but the Court rejected that argument without reasoning.³⁷⁷ The lower court had explained that "[t]he common sense of the situation" was that "any one who . . . enforce[d]" an unconstitutional statute did "so at his known peril."³⁷⁸

But this principle was not unique to section 1983 and was widely accepted at the time: "No question in law is better settled . . . than that ministerial officers and other persons are liable for acts done under an act of the legislature which is unconstitutional and void."³⁷⁹ And it was not uncommon for federal courts to presume that state law was consistent with widely accepted common-law rules absent contrary evidence.³⁸⁰ Not only can this principle explain *Myers*, but it might also explain why official immunities were not discussed until after *Monroe v. Pape*³⁸¹: Section 1983 applied only to acts taken pursuant to state law, and actions taken pursuant to an unconstitutional state law were entitled to no immunity.³⁸²

371. *Ex parte Young*, 209 U.S. 123 (1908).

372. *Id.* at 165–66.

373. *Cf.* Oldham & Steene, *supra* note 189, at 23 (questioning why *Ex parte Young* was necessary if a section-1983 cause of action was available).

374. *Myers v. Anderson*, 238 U.S. 368 (1915).

375. *See, e.g.*, Baude, *Is Qualified Immunity Unlawful?*, *supra* note 14, at 57–58; Kreimer, *supra* note 18, at 609 n.34.

376. *Myers*, 238 U.S. at 377–78.

377. *Id.* at 378–79.

378. *Anderson v. Myers*, 182 F. 223, 230 (C.C.D. Md. 1910).

379. *Sumner v. Beeler*, 50 Ind. 341, 342 (1875); *see also* 1 POMEROY, *supra* note 169, § 1879, at 682 (stating that "avertment of malice is unnecessary" for actions against election officials for refusing a vote).

380. *Cf.* Bellia & Clark, *supra* note 93, at 668–71 (collecting sources in the context of forms of proceeding).

381. *See* Baude, *Is Qualified Immunity Unlawful?*, *supra* note 14, at 58.

382. A similar circuit-court decision does more clearly cut against my reading of section 1983. *See* Brickhouse v. Brooks, 165 F. 534, 543 (C.C.E.D. Va. 1908) (rejecting an argument that, without malice, damages

* * *

In sum, section 1983 likely would not have been understood to have created a new cause of action. Instead, under the Process Act, plaintiffs would have needed to fit the alleged violation into a state-law form of action or traditional bill of equity. And rules of decision that did not affect the underlying constitutional right would have come from state law if there was no applicable federal law, under either background law, the Rules of Decision Act, or section 3 of the Civil Rights Act (now section 1988(a)).

III. WRITS OR RIGHTS

If this thesis is correct, the source of law in actions arising under section 1983 turned on the distinction between rules defining substantive rights and non-substantive-rights rules of decision. Originally understood, the following sources of law would have applied to cases arising under section 1983: (1) state forms of action circa 1792 (subject to limited updating), (2) state rules of decision that did not affect the substantive right (unless preempted), and (3) the law defining the federal substantive right. The distinction between the forms of action and other rules of decision has been described as “a line not always easy to draw,”³⁸³ and the line between substantive-right and non-substantive-right rules of decision as “difficult to define.”³⁸⁴ But there is some value in sketching out a few lines.

Forms of action were not available for every violation of every substantive right. Early in English law, “the king’s chancery . . . enjoyed a certain freedom” to issue new writs and create new forms of action.³⁸⁵ But as parliamentary supremacy was enshrined, chancery became “conservative and Parliament [was] jealous of all that look[ed] like an attempt to legislate.”³⁸⁶ The remedies that remained did not define “the [underlying] substantive rights” but rather gave “life to” them.³⁸⁷ As a necessary corollary, rights without legal remedies were still rights, but violations of such rights were “regarded as mere acts of rudeness or as being entitled to no standing in a court of law as justiciable grounds of complaint.”³⁸⁸

must be nominal because section 1983 “does not so require, and the rules of pleading applicable to common-law suits . . . do not apply to this action”).

383. Bellia & Clark, *supra* note 93, at 674 n.282.

384. 1 ROSE, *supra* note 80, § 10[A], at 87.

