EXPLORING THE LIMITS OF QUALIFIED IMMUNITY UNDER *HARLOW*'S DISCRETIONARY FUNCTION TEST

James E. Pfander[*] *& Alexander A. Reinert*[**]

INTRODUCTION

Buried in *Harlow v. Fitzgerald*,[1] the Supreme Court's leading decision on qualified immunity,[2] a largely overlooked phrase invokes a mostly forgotten distinction in the law of official liability and government accountability. *Harlow* is well known for the Court's oft-quoted test for qualified immunity: "We therefore hold that government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[3] Much subsequent doctrine and commentary has focused on the *Harlow* Court's self-conscious decision to modify qualified immunity's subjective "good faith"[4] element, putting a "clearly established law"[5] requirement in its place.[6] Much less attention — indeed, almost no attention at all — has been paid to the Court's decision to confine application of this new standard to claims brought against officers performing "discretionary functions," leaving officers performing "'ministerial' tasks" unprotected by immunity.[7] The Court itself has adverted to the distinction only a few times since *Harlow*, but has never outlined the difference between ministerial and discretionary

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[*] Owen L. Coon Professor of Law, Northwestern Pritzker School of Law.

[**] Max Freund Professor of Litigation and Advocacy, Benjamin N. Cardozo School of Law. We are grateful to the participants in this Symposium and to the participants in the Benjamin N. Cardozo School of Law's Summer Brown Bag Workshop for their helpful feedback on earlier drafts.

[1] 457 U.S. 800 (1982).

[2] *See generally* WILLIAM BAUDE ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1311–19 (8th ed. 2025) [hereinafter H&W 8] (summarizing qualified immunity doctrine).

[3] *Harlow*, 457 U.S. at 818 (citing Procunier v. Navarette, 434 U.S. 555, 565 (1978); Wood v. Strickland, 420 U.S. 308, 322 (1975)).

[4] *Id.* at 815.

[5] *Id.* at 818.

[6] *See id.* at 815–19; *see, e.g.*, H&W 8, *supra* note 2, at 1314–15; Karen M. Blum, *Section 1983 Litigation: The Maze, the Mud, and the Madness*, 23 WM. & MARY BILL RTS. J. 913, 924 (2015); John C. Jeffries, Jr., Lecture, *What's Wrong with Qualified Immunity?*, 62 FLA. L. REV. 851, 852 (2010); Joanna C. Schwartz, *Qualified Immunity's Boldest Lie*, 88 U. CHI. L. REV. 605, 613 (2021).

[7] *Harlow*, 457 U.S. at 816.

functions as it relates to qualified immunity doctrine.[8] Scholars have yet to consider the matter in any detail.[9]

With no guidance from the Court distinguishing ministerial from discretionary tasks, and no clearly stated rationale that later jurists might use to draw the operative line, most lower courts have reflexively extended the law of qualified immunity to encompass all official action.[10] As a consequence, the "clearly established law" standard seemingly applies to all constitutional tort claims, whether they implicate the discretionary acts and thought processes of high-level government officials or the actions of line officers best understood as ministerial.

In this Essay, we aim both to excavate the longstanding distinction between ministerial and discretionary functions on which *Harlow* relied and to bring it to bear on qualified immunity doctrine. We do so in three Parts. Part I sketches how nineteenth-century government accountability law both shielded high-level official action and preserved rule of law values by authorizing suit to go forward against low-level officials. It did so by directing litigation at executive officials performing ministerial functions. Across a range of remedial forms — including those initiated by writs of trespass, mandamus, and habeas corpus — suits to test the legality of government policy were typically directed at line officers rather than policymaking officials. Such ministerial actors enjoyed no immunity from suit and could not plead superior orders as a defense to personal liability. Indemnity took the sting out of personal liability and shifted the cost of noncompliance to the government.

Having clarified the role of ministerial accountability in the nineteenth century, Part II explains how constitutional litigation changed in the twentieth. The discretionary function exemption operated at common law to create a zone of discretion within which the official could

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[8] *See* Bogan v. Scott-Harris, 523 U.S. 44, 51 (1998) (explaining that legislative immunity does not extend to ministerial actions). *Compare* Davis v. Scherer, 468 U.S. 183, 197 n.14 (1984) (explaining that a "law that fails to specify the precise action that the official must take in each instance creates only discretionary authority"), *with* Westfall v. Erwin, 484 U.S. 292, 298 (1988) (rejecting argument that absolute immunity protected officials because their "precise conduct" had not been mandated by law).

[9] On the centrality of the ministerial-discretionary distinction in the rise of judicial review in England and its continuing importance in the law of government accountability, see generally LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 329–34 (1965); James E. Pfander, *Zones of Discretion at Common Law*, 116 NW. U. L. REV. ONLINE 148 (2021); and William Baude, Reply, *Is Quasi-Judicial Immunity Qualified Immunity?*, 74 STAN. L. REV. ONLINE 115 (2022). For a brief encounter with *Harlow*'s discretionary function limit, see James E. Pfander & Rex N. Alley, *Federal Tort Liability After* Egbert v. Boule*: The Case for Restoring the Officer Suit at Common Law*, 138 HARV. L. REV. 985, 1011–13 (2025). For a pre-*Harlow* discussion of the distinction's relevance to immunity doctrine, see generally Kathryn Dix Sowle, *Qualified Immunity in Section 1983 Cases: The Unresolved Issues of the Conditions for Its Use and the Burden of Persuasion*, 55 TUL. L. REV. 326 (1981).

[10] *See infra* notes 135–147 and accompanying text.

act free from any threat of liability.[11] But in a mostly overlooked element of *Ex parte Young*,[12] the Supreme Court rejected the claim that, as a high government official exercising discretion as to the enforcement of law, Minnesota Attorney General Edward T. Young's prosecutorial decisions lay beyond judicial control.[13] In reaching that conclusion, the Court viewed the Fourteenth Amendment as imposing a duty on Young to refrain from enforcing unconstitutional state laws and as overriding any official immunity that Young might enjoy under state law.[14] Later decisions broadened the direct enforcement of constitutional rights,[15] setting the stage for constitutional tort suits against high-level officials and posing a threat to policy formulation that the Court chose to manage with qualified immunity.

Part III explains on rule of law grounds why the *Harlow* Court's protections for high-level discretionary actors do not inevitably extend to line officers who carry out the policies in question. In keeping with the nineteenth-century model, *Harlow* balanced the importance of protecting high-level officials with the need to preserve a test of legality through litigation directed at low-level or ministerial actors. Where government officials enforce the law through summary action, where no alternative modes of review exist, and where state of mind and policy formation play no confounding role in the assessment of legality, individuals should have a right to test constitutionality without having to surmount *Harlow*'s clear-law standard. Indeed, many states continue to distinguish between ministerial and discretionary functions for liability purposes, agreeing with *Harlow*'s animating intuition that immunity does not extend to all official conduct. Part III shows that any plausible version of the ministerial-discretionary distinction — whether rooted in nineteenth-century or more recent doctrine — would shrink qualified immunity's footprint and lessen the impact of its many well-documented problems. A brief conclusion follows.