385. See MAITLAND, *supra* note 95, at 6.

386. *Id.*

387. See O’DONNELL, *supra* note 96, at 16; accord PLUCKNETT, *supra* note 104, at 381.

388. O’DONNELL, *supra* note 96, at 15; see also PLUCKNETT, *supra* note 104, at 353 (“The forms of action are in themselves a proof that the King’s Court only intended to intervene occasionally in the disputes of his subjects.”).

So there was a fundamental distinction between saying that a plaintiff's substantive rights were not violated and saying that the alleged violation did not fit into a recognized form of action. For example, when a person made a promise to another to do or refrain from doing something, that promise alone imposed a duty. But a breach of that duty was actionable in an action of covenant only if the promise was sealed or in an action of assumpsit only if consideration for the promise was alleged.³⁸⁹ Consider also malicious prosecution, the claim Thompson would have brought against the officers: at least traditionally, an action on the case would not lie unless the defendant's actions "constitut[ed] disregard . . . of the rights of the now-plaintiff" sufficient "to establish [actual] malice."³⁹⁰ That is, even if the defendant had violated the plaintiff's rights, that violation was not actionable unless the defendant displayed a disregard of those rights.³⁹¹

Some non-substantive-right rules of decision that we would now view as substantive were traditionally dictated by the form of action: such as causation, damages, and survivorship. "Problems of causation were solved by the writ system's requirements . . ." ³⁹² For example, a plaintiff had to prove that his "injury resulted . . . 'directly' ([to bring an action of] trespass), or 'indirectly' ([to bring an action of] case)."³⁹³ The kind and measure of damages were similarly defined by the form of action.³⁹⁴

Survivorship of an action was also determined by the forms of action and did not affect the underlying right. At common law, some actions survived the death of the plaintiff or of the wrong-doer; some did not.³⁹⁵ Although many of those rules were modified by statute,³⁹⁶ common-law survivorship rules came from the rules governing which parties were allowed in each form of action.³⁹⁷ Of course, whether an action survives to either party's personal representative

389. See O'DONNELL, *supra* note 96, at 23, 89, 104–05. Assumpsit would lie for promissory notes and bills of exchange even though they were naked promises under the theory that their form "import[ed] a consideration" standing alone. See *id.* at 104.

390. *Id.* at 80; cf. 1 PERKINS, *supra* note 96, at *89 ("[B]efore any action can be brought against a magistrate," the magistrate's attention must be "drawn to all the facts necessary to enable him" to know "the course he ought to have pursued.>").

391. Cf. 1 WAIT, *supra* note 97, at 2–3 ("The motives with which an act is done is sometimes made the test whether the act is actionable . . .").

392. WHITE, *supra* note 83, at 9.

393. *Id.* at 10. Compare O'DONNELL, *supra* note 96, at 63 (trespass requires immediate injury from the action), with *id.* at 73 (case requires that the "damage complained of does not directly ensue from the act itself").

394. See, e.g., O'DONNELL, *supra* note 96, at 99 (distinguishing between the measure of damages in special assumpsit versus general (indebitatus) assumpsit).

395. See 1 PERKINS, *supra* note 96, at *77–80, *100–02.

396. See, e.g., *id.* (detailing many Parliamentary enactments that replaced common-law survivorship rules).

397. See CHITTY, *supra* note 104, at v, *1–2 & n.b, *11–13; 1 WAIT, *supra* note 97, at 43–44; HENRY JOHN STEPHEN, A TREATISE ON THE PRINCIPLES OF PLEADING IN CIVIL ACTIONS 43 (3d Am. ed. from 2d London ed., William H. Morrison 1882); see also *Hatfield v. Bushnell*, 11 F. Cas. 814, 814–15 (C.C.D. Vt. 1849) (No. 6211).

or estate does not affect the plaintiff's rights—it concerns the prerequisites for bringing or maintaining an action. And early nineteenth-century federal courts understood that the Process Act required them to apply state survivorship rules in actions at law even when the right arose under federal law.³⁹⁸

Some rules neither affected substantive rights nor were governed by the form of action. These kinds of non-form-of-action, non-substantive-right rules placed outside limits on bringing an otherwise appropriate form of action. One such rule is a statute of limitations.³⁹⁹

Immunities are not easy to categorize. Most judicial decisions appear to have explained that immunities did not affect the substantive right.⁴⁰⁰ Consider *Weaver v. Devendorf*.⁴⁰¹ There, the high court of New York addressed an alleged error by assessors.⁴⁰² The court explained that assessments were “judicial act[s]” and that a writ of certiorari would lie for errors in assessment of any kind.⁴⁰³ But despite that remedy, under New York law, officers could not be “responsible in a civil suit” for any judicial act.⁴⁰⁴ Because a writ of certiorari would lie but an action on the case would not, the question was one of form of proceeding not of substantive right. Other court decisions appear to make the same point.⁴⁰⁵

398. See *Jones v. Vanzandt*, 13 F. Cas. 1054, 1055 (C.C.D. Ohio 1849) (No.7,503) (McLean, Circuit Justice) (applying an Ohio survivorship statute under the Process Act of 1828 in case founded on federal fugitive slave laws because the statute “applie[d] to all actions of trespass on the case . . . and this is an action of trespass on the case”); *Hatfield*, 11 F. Cas. at 814–15. To be sure, after 1871, the Supreme Court muddled the issue by holding that “[w]hether an action survives depends on the substance of the cause of action, not on the forms of proceeding to enforce it” and so concluded that the “common law” determined the survivorship of a cause of action arising out of a federal statute. *Ex parte Schreiber*, 110 U.S. 76, 80 (1884); see also *Street*, *supra* note 353, at 321. *But see* 1 ROSE, *supra* note 80, § 814[d], at 740–41 (expressing doubt that general common law should apply). That holding is inconsistent with how survival of actions was traditionally viewed. And it is unclear why the “common law” rather than state law under the Rules of Decision Act would have applied as survival was a question of “local law.” See *Hatfield*, 11 F. Cas. at 814; *Bucher v. Cheshire R. Co.*, 125 U.S. 555, 584 (1888).

399. See *supra* notes 174–75 and accompanying text.

400. *But see* *State v. McDonald*, 4 Del. (4 Harr.) 555, 556 (1845) (stating that a judge who makes an honest judicial error “is not liable legally or morally”). Although I treat common-law forms of action here, it appears that suits in equity for injunctive relief were viewed similarly. See, e.g., James B. Clark, *Public Officers*, in 17 *ENCYCLOPEDIA OF PLEADING AND PRACTICE* 139, 187–90 (William M. McKinney ed., Edward Thompson Co., 1899).

401. *Weaver v. Devendorf*, 3 Denio 117 (N.Y. Sup. Ct. 1846).

402. *Id.* at 119.

403. *Id.* at 119–20.

404. See *id.* at 120. Under New York law, a corrupt judicial act could “be punished criminally” but not in a civil suit, indicating that the official’s duty and the corresponding substantive right were separate from the aggrieved party’s ability to maintain a particular form of action. *Id.*

405. See, e.g., *Muscatine W. R. Co. v. Horton*, 38 Iowa 33, 47–48 (1873) (distinguishing between “err[ing]” or “deciding wrongly [on] the law” and “be[ing] held liable for damages to the party suffering from their erroneous acts”); *Reed v. Conway*, 20 Mo. 22, 49 (1854) (explaining that an officer might “decide wrongly” and the “party will [still] be without remedy” because “there is no liability . . . without malice alleged and proved” (quoting *Wheeler v. Patterson*, 1 N.H. 88, 90 (1871))); *Wheeler*, 1 N.H. at 90–91 (explaining the general principle that if immunity prevents rights from being “sufficiently secure[.] . . . the legislature can provide further remedy” (emphasis added)); see also 1 PERKINS, *supra* note 96, at *88 (distinguishing between a judge’s erroneous judgment and the applicability of a civil action); *id.* at *89, *95–96, (explaining various

But whether an immunity was a non-substantive-right, non-form-of-action rule of decision or a requirement of the form of action was not always clear. One state supreme court explained that the question whether “malice” was a necessary element of a claim was “answered by reference to the form of the action” and concluded that an action of trespass would lie without it.⁴⁰⁶ Another set of immunity-like rules shielded officers who arrested parties or witnesses who were protected by a writ of privilege.⁴⁰⁷ If a protected person was wrongly arrested, a writ of habeas corpus and even contempt proceedings against the officer were available with no apparent immunity-like limitation.⁴⁰⁸ But neither an action of trespass or an action on the case could be maintained, except where—as in New York—a state statute provided.⁴⁰⁹ Other decisions and treatises treated the question of official immunity as a question of the form of action,⁴¹⁰ including for Thompson’s hypothetical action on the case for malicious prosecution.⁴¹¹

Other decisions described immunity as a rule of decision that operated outside of the form-of-action framework.⁴¹² For example, one state supreme court explained that “public policy” demanded that officers who are “trust[ed]” in their “sound judgment and discretion . . . be *protected* from any [civil] consequences.”⁴¹³ And another stated that road supervisors were liable unless “they [were] *exempt*, on account of the *quasi* judicial nature of their duties and powers.”⁴¹⁴

situations in which an action would not lie against an official absent special mental states); Clark, *supra* note 400, at 175–77 (detailing the forms of action and proper parties for actions specifically against public officers by private parties).