I. Official Accountability in Nineteenth-Century Officer-Suit Litigation

Nineteenth-century suits to ensure government compliance with law displayed several familiar features, as briefly summarized in this Part. Naming officials to sidestep the doctrine of sovereign immunity, the suits often asserted claims of right under general law principles, such as those

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[11] *See generally* Baude, *supra* note 9 (characterizing the common law as providing only a narrow zone of immunity for discretionary, quasi-judicial acts); Pfander, *supra* note 9 (arguing that common law did not provide immunity when executive officials acted outside of their lawful discretion).

[12] 209 U.S. 123 (1908).

[13] *Id.* at 158.

[14] *See id.* at 159.

[15] *See* Monroe v. Pape, 365 U.S. 167, 187 (1961); Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971).

prohibiting trespassory invasions of person or property. Moreover, the suits tended to name low-level officers as defendants because they were often said to act in a ministerial capacity — as opposed to a discretionary capacity — and therefore had no claim to immunity.

A. Litigation in the Early Republic: Marbury v. Madison

The Supreme Court in *Marbury v. Madison*[16] adapted common law forms to ensure accountable government. In affirming William Marbury's right to contest the denial of his title to office before dismissing for want of jurisdiction, Chief Justice Marshall distinguished between the ministerial actions of federal officials (subject to legal control) and their discretionary actions (not so).[17] As the Court explained, the ability of the federal courts to examine the legality of a federal executive action "must always depend on the nature of that act."[18] In cases where the President has been invested with discretionary power by the Constitution, the courts have "no power to control that discretion."[19] But where the "rights of individuals" depend on official acts, the officer "is amenable to the laws for his conduct; and cannot at his discretion sport away the vested rights of others."[20]

The Court's distinction between the officer's lawful discretionary conduct and "any illegal act, under color of his office,"[21] came to shape the developing law of government accountability in the nineteenth century. Where the Constitution or Congress had conferred discretion to act, individuals had no rights to enforce[22] and federal courts had no role to play.[23] But where Congress conferred only limited official authority, as in legislation authorizing the capture of certain American vessels trading with the enemy during the Quasi-War with France, courts were expected to enforce those limits even when the defendant acted with "pure intention."[24]

Following English law, which applied general principles of tort law to the public and to the Crown's officers,[25] the Court consistently held

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16 5 U.S. (1 Cranch) 137 (1803).

17 *See id.* at 166.

18 *Id.* at 165.

19 *Id.* at 166.

20 *Id.*

21 *Id.* at 170.

22 *See, e.g.*, Crowell v. McFadon, 12 U.S. (8 Cranch) 94, 98 (1814) (rejecting suit to recover value of cargo lost when mistaken seizure of vessel occurred within scope of discretion conferred by Congress).

23 *See* Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 YALE L.J. 1288, 1417–29 (2021) (explaining that courts refused to permit challenge to valuations of taxable property within scope of official discretion).

24 *See* Little v. Barreme, 6 U.S. (2 Cranch) 170, 177, 179 (1804).

25 *See* James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government*, 91 NW. U. L. REV. 899, 920–21 (1997).

that federal officials were not shielded from liability by virtue of their office when they violated individual rights. The *Marbury* Court said as much: "[I]t cannot be pretended that [Madison's] office alone exempts him from being sued in the ordinary mode of proceeding, and being compelled to obey the judgment of the law."[26] Writs could be issued to test legality "if the case . . . would, were any other individual the party complained of, authorize the process."[27] General tort law played a similar role throughout the nineteenth century. In such well-known cases as *Osborn v. Bank of the United States*[28] and *United States v. Lee*,[29] the Court invoked general tort law as the predicate for suits directing officials (state and federal) to refrain from unconstitutional takings of the plaintiffs' property.[30]

In this model, the official defendant's state of mind was typically irrelevant in assessing legality. Instead, nineteenth-century judges focused on the official's conduct.[31] Summary invasions of the rights of person and property were thus almost invariably viewed as tortious, unless justified under legislation properly enacted to shield the conduct from liability.[32] In challenges to tax collection, the Court did not bother to address the officer's state of mind, given the summary and obviously intentional nature of the property's seizure.[33] Or when a superior federal postal official investigated mail theft and wrongly initiated criminal process against a subordinate officer, a jury verdict against the superior officer was upheld on appeal despite the defendant's protestations of good faith.[34] Were it otherwise, the officer's "pretence of error and unintentional mistake would become a cloak, to give impunity to malice, and fraud, and falsehood."[35]

The irrelevance of the officer's state of mind reflects the functional importance of tort-based liability in filling out the nineteenth-century system of government accountability. As Professor Louis Jaffe has explained, governments (then and now) might enforce the law by adjudicatory process — instituting suit against an individual (such as a taxpayer).[36] In such a proceeding, the individual had an absolute right

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[26] *Marbury*, 5 U.S. (1 Cranch) at 170.

[27] *Id.*

[28] 22 U.S. (9 Wheat.) 738 (1824).

[29] 106 U.S. 196 (1882).

[30] *See Osborn*, 22 U.S. (9 Wheat.) at 857–58 (upholding suit for injunctive relief from threatened official trespass on bank's property to collect unlawful tax); *Lee*, 106 U.S. at 219–21 (authorizing ejectment suit to challenge official possession of property wrongly taken pursuant to unlawful tax sale).

[31] *See, e.g.*, Little v. Barreme, 6 U.S. (2 Cranch) 170, 179 (1804) (holding an officer liable despite "pure intention").

[32] On the distinction between summary (tortious) and adjudicatory or formal (non-tortious) government enforcement proceedings, see JAFFE, *supra* note 9, at 236.

[33] *See* Poindexter v. Greenhow, 114 U.S. 270, 288 (1885).

[34] *See* Merriam v. Mitchell, 13 Me. 439, 448, 458 (1836) (upholding damages for false imprisonment).

[35] *Id.* at 458.

[36] *See* JAFFE, *supra* note 9, at 236.

to raise legal defenses to liability based on all applicable law, including the Constitution.[37] Alternatively, the government might enforce the law by summary process — arresting an individual or seizing property in payment of some obligation such as taxes.[38] Such summary enforcement proceedings do not afford the individual an opportunity to contest legality before the seizure occurs.[39] The Court's recognition of a virtually ironclad right in individuals to pursue post-seizure claims sounding in habeas or tort reflected the judgment that the government cannot seize people or property without due process of law.[40] That process might occur in advance, through adjudication of an enforcement proceeding, or it might occur after the fact as a challenge to the summary invasion of personal or property rights.

The essential role of judicial review helps explain why state of mind did not figure prominently in officer suits. In a proceeding brought by the government to enforce federal law or collect disputed taxes, for example, very little turns on the government's "state of mind." We focus instead on the individual defendant's legal obligation and the viability of any defenses. Similarly, in a trespass suit to challenge the seizure of taxpayer property, the litigation focuses on the legality of the tax and the official's claim of authority to seize property to compel payment.[41] The official's conduct, invading personal or property rights, gives rise to an action. While the officer presumably acts in good faith in reliance on apparent authority, such good faith does not legalize an unlawful seizure.[42] Otherwise, the government could avoid a test of legality by proceeding summarily.