406. Shanley v. Wells, 71 Ill. 78, 79–81, 83 (1873); *see also* Johnston v. Riley, 13 Ga. 97, 137 (1853); Kingsbury v. Pond, 3 N.H. 511, 513 (1826); 1 PERKINS, *supra* note 96, at *207–08; 1 POMEROY, *supra* note 169, § 174, at 93.

407. *See* Charles H. Street, *Privilege*, in 16 ENCYCLOPEDIA OF PLEADING AND PRACTICE 968, 969–70 (William M. McKinney ed., Edward Thompson Co., 1899).

408. *See id.* at 981–83.

409. *Id.* at 983–86. Chitty’s treatise in 1876 was to similar effect, but it suggested that knowledge or malice might justify either trespass or case “if any action at all will lie.” *See* 1 PERKINS, *supra* note 96, at *204 n.l.

410. *E.g.*, 1 PERKINS, *supra* note 96, at *96–97 (when a sheriff can be a defendant); Jenkins v. Waldron, 11 Johns. 114, 120–21 (N.Y. Sup. Ct. 1814) (citing various English decisions for the principle that no form of action is maintainable against quasi-judicial officers without evidence of malice); McDaniel v. Tebbetts, 60 N.H. 497, 497 (1881) (holding that an action on the case would not lie for erroneous acts of a quasi-judicial nature).

411. O’DONNELL, *supra* note 96, at 79 (malicious prosecution); 1 PERKINS, *supra* note 96, at *204, *208 (malicious prosecution); 1 POMEROY, *supra* note 169, § 1777, at 647 (malicious prosecution); *id.* § 1794, at 654 (malicious arrest); 2 WAIT, *supra* note 97, at 105 (all abuse of legal process, including malicious arrest and malicious prosecution).

412. *See, e.g.*, Schoettgen v. Wilson, 48 Mo. 253, 257–58 (1871).

413. Downer v. Lent, 6 Cal. 94, 95 (1856) (emphasis added); *accord* Miller v. Rucker, 64 Ky. 135, 136–37 (1866); Brock v. Hopkins, 5 Neb. 231, 235–36 (1876).

414. McCord v. High, 24 Iowa 336, 346–47 (1868) (first emphasis added); William B. Hale, *Parties to Actions*, in 15 ENCYCLOPEDIA OF PLEADING AND PRACTICE 456, 526 & n.3 (William M. McKinney ed.,

Professor James Pfander has argued that most immunity decisions in the nineteenth century were actually about the zones of officials' discretion in administrative law.⁴¹⁵ But that does not appear to explain why other writs could sometimes lie even without malice or why legislatures could authorize a judicial remedy for a wrongful but not-then-actionable use of discretion.⁴¹⁶ If an act within the bounds of an official's discretion "was not subject to judicial review,"⁴¹⁷ those exceptions would make no sense. In any event, Pfander acknowledges that *some* forms of immunity in *some* jurisdictions were viewed as rules on top of the question of lawfulness,⁴¹⁸ and that fact is enough to establish that states *could* impose such an immunity without affecting the underlying substantive right, even if they had not done so in 1871.

Perhaps the best explanation is that the nature of the immunity varied by jurisdiction and by official. In either case—under the Rules of Decision Act (possibly section 1988(a)) as non-substantive-right rules of decision, or under the Process Act as form-of-action rules of decision—immunities would have been determined by some kind of state law because immunities did not limit the substantive right at issue.

IV. IMPLICATIONS FOR MODERN SECTION-1983 LITIGATION

The modern implications of my interpretation are hazy. Our legal world has changed substantially since 1871, and stare decisis generally disfavors disrupting the status quo. Even if one were to conclude that stare decisis forecloses a return to the original understanding of section 1983, however, even making that assessment requires knowing that understanding and how it would look in practice today.⁴¹⁹ Although the primary focus of this Article is the original understanding of section 1983 and the historical legal context in which it was enacted, this Part briefly explores how that interpretation might cash out in practice.

Edward Thompson Co., 1899) (explaining that "immunity of judicial officers from suit for the consequences of their acts is an illustration" of an "exception[] resting on reasons of public policy").

415. James E. Pfander, *Zones of Discretion at Common Law*, 116 NW. U.L. REV. ONLINE 148, 159–61 (2021).

416. See *supra* notes 401–11 and accompanying text.

417. Pfander, *supra* note 415, at 160.

418. *Id.* at 167 & n.113; see also *id.* at 161 (accepting immunity for "legislators, judges, and high-ranking executive officials").

419. Although one of the benefits of stare decisis is to avoid reconsidering old decisions, considering whether to overturn a precedent requires deciding whether the precedent is incorrect and how incorrect it is. See *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 268–69 (2022); *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 455–56 (2015).

A. *Post-Enactment Developments*

1. *The Conformity Act of 1872*

In 1872, Congress directed that, at common law, courts use the forms of action “*existing at the time*” in the state in which the federal court sat,⁴²⁰ “irrespective of [whether] the cause is founded on a federal or state statute.”⁴²¹ This “dynamic” conformity—as opposed to the “static” conformity of the Process Act—ensured consistency across federal and state courts within a state.⁴²² So, post-Conformity Act, a plaintiff like Thompson would have needed to find a *contemporary* form of proceeding under New York law. And any non-substantive-right rules of decision would have come from contemporary New York law absent applicable federal law.

2. *The Rules Enabling Act*

In 1934, Congress enacted the Rules Enabling Act, designed to federalize questions of civil procedure in federal court. The Act delegated to the Supreme Court the “power to prescribe, by general rules, . . . the practice and procedure in civil actions at law.”⁴²³ This rulemaking power included procedural questions that had been answered by state-law forms of proceeding.⁴²⁴ But Congress forbade the Supreme Court from “abridg[ing], enlarge[ing], [or] modify[ing] the substantive rights of any litigant.”⁴²⁵ So, standardizing federal-court procedure would not have granted federal courts the power to ignore state substantive law, even when that substantive law was or had been embedded in the form of action.⁴²⁶ And with respect to the source of the cause of action in federal court, “federal courts [still] relied on state law to determine the causes of action available for the violation of federal statutes that themselves did not create a cause of action.”⁴²⁷ So, for Thompson’s claim against the officers, the Rules Enabling Act and the Federal Rules of Civil Procedure would not have affected the

420. Conformity Act of 1872, ch. 255, § 5, 17 Stat. 196, 197 (emphasis added).

421. Note, *Conformity by Federal Courts to State Procedure*, *Rev. Stat.*, § 914, 35 HARV. L. REV. 602, 602–03 (1922) (footnotes omitted); see also 1 ROSE, *supra* note 80, § 900[c], at 835.

422. See *Nudd v. Burrows*, 91 U.S. 426, 441 (1875).

423. Rules Enabling Act, ch. 651, § 1, 48 Stat. 1064, 1064 (1934).

424. Compare FED. R. CIV. P. 17–21, 23 (governing joinder of parties and claims and the proper parties to actions), with 1 ROSE, *supra* note 80, § 902[a], at 842–44 (parties to action and joinder of parties were derived from state law under the Conformity Act), and *id.* § 903[a], at 845–46 (state law governed “what causes of action may be joined in one suit”).

425. § 1, 48 Stat. at 1064.

426. See WHITE, *supra* note 83, at 9–10 (explaining that the substance of tort law tracked the requirements of the form of action).

427. See Anthony J. Bellia Jr., *Justice Scalia, Implied Rights of Action, and Historical Practice*, 92 NOTRE DAME L. REV. 2077, 2099 (2017) [hereinafter Bellia, *Implied Rights*].

ultimate source of law for causation, damages, survivorship, or a cause of action: contemporary New York law.