The nineteenth-century model did not immunize government policy from judicial review, in short, but did tend to direct after-the-fact litigation at the low-level officials who carried out the policy rather than the high-level officials who formulated it. Consider three well-known examples. Habeas proceedings ran against low-level custodians, as in *Ex parte Bollman*,[43] even though that litigation tested the legality of President Jefferson's decision to hold the Aaron Burr conspirators on treason charges.[44] In *Little v. Barreme*,[45] the suit contested the seizure of a

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[37] *See* Pfander & Alley, *supra* note 9, at 999.

[38] *See id.*

[39] *See id.* at 998–1005.

[40] *See* Poindexter v. Greenhow, 114 U.S. 270, 303 (1885) (stating that due process requirement limits state denial of remedies); United States v. Lee, 106 U.S. 196, 218 (1882) (deeming officer suit essential to prevent taking of property without due process).

[41] *See, e.g.*, McMillen v. Anderson, 95 U.S. 37, 40–41 (1877).

[42] *See, e.g.*, Merriam v. Mitchell, 13 Me. 439, 448, 458 (1836).

[43] 8 U.S. (4 Cranch) 75 (1807).

[44] *See id.* at 101–02 (Johnson, J., dissenting); 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 302 (rev. ed. 1926); Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 VA. L. REV. 575, 685 (2008).

[45] 6 U.S. (2 Cranch) 170 (1804).

foreign vessel during the Quasi-War with France and asserted a maritime tort against the naval captain who effectuated the seizure "with pure intention,"[46] rather than the Secretary of the Navy who formulated the policy.[47] In *United States v. Lee*, an ejectment suit named the military officials in possession of an estate taken during the Civil War,[48] rather than the higher-ups who turned the estate into a military fortress and cemetery.[49] Such litigation ensured a test of legality without naming the official policymakers directly.

The logic of such litigation foreclosed any defense of superior orders. The rule of law required that inferior officers comply with law without regard to the good faith they displayed in carrying out the orders of their superiors, as Captain George Little learned to his chagrin.[50] If the policy formulated by the superior officer was unlawful, then actions taken in reliance on that policy would subject the low-level officer to personal liability. True, that liability might prove burdensome to the individual, but Congress was expected to indemnify the officer through the passage of a private bill.[51] Rule of law concerns also shaped the definition of who qualified as a ministerial officer for litigation purposes. As the Court explained in *Marbury*, where vested rights were implicated, ministerial officers were expected to answer on behalf of the government.[52] Even the Secretary of State was such an official, at least with respect to the ministerial act of installing Marbury in office.[53]

Following Chief Justice Marshall's lead, nineteenth-century jurists came to characterize tort-based challenges to summary government proceedings as a test of the legality of ministerial action. In other words, in treating the defending officials as ministerial actors, the courts were announcing their conclusion that the conduct in question was not shielded from liability by a grant of discretionary authority to formulate applicable law. For example, the Court in 1871 applied the "well settled" rule that "where the law requires absolutely a ministerial act to be done by a public officer, and he neglects or refuses to do such act, he may be compelled to respond in damages to the extent of the injury arising from

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[46] *Id.* at 179.

[47] *See id.* at 177–78.

[48] *See* 106 U.S. 196, 197, 218 (1882).

[49] *See History of Arlington National Cemetery*, ARLINGTON NAT'L CEMETERY, https://www.arlingtoncemetery.mil/Explore/History-of-Arlington-National-Cemetery [https://perma.cc/55LU-3MSD].

[50] *See Little*, 6 U.S. (2 Cranch) at 179 (rejecting good faith reliance on superior orders as defense to liability for a wrongful seizure); *see also* The Apollon, 22 U.S. (9 Wheat.) 362, 367 (1824) ("[T]his Court can only look to the questions, whether the laws have been violated; and if they were, justice demands, that the injured party should receive a suitable redress.").

[51] *See The Apollon*, 22 U.S. (9 Wheat.) at 366–67; *see also* James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. REV. 1862, 1877–78 (2010) (explaining cases illustrating this trend).

[52] *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 166 (1803).

[53] *See id.* at 137–38, 166.

his conduct."[54] Much the same distinction would eventually take hold in litigation seeking injunctive and mandamus-like relief against federal officials; courts continued to treat ministerial conduct, like that in *Marbury*, as subject to judicial control.[55]

B. The Role of Discretion in Nineteenth-Century Official Immunity

Unlike with challenges to ministerial conduct, individuals generally lacked any rights to enforce against action taken within lawfully conferred zones of official discretion.[56] That was also true when the official defendant enjoyed absolute immunity from suit. Such immunity extended to the judges of superior courts and to legislators, acting within the scope of their official duties.[57] But the recognition of such immunities did not foreclose legal accountability. One could always appeal from an adverse judicial decision and, when appellate rights were uncertain, could often initiate suit against the tribunal or justice of the peace as a way of securing a second judicial opinion.[58] Legislative immunity worked the same way; in *Kilbourn v. Thompson*,[59] the Court conferred absolute immunity on the legislators who voted to jail an individual for contempt of Congress but also signaled that the sergeant-at-arms who carried out the order was subject to liability for trespass or false imprisonment.[60] Official immunity was thus balanced by the availability of a suit against a low-level official to test the policies formulated at a higher level.

The idea of remedial substitution reflected in the trade-off between high-level immunity and low-level accountability helps explain how the law of immunity took shape in the latter part of the nineteenth century as the administrative state was beginning to emerge. Broadly speaking, the Court authorized greater use of pre-enforcement injunctive relief to test the legality of the government's threatened or continuing violation of individual rights.[61] Those decisions often pursued the direct enforcement of federal rights, rather than relying on tort-based private law.[62] In addition, as Congress created administrative agencies, it often conferred a statutory right to federal judicial review on the individuals

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[54] Amy v. Supervisors, 78 U.S. (11 Wall.) 136, 138 (1871).

[55] *See* Bogan v. Scott-Harris, 523 U.S. 44, 51–52 (1998) (collecting authorities).

[56] *See Marbury*, 5 U.S. (1 Cranch) at 165–66.

[57] *See* Pfander & Alley, *supra* note 9, at 1008.

[58] *See id.*

[59] 103 U.S. 168 (1880).

[60] *See id.* at 200–01, 204–05.

[61] *See, e.g.*, *Ex parte* Young, 209 U.S. 123, 167–68 (1908) (upholding federal court power to entertain suit to enjoin threatened enforcement of unconstitutional state law); Am. Sch. of Magnetic Healing v. McAnnulty, 187 U.S. 94, 110–11 (1902) (upholding federal power to restrain unlawful denial of access to mail); Phila. Co. v. Stimson, 223 U.S. 605, 620 (1912) (confirming federal judicial power to restrain unlawful assertion of federal regulatory authority).