3. *Statutory Amendments*

Since 1874, Congress has amended section 1983 only twice (in 1979 and 1996), neither of which altered the operative text.⁴²⁸ Amendments affecting only one part of the text, though, do not necessarily change the meaning of the unaffected part, in part because the old-soil canon generally counsels in favor of retaining the original meaning of the unaffected text.⁴²⁹

An objector, however, might say that the old-soil canon does not apply where the amendment presupposes an interpretation of the unaffected text that makes the canon's assumption implausible. But if the statute's *meaning* mirrors the courts' interpretation circa 1996, then current calls to return to a supposed pre-amendment meaning would also fail. So, on this front, my interpretation and the calls to return to the supposed original meaning—if they fall—fall together.

Another objection might be that, under a theory of congressional ratification, statutory *stare decisis* is strengthened when Congress amends the statute without explicitly rejecting the then-prevailing judicial interpretation.⁴³⁰ The ultimate question whether *stare decisis* would or should prevent courts from adopting the original understanding of section 1983 is outside the scope of this Article. But one need not conclude that the Supreme Court should upend modern section-1983 jurisprudence to agree with my interpretation. And in assessing *others'* calls to overturn Supreme Court precedent and return to section-1983's supposed original meaning, we should have our eyes open to what the original meaning of section 1983 actually was.⁴³¹

428. See Act of Dec. 29, 1979, Pub. L. No. 96-170, 93 Stat. 1284 (including the District of Columbia as a state); Federal Courts Improvement Act of 1996, § 309, Pub. L. No. 104-317, 110 Stat. 3847 (governing injunctions against judges in their official capacity).

429. See *CSX Corp. v. United States*, 18 F.4th 672, 681 (11th Cir. 2021) (When “a word or phrase . . . is ‘obviously transplanted from another legal source [it] brings the old soil with it.’” (quoting *Hall v. Hall*, 138 S. Ct. 1118, 1128 (2018))).

430. See *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 274 (2014).

431. Plus, even assuming *stare decisis* applies to settled questions, the original meaning of section 1983 might still apply to open questions, such as whether the any-crime rule or malice requirement apply to process-based seizures. *Chiaverini v. City of Napoleon*, No. 21-3996, 2023 WL 152477 (6th Cir. 2023), *cert. granted*, 2023 WL 8605742, at *1 (U.S. Dec. 13, 2023) (No. 23-50) (granting certiorari to a case addressing the any-crime rule); *Thompson v. Clark*, 596 U.S. 36, 44 n.3 (2022) (pretermitted whether malice is required); see also Brief for Petitioner at 45–47, *Gonzalez v. Trevino*, No. 22-1025 (U.S. Dec. 11, 2023) (arguing that abuse of process is the analogous 1871 common-law tort and identifying improper motive as a central element); cf. Christopher J. Walker & Scott T. MacGuidwin, *Interpreting the Administrative Procedure Act: A Literature Review*, 98 NOTRE DAME L. REV. 1963, 1989–96 (2023) (proposing the same approach under the Administrative Procedure Act).

B. *Application in Our Modern Legal World*

1. *Using State-Law Causes of Action*

In actions at law, section 1983 might require plaintiffs to have a state-law cause of action and satisfy its elements even today.⁴³² Courts today recognize section 1983 as the cause of action and look to elements of analogous tort causes of action at common law in 1871 to define the “contours” of this supposed cause of action.⁴³³ But even post-Rules Enabling Act, the original understanding of section 1983 would have required a state-law cause of action, and neither the Rules Enabling Act nor the Federal Rules of Civil Procedure altered that principle. Elements of those state-law causes of action could be set aside only if they purported to legalize something that the Constitution prohibits or if they had been preempted by federal statute. On the other hand, where a state-law element merely added a prerequisite to *recovery*, a plaintiff would have to satisfy both the constitutional (to establish a constitutional violation) and the state-law tort element (to maintain the cause of action).⁴³⁴ So Thompson would have had to establish the non-substantive-right element under New York law that “the proceeding was brought out of actual malice.”⁴³⁵

The propriety of requiring a state-law cause of action, though, might depend on whether federal courts can recognize implied rights of action. If so, then courts, after the repeal of the Conformity Act, could have arguably recognized one in section 1983. Of course, even so, the doctrine of implied causes of action rests on a theory of congressional intent with respect to private suits,⁴³⁶ and it is unlikely that in 1871 Congress would have intended courts to have implied a private right of action.⁴³⁷

2. *Borrowing “Substantive” Rules from Modern State Law*

Regardless of whether state law must provide the cause of action, courts should apply modern state rules of decision in actions at law under section 1983

432. The Supreme Court has already held that traditional equity rules are imposed on section 1983. *See Mitchum v. Foster*, 407 U.S. 225, 243 (1972). Whether those rules are imposed by federal courts’ equity jurisdiction, see *Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 318–19 (1999), or the original understanding of section 1983, the limits are analogous to those grounded in state law here.

433. *See Manuel v. City of Joliet*, 580 U.S. 357, 370–71 (2017).

434. *Cf. Bellia, Implied Rights*, *supra* note 427, at 2100 (“A state law cause of action might . . . be subject to limitations to which a federal cause of action would not.”). This approach would not violate the “shall be liable” language because there would simply be no applicable action at law to bring. *See supra* notes 213–16 and accompanying text.

435. *See Cantalino v. Danner*, 754 N.E.2d 164, 166 (N.Y. 2001). Another example might be state-law notice requirements, which courts today do not require for section-1983 claims, *see* 1B SCHWARTZ, *supra* note 20, § 12.08, at 12-122–12-127, but that presumably would apply under the original meaning.

436. *See Alexander v. Sandoval*, 532 U.S. 275, 286–92 (2001).

437. *See Bellia, supra* note 26, at 838–46; *supra* note 175 and accompanying text.

absent clearly applicable federal law. For example, courts today apply the modern “general or residual statute [of limitations] for personal injury actions” under section 1988(a).⁴³⁸ Under the original understanding, however, the Rules of Decision Act would direct Thompson to look to the statute of limitations for the relevant state cause of action—here, one year for malicious prosecution.⁴³⁹ And with respect to survivorship, the rules of the most analogous state-law claim generally apply,⁴⁴⁰ but lower federal courts refuse to apply—under the “inconsistent” clause of section 1988(a)—state rules barring survivorship when the state actor’s conduct caused the death or state rules restricting the damages available in an otherwise survived action.⁴⁴¹ Originally, however, survivorship would have been governed by the forms of action, which were provided by state law under the Process Act and not subject to the “inconsistent” limitation.⁴⁴² For causation and damages, courts today apply the purported general law of 1871—that is, the well-settled rules in 1871 at common law governing the most analogous torts—updated only in extreme circumstances.⁴⁴³ For Thompson, the general law of damages (presumably circa 1871) might limit Thompson’s recovery to the damages related to the *seizure* and not the *prosecution*.⁴⁴⁴ But the original understanding would use New York’s law for damages in malicious prosecution actions, which includes “attorney’s fees”⁴⁴⁵ and all other damages from the first legal process “until the conclusion of the criminal prosecution.”⁴⁴⁶

Official immunities offered by current state law would also apply. Today, the Court has its own doctrine of official immunities, purportedly rooted in the general law of 1871.⁴⁴⁷ But under the original meaning, immunities would likely need to be borrowed from state law, as they are a condition on recovery and not a definition of the right.⁴⁴⁸ So the New York City police officers would be entitled only to the immunity New York law offers them: today, immunity

438. See *Owens v. Okure*, 488 U.S. 235, 249–50 (1989); 1B SCHWARTZ, *supra* note 20, § 12.02[B], at 12-16. For Thompson in New York, that was three years. See N.Y. C.P.L.R. § 214(5) (McKinney 2021).

439. See N.Y. C.P.L.R. § 215(3) (McKinney 2021).

440. See *Robertson v. Wegmann*, 436 U.S. 584, 588–93 (1978).

441. See 1B SCHWARTZ, *supra* note 20, § 13.02[B], at 13-6 to 13-18.1.

442. That state rules of survivorship would have applied to civil actions arising under the Ku Klux Klan Act (even if those rules “generally [are] inhospitable to survival,” see *Robertson*, 436 U.S. at 594) appears to have been understood by the bill’s sponsor. See *supra* notes 352–56 and accompanying text.

443. See, e.g., *Williams v. Aguirre*, 965 F.3d 1147, 1167–68 (11th Cir. 2020).

444. See *id.* at 1161.

445. See *Broughton v. State*, 335 N.E.2d 310, 316 (N.Y. 1975).

446. *Oakley v. City of Rochester*, 421 N.Y.S.2d 472, 474 (App. Div. 1979).

447. *Ziglar v. Abbasi*, 582 U.S. 120, 157 (2017) (Thomas, J., concurring in part and concurring in the judgment).