[62] On the move from common law torts to constitutional claims as a means of enforcing rule of law norms, see generally Richard H. Fallon, Jr., *Bidding Farewell to Constitutional Torts*, 107 CALIF. L. REV. 933 (2019).

and firms affected by the agency decisions.[63] Both forms of expanded review, statutory and nonstatutory, left less room for private tort law to function as a vehicle for ensuring judicial oversight.[64]

We can see the Court working to integrate judicial review with private tort liability in *Spalding v. Vilas*,[65] a late-nineteenth-century decision that explored executive immunity[66] and played a prominent role in later conceptions of qualified immunity.[67] Evaluating a two-pronged attack on government policy, the Court first found that the relevant statute authorized Postmaster General Vilas to take the measures in question.[68] Second, the Court rejected claims for defamation and interference with contractual relations, shielding Vilas from liability for the tort of malicious policy execution.[69]

To summarize, the nineteenth-century litigation model relied extensively on private law claims brought against ministerial officials. When discretionary powers had been lawfully conferred and exercised, individuals could not contest the resulting policy. Suits still might have proceeded against low-level officials who were tasked with carrying government policy into effect. But the nineteenth-century model presents a puzzle. If individuals generally had no rights to enforce against government officials exercising lawful discretion, why did the Court in *Harlow* have occasion to fashion a qualified immunity specially tailored to the needs of government officials facing liability for their discretionary actions? The answer lies in the twentieth-century shift to direct enforcement of constitutional rights.

II. DISCRETION, IMMUNITY, AND THE DIRECT ENFORCEMENT OF CONSTITUTIONAL RIGHTS

At the dawn of the twentieth century, the Court transformed constitutional litigation into a regime of direct enforcement, treating some constitutional rights as swords rather than shields.[70] That change was

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[63] *See* Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 992–94 (2011) (providing examples).

[64] On the move away from private law as the vehicle for constitutional litigation, see E. Garrett West, *Refining Constitutional Torts*, 134 YALE L.J. 858, 868, 944 (2025); on the appellate review model, see generally Crowell v. Benson, 285 U.S. 22 (1932).

[65] 161 U.S. 483 (1896).

[66] *See id.* at 498–99 (affirming official's discretionary decision to implement a statutory directive and rejecting claims for tort-based damages).

[67] *See* Butz v. Economou, 438 U.S. 478, 492–94 (1978) (relying on *Spalding* in formulating qualified immunity doctrine); Harlow v. Fitzgerald, 457 U.S. 800, 807–08 (1982) (same).

[68] *Spalding*, 161 U.S. at 490–91.

[69] *See id.* at 498–99; *see also* Kendall v. Stokes, 44 U.S. (3 How.) 87, 98 (1845) ("[A] public officer is not liable to an action if he falls into error in a case where the act to be done is not merely a ministerial one, but is one in relation to which it is his duty to exercise judgment and discretion . . . .").

[70] On the switch from a negative Constitution to one that imposes affirmative duties on government officials, see generally West, *supra* note 64; Walter E. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532 (1972).

necessitated by the Fourteenth Amendment, as the Court interpreted the Due Process Clause to invalidate rate regulation that denied parties a just and reasonable return on their investment.[71] In *Ex parte Young*, the Court confirmed this change by upholding the power of a lower federal court to enjoin a state official from enforcing a rate schedule that violated the Fourteenth Amendment.[72] In doing so, the Court recognized that an official, even one exercising discretionary functions, was subject to liability for unconstitutional conduct.

A. The Direct Enforcement Model of Ex Parte Young

Unlike the leading cases of the nineteenth century,[73] the official defendant in *Ex parte Young* only threatened to bring an enforcement action; in other words, the state was proceeding through formal or adjudicative channels, rather than summarily, in enforcing its railroad rates.[74] Normally, the state attorney general has discretion over matters of law enforcement and does not violate any tort-based duty to the railroad in bringing such suits.[75] When the state sues to enforce its rates, the railroad would raise its constitutional claims as defenses to the proceeding.[76]

In allowing the suit to proceed for anticipatory injunctive relief, the *Ex parte Young* Court recognized that the imposition of a duty to refrain from enforcing unconstitutional laws necessarily limited the discretionary immunity that executive officers would otherwise enjoy. The Court first acknowledged the general distinction between ministerial and discretionary official conduct, explaining that "the court cannot control the exercise of the discretion of an officer" but "can only direct affirmative action where the officer [has] some duty to perform not involving discretion, but merely ministerial in its nature."[77] An injunction to block the enforcement of an unconstitutional statute would prevent an officer only "from doing that which he has no legal right to do" and thereby did not interfere "with the discretion of an officer."[78] The ministerial duty

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[71] *See* Smyth v. Ames, 169 U.S. 466, 546–47 (1898), *overruled by* Fed. Power Comm'n v. Nat. Gas Pipeline Co. of Am., 315 U.S. 575 (1942); *see also* Molly S. McUsic, *The Ghost of* Lochner*: Modern Takings Doctrine and Its Impact on Economic Legislation*, 76 B.U. L. REV. 605, 642 (1996) (discussing rate regulation cases).

[72] *See* 209 U.S. 123, 159–60 (1908).

[73] *See* Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 868–69 (1824) (holding that Ohio officials committed trespass by collecting tax summarily); Poindexter v. Greenhow, 114 U.S. 270, 288 (1885) (reaching analogous conclusion for a Virginia official).

[74] *Young*, 209 U.S. at 131 (highlighting Young's threatened institution of proceedings).

[75] Young's brief to the Court urged that "control of the discretion vested in an executive officer is not within the power or authority of the judiciary." Brief for Petitioner on Hearing of Rule to Show Cause, *Young*, 209 U.S. 123 (No. 10), 1907 WL 18905, at *13; *see also Young*, 209 U.S. at 134 (noting argument that control of executive discretion lies beyond the courts' authority).

[76] Apart from allegedly denying the railroad a reasonable return on invested capital, Minnesota law imposed substantial penalties on those who violated the statute, penalties the Court regarded as a separate violation of the Due Process Clause. *See Young*, 209 U.S. at 147–48.

[77] *Id.* at 158.

[78] *Id.* at 159.

to abide by the Constitution operated to override any discretionary immunity the officer might have enjoyed under general or state law.

Early § 1983[79] cases betrayed no indication that immunity would apply where officials violated ministerial duties. Thus, for example, in the case of *Myers v. Anderson*,[80] the Supreme Court affirmed a damages award under § 1983 against two supervisors of the Board of Elections who denied three Black men the right to vote in violation of their Fifteenth Amendment constitutional right.[81] The decision gave no hint of any official immunity applicable to the defendants, and we suggest here that this makes sense given that the duty to register otherwise qualified voters without regard to race was ministerial under any conception.[82] Similarly, in *Brickhouse v. Brooks*,[83] the plaintiff alleged that he was denied the right to vote on account of his race, and the court found irrelevant the defendants' contention that their actions were "not alleged to have been willful or malicious."[84]

Direct constitutional enforcement thus created a new form of liability for officials exercising discretionary functions and preserved existing liability for ministerial acts. As this new form of constitutional tort liability evolved from litigation aimed at line officers, as in *Monroe v. Pape*[85] and *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,[86] into suits against high government officials, the *Harlow* Court recognized a form of qualified immunity for officials performing discretionary functions.[87] The next section explores the Court's use of qualified immunity as a response to this distinctive form of constitutional tort liability and the way the ministerial-discretionary distinction shaped the doctrine's development.

B. The Rise of Qualified Immunity in Constitutional Tort Litigation

Other works have traced the rise of qualified immunity.[88] We focus here on the way in which nineteenth-century ideas shaped the developing

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[79] 42 U.S.C. § 1983.

[80] 238 U.S. 368 (1915).

[81] *Id.* at 377–78, 383.

[82] *See, e.g.*, Kilham v. Ward, 2 Mass. (1 Tyng) 236, 236–37, 267–68 (1806) (finding selectmen to be liable in damages for refusing to accept vote of qualified voter, without showing of malice); Lincoln v. Hapgood, 11 Mass. (10 Tyng) 350, 354–55 (1814) (same); Jeffries v. Ankeny, 11 Ohio 372, 375–76 (1842) (approving damages action against judicial officer who refused, without a showing of malice, to accept vote of someone legally entitled to cast ballot); Monroe v. Collins, 17 Ohio St. 666, 690 (1867) (holding that officers who discriminated on basis of race were liable in damages notwithstanding that they acted pursuant to unconstitutional voting law).

[83] 165 F. 534 (C.C.E.D. Va. 1908).

[84] *Id.* at 543.

[85] 365 U.S. 167 (1961); *see id.* at 169.

[86] 403 U.S. 388 (1971); *see id.* at 389–90.

[87] Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

[88] *See, e.g.*, William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 51–61 (2018); Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*, 111 CALIF. L. REV. 201, 208–14 (2023).

doctrine and led to the *Harlow* Court's articulation of a discretionary function test that was designed to address state-of-mind claims against high-level officials. Begin with the Court's reliance on the jurisprudence of the nineteenth century in two of its earliest immunity decisions. In both *Tenney v. Brandhove*[89] and *Pierson v. Ray*,[90] the Court applied the traditional nineteenth-century model of absolute immunity to block § 1983 claims against legislative and judicial actors,[91] while expressly reaffirming that executive officials remain subject to liability when they enforce the law.[92] The animating element of these decisions was to shield a discretionary, policymaking function from constitutional tort liability while reaffirming that alternative remedies against executive officials were available to secure the rule of law.[93] Granted, *Pierson* also incorporated a good faith immunity for line officers sued under § 1983.[94] But, as one of us has argued, this incorporation rested on an erroneous understanding of nineteenth-century jurisprudence.[95]

Similar nineteenth-century ideas about protecting officials engaged in discretionary policy formation animated the next wave of immunity decisions. In *Scheuer v. Rhodes*,[96] the Court grounded its immunity doctrine on the need to protect officials' ability to exercise discretion within their spheres of authority.[97] Indeed, rather than suggesting a one-size-fits-all immunity doctrine, the Court embraced one that was tailored to the range of lawful discretion conferred on the various defendant officials present in the suit.[98] In so doing, the Court relied on nineteenth-century jurisprudence, observing that since that time, "[g]ood-faith performance of a discretionary duty has remained, it seems, a defense."[99] Much the same emphasis on discretionary action informed the Court's decisions in *Wood v. Strickland*[100] and *Procunier v. Navarette*,[101] which shielded decisions "made in good faith in the course

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89 341 U.S. 367 (1951).

90 386 U.S. 547 (1967).

91 *Id.* at 553–55 (judicial actor); *Tenney*, 341 U.S. at 372–79 (legislative actor).

92 *See Pierson*, 386 U.S. at 555 ("The common law has never granted police officers an absolute and unqualified immunity . . . ."); *Tenney*, 341 U.S. at 378 ("Legislative privilege . . . deserves greater respect than where an official acting on behalf of the legislature is sued or the legislature seeks the affirmative aid of the courts to assert a privilege.").

93 *See Pierson*, 386 U.S. at 554–55; *Tenney* 341 U.S. at 377–78.

94 *Pierson*, 386 U.S. at 557.

95 *See* Reinert, *supra* note 88, at 217 & n.98, 221–28.

96 416 U.S. 232 (1974).

97 *See, e.g.*, *id.* at 240, 247.

98 *Id.* at 247 (noting that the scope of immunity would "depend[] upon the scope of discretion and responsibilities of the office").

99 *Id.* at 240 n.4 (citing, inter alia, Spalding v. Vilas, 161 U.S. 483, 493–98 (1896)).

100 420 U.S. 308 (1975).

101 434 U.S. 555 (1978).

of exercising [an official's] discretion within the scope of his official duties."[102]

While the Court extended protection to discretionary policy formation, it continued to insist that the execution of that policy might lead to liability in keeping with the rule of law concerns that underlay the nineteenth-century model. Distinguishing between ministerial and discretionary duties in the context of municipal liability in *Owen v. City of Independence*,[103] the Court refused to afford municipalities a good faith or qualified immunity defense to § 1983 liability.[104] Along the way, the Court rejected the City's argument that municipalities were liable at common law only for their ministerial acts, not their discretionary ones.[105] In doing so, the Court correctly concluded that at common law, the scope of discretionary duties was quite narrow. For "[w]hile the city retained its immunity for decisions as to whether the public interest required acting in one manner or another, once any particular decision was made, the city was fully liable for any injuries incurred in the execution of its judgment."[106]

Harlow arose in this context, as the Court confronted the prospect of state-of-mind-based liability for retaliatory governmental action taken or directed by what the *Harlow* Court described as "high officials."[107] Such officials were said to "require greater protection than those with less complex discretionary responsibilities."[108] The *Harlow* Court supported that assertion by pointing to earlier cases[109]: In *Scheuer*, the complaint had alleged that the governor of Ohio "intentionally, recklessly, willfully and wantonly" deployed troops to quell the protests at Kent State University,[110] and in *Butz v. Economou*,[111] a commodities trader and critic of the Department of Agriculture had alleged that Secretary Earl Butz violated the First Amendment by initiating retaliatory proceedings against him.[112] In both, the Court had acknowledged and rejected arguments that absolute official immunity should attach to the actions of "high [government] officials of the Executive Branch."[113] But in both cases, the Court had also recognized the importance of qualified

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[102] *Wood*, 420 U.S. at 319; *see Procunier*, 434 U.S. at 561–62. Justice Stevens dissented in *Procunier* in part because the majority disregarded the line between ministerial and discretionary duties in its provision of qualified immunity for a prison warden and correctional officers under his supervision. *See Procunier*, 434 U.S. at 568–69, 569 n.3 (Stevens, J., dissenting).

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

[104] *See id.* at 624–25.

[105] *See id.* at 648–50.

[106] *Id.* at 649.

[107] Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982).

[108] *Id.*

[109] *See id.* at 807–08 (citing Scheuer v. Rhodes, 416 U.S. 232, 247–48 (1974); Butz v. Economou, 438 U.S. 478, 504–06 (1978)).

[110] *Scheuer*, 416 U.S. at 235.

[111] 438 U.S. 478 (1978).

[112] *Id.* at 481, 483.