448. This would hold true whether immunities were embedded in the forms of action or were imposed on them. Compare *supra* text accompanying note 438 (discussing statute of limitations, a non-substantive-right, non-form-of-action rule decision), with *supra* notes 443–46 and accompanying text (discussing causation, damages, and survivorship, form-of-action rules of decision).

“unless ‘there is bad faith *or* the action taken is without a reasonable basis’”⁴⁴⁹; tomorrow, perhaps neither.⁴⁵⁰

3. *Limits on State Law*

No matter the scope of the role of state law, there would be limits on its applicability, five of which I mention here. First, the original meaning of the Equal Protection Clause likely required states to give the protection of the state—through criminal and civil remedies—to all persons on an equal basis.⁴⁵¹ So a state law that is unequal is inapplicable; for example, a law granting officers immunity only from suits by female plaintiffs. Second, state rules cannot discriminate against federal claims, by offering a different rule for section-1983 claims than normal state-law tort claims, for example.⁴⁵² As *McCulloch* recognized, when Congress exercises its constitutionally authorized power, the states cannot purposefully interfere.⁴⁵³ Third, because post-deprivation tort remedies form a part of procedural due process,⁴⁵⁴ removing those remedies without offering any additional process in return might become a due-process violation at some point. For example, statutes of limitations that do not give a reasonable opportunity to bring claims⁴⁵⁵ or very broad official immunities might raise due-process concerns.⁴⁵⁶ Fourth, limitation running in favor of officers might also apply. Professor Nathan Chapman has argued for a limited form of qualified immunity on the basis of fair notice.⁴⁵⁷ Perhaps a state immunity that would impose liability without some fundamentally required notice would violate the Constitution, whether under the Due Process Clause or the original meaning of the Ex Post Facto Clause.⁴⁵⁸ Finally, because federal law preempts state law,

449. *Triolo v. Nassau Cnty.*, 24 F.4th 98, 108–09 (2d Cir. 2022) (emphasis added) (quoting *Arteaga v. State*, 527 N.E.2d 1194, 1196 (N.Y. 1988)). It appears that in the malicious-prosecution context, proving malice would necessarily overcome the official’s qualified immunity.

450. *See* S.B. 182-A, § 3(B), 2023–24 Leg., Reg. Sess. (N.Y. 2023) (proposing the repeal of qualified immunity for state-law claims).

451. *See* Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Pre-Enactment History*, 19 GEO. MASON U.C.R.L.J. 1, 44–45 (2008).

452. *See, e.g.*, *Campbell v. City of Haverhill*, 155 U.S. 610, 614–15 (1895). The *Campbell* court appeared to suggest that the basis for the limitation is in the inherent power for courts to effectuate the purposes of federal statutes. *See id.* But it is more likely that the limitation is a negative inference from Congress’s Article I powers.

453. *McCulloch v. Maryland*, 17 U.S. 316, 391–96 (1819).

454. *See* *Ingraham v. Wright*, 430 U.S. 651, 678 (1977).

455. *Cf. Campbell*, 155 U.S. at 615. It is unclear on what constitutional principle *Campbell* and the cases on which it relies ground this limitation, but the best argument appears to be the Due Process Clauses.

456. *Cf.* Carlos M. Vázquez & Stephen I. Vladeck, *State Law, the Westfall Act, and the Nature of the Bivens Question*, 161 U. PA. L. REV. 509, 573–76 (2013).

457. *See* Chapman, *supra* note 41, at 29–31.

458. *See id.* at 27 nn.125–26 (collecting sources).

nothing prevents Congress from providing uniform, federal rules if state rules threaten the supposed purpose of section 1983.⁴⁵⁹

CONCLUSION

Whatever one's view on the current state of section-1983 doctrine or the best way forward, understanding how section 1983 would have originally been interpreted is crucial. Our current interpretations impose modern conceptions that had no widespread acceptance in 1871. If we are to give weight to historical practice today, we should not evaluate how our Ferraris would have driven on the roads of ancient Egypt. Rather, we should first seek to understand how those roads would have functioned for chariots, and then we can discuss how that historical practice should inform (if at all) our construction of modern roads for modern cars. Likewise, only after we understand the legal world of 1871 and what section 1983 originally meant in the light of that context can we meaningfully debate whether and how that meaning should inform section-1983 litigation today.

459. See, e.g., George Floyd Justice in Policing Act of 2021, H.R. 1280, 117th Cong. (2021).