[113] *Harlow*, 457 U.S. at 807.

immunity "to protect officials who are required to exercise their discretion."[114] *Butz* attempted to ensure such protection through a state-of-mind inquiry; liability would attach where the official "knows or should know he is acting outside the law."[115]

Harlow adjusted course, installing a nominally objective clearly established law test for qualified immunity as it applies to constitutional claims against high government officials exercising discretion in directing policy. *Harlow* itself was such a case: The noted whistleblower, A. Ernest Fitzgerald, had been discharged following a discussion between President Nixon and his advisors.[116] Fitzgerald contended that Nixon and his advisors initiated his discharge in violation of his First Amendment right to speak freely about government fraud, waste, and abuse.[117] After rehearsing prior law, the *Harlow* Court explained its decision to modify the standard: "[T]he dismissal of insubstantial lawsuits without trial . . . requires an adjustment of the 'good faith' standard . . . ."[118] *Harlow* was self-consciously designed, in short, to protect high officials through an objective standard that was meant to facilitate summary adjudication of insubstantial claims without necessitating a jury trial on state of mind.[119]

Whatever its wisdom as applied to high government officials, the *Harlow* standard did not apply to ministerial actors.[120] The Court made that clear, explaining that, unlike lower-level officers, high officials required greater protection from the threat of liability for policy direction within the scope of their discretion.[121] The Court's distinction appears to rest on a principle much like the nineteenth-century theory discussed previously, which presumed that other tests of legality were available, including suit against the line officers who executed the laws, regulations, or policies in question. The distinction also recognized the centrality of state of mind to the constitutional tort liability of high-level policymaking officials.[122] Under the Court's retaliation doctrine, official discretion was no defense to liability for actions that intentionally or deliberately violated an individual's constitutional rights.[123] That made retaliatory motive a basis for constitutional claims across a broad range

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114 *Id.* (quoting *Butz*, 438 U.S. at 506).

115 *Butz*, 438 U.S. at 506–07. Such an inquiry, the Court explained, would hold officials responsible for "an awareness of clearly established constitutional limits." *Id.* at 506.

116 *Harlow*, 457 U.S. at 802–05.

117 *Id.* at 804–05. In a companion case, the Court conferred absolute immunity on the President. *See* Nixon v. Fitzgerald, 457 U.S. 731, 749 (1982).

118 *Harlow*, 457 U.S. at 814–15; *see also* Wood v. Strickland, 420 U.S. 308, 322 (1975) (applying an objective immunity standard); Pierson v. Ray, 386 U.S. 547, 554 (1967) (same).

119 *See Harlow*, 457 U.S. at 818 (explaining its effort to "avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment").

120 *See id.* at 816.

121 *See id.*

122 *See id.* at 815, 817 & nn.28–29.

123 *See* Perry v. Sindermann, 408 U.S. 593, 597–98 (1972).

of activities, including government enforcement proceedings (as in *Butz*) and employment decisions (as in *Harlow*). A judicial role in parsing these "subjective motivation[s]" was thought to "be peculiarly disruptive of effective government."[124]

In contrast, as we have seen, much of the litigation addressed to low-level officials centered on objective claims of illegality to which the defendant's state of mind was largely irrelevant. Suits against low-level officials (such as a habeas proceeding to contest custody or a tort suit to contest summary enforcement proceedings) precipitated a test of legality without any inquiry into state of mind of the kind that would require application of *Harlow*'s clear-law standard.[125] Or as the *Harlow* Court explained, "the thought processes accompanying 'ministerial' tasks" would not be expected to be "influenced by the decisionmaker's experiences, values, and emotions."[126] In short, misfeasance in the performance of ministerial tasks did not require a showing of clear law to simplify litigation as to the officer's state of mind. What's more, the extension of such an immunity to ministerial actors would threaten rule of law values and undercut the justification for shielding high-level official action.

To summarize the lessons of *Harlow*, then, the Court said nothing to suggest that its standard would extend to ministerial conduct and much to foreclose such an extension. Where low-level or ministerial officers violate constitutional rights, where those officers execute the laws rather than formulate the governing policy, and where alternative forms of relief do not exist, *Harlow* strongly implies that the suit may proceed without any clear-law showing.

III. RECLAIMING *HARLOW*'S DECISION TO PRESERVE MINISTERIAL LIABILITY

In this Part, we explain how *Harlow*'s decision to maintain a separate ministerial category disappeared from the law of qualified immunity, the problems that such a disappearance has caused, and the importance of restoring the category. Preserving a test of simple legality as applied to ministerial conduct will preserve rule of law values without any threat to those shielded by *Harlow*'s formulation.

*A. The Post-*Harlow *Expansion of the Discretionary Category*

The virtual disappearance of *Harlow*'s ministerial category apparently rests on a judicial perception that official action often requires the exercise of a measure of discretion and that all such action equally

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[124] *Harlow*, 457 U.S. at 817.

[125] To be sure, evidence that force otherwise justified was inflicted by an official with a wanton or depraved state of mind would justify damages. *See* Wilkes v. Dinsman, 48 U.S. (7 How.) 89, 130 (1849).

[126] *Harlow*, 457 U.S. at 816.

deserves the *Harlow* immunity shield. That attitude informed both the most relevant Supreme Court decision, *Davis v. Scherer*,[127] and the lower court decisions that continue to narrow the ministerial category.

In *Davis*, the Court rejected the plaintiff's argument that his due process right to a hearing before being discharged from public employment was clearly established within the meaning of *Harlow*.[128] It was common ground that the termination decision entailed the exercise of discretion; the plaintiff argued that a state regulation limited the *Harlow* immunity by requiring a pretermination hearing.[129] But the Court dismissed the regulation as irrelevant;[130] the plaintiff's cause of action did not arise directly from the violation of that regulation,[131] and the duty it imposed was enforceable, if at all, through state processes rather than through § 1983.[132] Similarly, the Court rejected the argument that the regulation notified defendants that a hearing was required and made it objectively unreasonable for them to believe their conduct was lawful.[133] Nor did the Court view the regulation as sufficiently hemming in the officers' discretion to transform the personnel decision into a ministerial matter.[134]

Lower courts have seemingly understood the Court's diffidence as a signal that they should abandon the ministerial category.[135] Out of hundreds of federal appellate decisions issued over the last forty years, only a handful of courts have denied qualified immunity after concluding that the duty in question was ministerial.[136] In explaining this one-sided

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127 468 U.S. 183 (1984). Just prior to *Davis*, the Court located in state sovereign immunity a distinction between ministerial and discretionary conduct, but gave no real content to the categories. *See* Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 109–11, 110 n.20 (1984).

128 *Davis*, 468 U.S. at 191–92.

129 *See id.* at 196 n.14.

130 *See id.* at 194–95.

131 *See id.* at 193, 194 n.12, 196 n.14.

132 *Cf. id.* at 194 n.12 ("In the present case, . . . there is no claim that the state regulation itself or the laws that authorized its promulgation create a casue of action for damages or provide the basis for an action brought under § 1983.").

133 *See id.* at 193–94.

134 *See id.* at 196 n.14 (citing Amy v. The Supervisors, 78 U.S. (11 Wall.) 136, 138 (1871); Kendall v. Stokes, 44 U.S. (3 How.) 87, 98 (1845)). The Court located discretion in the regulation's reference to "a 'complete investigation' and a 'thorough study of all information' sufficient . . . to terminate [plaintiff]'s employment." *Id.* (quoting *id.* at 188 n.6).

135 Since *Davis*, the Court has not addressed the distinction between ministerial and discretionary functions in the context of qualified immunity. In a judicial immunity case, the Court held that "court reporters do not exercise the kind of [discretionary] judgment that" merits the protection of absolute judicial immunity. Antoine v. Byers & Anderson, Inc., 508 U.S. 429, 437 (1993). And in *Bogan v. Scott-Harris*, 523 U.S. 44 (1998), the Court adverted to the distinction in justifying the provision of absolute immunity to local legislators acting in their legislative capacity. *See id.* at 51–52.

136 *See, e.g.*, Groten v. California, 251 F.3d 844, 851 (9th Cir. 2001) (ruling no qualified immunity for ministerial duty relating to providing applications for real estate license); Walz v. Town of Smithtown, 46 F.3d 162, 169 (2d Cir. 1995) (ruling no qualified immunity for ministerial duty relating to

set of outcomes, the Eighth Circuit observed in *Sellers v. Baer*[137] that "[t]he exception to qualified immunity for functions that are 'ministerial' rather than 'discretionary' is quite narrow."[138] The appellate court found it difficult "to imagine the case in which the ministerial-duty exception ever could apply," concluding that as a practical matter, "the ministerial-duty exception to the qualified immunity defense [wa]s [a] dead letter."[139] Many other circuits have followed suit.[140]

Yet despite having abandoned the distinction for *Harlow* purposes, federal courts often analyze whether official conduct was ministerial or discretionary when considering the viability of *state law* tort claims against state and local officials.[141] Indeed, in many cases in which federal courts disregard the distinction when considering the *Harlow* immunity, they spend significant time elaborating on the ministerial distinction when considering whether state law versions of qualified immunity should bar state law tort claims concerning identical conduct.[142] Most striking, in numerous circuit court cases concerning policing and prisons, federal courts find certain conduct ministerial for the purposes of state law immunity but engage in no analysis of whether the same

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denial of excavation permit); Boretti v. Wiscomb, No. 92-2203, 1993 WL 300325, at *3 (6th Cir. Aug. 3, 1993) (ruling no qualified immunity because prescribed treatment plan created "ministerial, rather than discretionary, duties"); Morrison v. Lipscomb, 877 F.2d 463, 468 (6th Cir. 1989) (ruling no qualified immunity because a clerk implementing an order was ministerial); Davis v. Knud-Hansen Mem'l Hosp., 635 F.2d 179, 186 (3d Cir. 1980) (ruling no qualified immunity, as negligence in medical care assumed "to implicate ministerial rather than discretionary conduct"); Bryan v. Jones, 519 F.2d 44, 46 (5th Cir. 1975) (finding, in the § 1983 context, "[n]o discretion reposes in the jailer who imprisons a man the law says should be free"), *rev'd on reh'g*, 530 F.2d 1210 (5th Cir. 1976); Jackson v. Kelly, 557 F.2d 735, 738–39 (10th Cir. 1977) (finding that qualified immunity does not attach to the exercise of medical care); Henderson v. Bluemink, 511 F.2d 399, 403 (D.C. Cir. 1974) (same); *cf.* Douthit v. Jones, 619 F.2d 527, 534–37 (5th Cir. 1980) (using the "limited discretion" of a jailer, *id.* at 534, to conclude that qualified immunity was unwarranted in a wrongful incarceration claim); Rieser v. District of Columbia, 563 F.2d 462, 475 (D.C. Cir. 1977) (distinguishing between "execution of policy" and "formulation of policy"), *opinion reinstated in part on reh'g*, 580 F.2d 647 (D.C. Cir. 1978). Notably, there is one recent district court case which found that defendants could not invoke qualified immunity because they could not establish that they acted within their discretionary authority. *See* Sheets v. Charlotte County, No. 24-CV-958, 2025 WL 1644084, at *4–5 (M.D. Fla. June 10, 2025).

137 28 F.3d 895 (8th Cir. 1994).

138 *Id.* at 902.

139 *Id.*

140 *See, e.g.,* Holloman *ex rel.* Holloman v. Harland, 370 F.3d 1252, 1265 (11th Cir. 2004); Eddy v. V.I. Water & Power Auth., 256 F.3d 204, 210–11 (3d Cir. 2001) (citing *Sellers*, 28 F.3d at 902); F.E. Trotter, Inc. v. Watkins, 869 F.2d 1312, 1314–15 (9th Cir. 1989); Nietert v. Overby, 816 F.2d 1464, 1467–68 (10th Cir. 1987); Lojuk v. Johnson, 770 F.2d 619, 626–27, 626 n.7 (7th Cir. 1985).

141 *See, e.g.*, Kruger v. Nebraska, 820 F.3d 295, 304 (8th Cir. 2016); Harmon v. Second Jud. Cir., 728 F. Supp. 3d 992, 1008–09 (E.D. Mo. 2022); Kmart Corp. v. Kroger Co., 963 F. Supp. 2d 605, 610–12 (N.D. Miss. 2013).

142 *See, e.g.*, *Harmon*, 728 F. Supp. 3d at 1008–09.

actions should be considered ministerial for the purposes of federal immunity.[143]

We find that many of these decisions involve models of liability comparable to *Harlow*, in that the plaintiff must overcome a higher threshold to establish liability for discretionary functions as compared to ministerial ones.[144] In *Harlow*'s model, plaintiffs must overcome the "clear law" threshold where the conduct was discretionary;[145] in the state law model, plaintiffs must establish intent or malice where the conduct was discretionary, and only negligence where the conduct is ministerial.[146] In other words, liability for discretionary functions in both regimes requires a more clear-cut degree of culpability on the part of the defendant. We also find that some of the state law models resemble the nineteenth-century regime by distinguishing between decisions made at the planning level (treated as discretionary) and those made operationally (treated as ministerial).[147]

While we lack the space to explore them here, some puzzles arising from these recent applications of the distinction between ministerial and discretionary functions call out for clarification. Recent cases contribute to a regime in which immunity for the same conduct is broader when a state actor violates the Federal Constitution than when they violate state law; in other words, courts have extended federal immunity under

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143 *See, e.g.*, Davis v. Knud-Hansen Mem'l Hosp., 635 F.2d 179, 186–88 (3d Cir. 1980) (prison medical care); Martinez v. City of Los Angeles, 141 F.3d 1373, 1379 (9th Cir. 1998) (law enforcement investigation); Losinski v. County of Trempealeau, 946 F.2d 544, 553–54 (7th Cir. 1991) (protection of domestic violence survivor); Letterman v. Does (*Letterman II*), 859 F.3d 1120, 1125–27 (8th Cir. 2017) (finding that state immunity doctrine did not apply because duty to follow close-observation policy in prison was ministerial); Letterman v. Does, 789 F.3d 856, 865 (8th Cir. 2015) (addressing the same case as *Letterman II*, analyzing qualified immunity in § 1983 claim without considering whether conduct was ministerial).

144 *See* Johnson v. City of Minneapolis, 901 F.3d 963, 972 (8th Cir. 2018) (noting that under Minnesota law, a discretionary act will not be protected by official immunity if conduct "is committed with malice"); *Letterman II*, 859 F.3d at 1126 (noting that under Missouri law, a discretionary act will not be protected by official immunity if conduct "is willfully wrong or done with malice or corruption" (quoting Southers v. City of Farmington, 263 S.W.3d 603, 610 (Mo. 2008) (en banc), *as modified on denial of reh'g* (Sep. 30, 2008))); *Southers*, 263 S.W. at 610 (Mo. 2008) ("Even a discretionary act, however, will not be protected by official immunity if the conduct is willfully wrong or done with malice or corruption."); *cf., e.g.*, *Kruger*, 820 F.3d at 304 (applying state law that provides immunity for negligence where duty is discretionary, but imposing liability for negligence where duty is ministerial); *Harmon*, 728 F. Supp. 3d at 1008–09 (same); *Kmart*, 963 F. Supp. 2d at 611–12 (same).

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

146 *E.g.*, Mann v. Taser Int'l, Inc., 588 F.3d 1291, 1309 (11th Cir. 2009).

147 *See* McQuirk v. Donnelley, 189 F.3d 793, 798–99 (9th Cir. 1999); *Martinez*, 141 F.3d at 1379 (holding that negligence in conducting investigation was ministerial even if decision to conduct investigation was discretionary); Szadkowski v. Wash. Metro. Area Transit Auth., 139 F.3d 892, 1998 WL 116177, at *2 (4th Cir. 1998) (unpublished table decision) (distinguishing between design and maintenance of facilities); *see also* Pro-Eco, Inc. v. Bd. of Comm'rs, 57 F.3d 505, 516 (7th Cir. 1995) (applying Indiana law); Kitchen v. CSX Transp., Inc., 6 F.3d 727, 732–33 (11th Cir. 1993) (applying Georgia law); Larson *ex rel.* Larson v. Miller, 76 F.3d 1446, 1456–57 (8th Cir. 1996) (applying Nebraska law).

§ 1983 to ministerial conduct that enjoys no protection under state law. Should we understand § 1983 liability and immunity as independent of state law (thereby necessitating distinctive state and federal accounts of what constitutes ministerial action)? Should we understand the availability of state law remedies as moderating constitutional entitlements and thereby broadening federal immunity? Despite their evident importance, these questions have not been taken up by the federal courts. We therefore focus in the next section on what we view as the central value of restoring the limits specified in *Harlow*.

B. Recovering a More Nuanced Conception of Ministerial Action

The distinction between ministerial and discretionary functions introduced in *Harlow* but seemingly cast aside in *Davis* should occupy an important place in constitutional litigation. To envision such a place, recall the Court's decision to treat Madison as a ministerial actor in relation to Marbury's claim to office.[148] What made Madison a minister was the inability of Marbury to vindicate his "vested rights" to his office in any other way.[149] If one understands the point of constitutional litigation in similar terms — as a vehicle for the vindication of claims of right — then the availability of remedial alternatives may deserve a more central role in the ministerial characterization. In *Davis*, for example, the plaintiff had secured a test of legality, reinstatement to office, backpay, and a declaration that his constitutional right to due process had been violated; the discretionary characterization served to foreclose only an award of damages for the due process violation.[150]

Davis illustrates a central reality of modern constitutional litigation: that suits for injunctive and declaratory relief often ensure a test of legality and displace the suit for damages. But rather than focus on the test of legality in *Davis*, federal courts have tended to view any degree of discretion in an official's choice about how to carry out government policy as enough to trigger application of the *Harlow* standard.[151] The resulting gap in remediation, primarily affecting suits contesting the summary use of force in order to secure compliance with law and policy, has been widely noted and criticized.[152] Retail use of force by government officials in detention centers and on the street — widely viewed as ministerial in the nineteenth century — now typically enjoys qualified immunity under *Harlow*'s discretionary function test.[153] Yet such interactions (and any policies that regulate them) do not lend themselves to a test of legality through injunctive and declaratory adjudication.

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148 *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 166 (1803).
149 *See id.*
150 *See* Davis v. Scherer, 468 U.S. 183, 186, 187, 190 (1984).
151 *See supra* notes 135–140 and accompanying text.
152 *See, e.g.*, Reinert, *supra* note 88, at 214 & nn.79–82 (summarizing critiques of current doctrine).
153 *See, e.g.*, Kisela v. Hughes, 138 S. Ct. 1148, 1152 (2018) (police use of force).

Two more factors should inform the discretionary determination: the degree to which the official's action calls for the formulation of policy (as in *Butz* and *Harlow*) and the degree to which liability depends on the defendant's state of mind. Use of force may reflect a policy, written or unspoken, but it does not entail the formulation of policy. That happens at the departmental level. Suits to test the constitutionality of such policies do not typically occur in the absence of the application of force to an individual. The nineteenth-century model on which *Harlow* was based would allow such a suit to go forward to secure a test of the policy and its application, targeting the line officer rather than those who formulated the policy. A similar model would leave policymakers protected but would subject the policy to a test of legality in a suit against ministerial officers. Unconstitutional policies would offer no protection to the officer in question.

In the nineteenth century, state of mind played a less significant role in assessments of the legality of ministerial action. As noted in *Merriam v. Mitchell*,[154] courts necessarily abstract away from state of mind and focus on the facts of the interaction as the key to an assessment of its legality.[155] Threatened invasions work the same way, as *Ex parte Young* illustrates; the suit for injunctive relief focuses on the constitutionality of the statute rather than the officer's state of mind.[156] In contrast, by recognizing in *Butz* and *Harlow* that actions undertaken with a retaliatory motive might violate the Constitution, the Court fashioned a form of liability that centered on official state of mind. *Harlow*'s imposition of a clear-law standard should be understood as a way to objectify the state-of-mind inquiry.

But suits contesting the constitutionality of retail law enforcement provide little justification for the application of a comparable guide to state-of-mind judgments. For starters, officers are not formulating policy when they engage in summary proceedings. While they are using force, say, within some bounds of discretion, retail law enforcement is a series of one-off interactions. And those interactions are judged under an objective reasonableness inquiry in which an officer's subjective state of mind is irrelevant.[157] If the accretion of individual encounters together creates something that looks like policy, that does not change the nature of the liability calculus as against individual law enforcement — it brings the municipal entity in as a suable entity, free and clear of qualified immunity. Secondly, in many interactions, the official and the individual have no ongoing relationship of the kind that might lead an officer to harbor the sort of retaliatory purpose central to the legal claims at issue in *Butz* and *Harlow*. In circumstances where such a

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154 13 Me. 439 (1836).

155 *See id.* at 457–58.

156 *See Ex parte* Young, 209 U.S. 123, 158–59 (1908).

157 *See, e.g.*, Graham v. Connor, 490 U.S. 386, 397 (1989).

relationship *has* arisen, the Court has installed limits on the assertion of retaliation claims that seek to ensure a more objective assessment. Thus, in *Hartman v. Moore*,[158] the Court conditioned the right of individuals to recover for retaliatory prosecution under the First Amendment on their ability to plead and prove an absence of probable cause for the prosecution.[159] Such a decision resembles *Spalding v. Vilas*[160] in warding off liability for wrongful motive in the otherwise-lawful administration of law.[161]

Only in prison settings involving use of force, where retaliatory motives may shape the conduct of prison officials in relation to individuals in detention, does state of mind play a consistent role.[162] Even there, however, the Court will look to objective criteria — the extent of the force used and the asserted need for it — to assess whether the required subjective state of mind has been satisfied.[163] If objectively unreasonable, a factfinder may be able to infer the requisite culpability, whether motivated by retaliation or not.[164] While the prison guard certainly exercises a measure of discretion in meting out force and in choosing how harshly to respond to provocation, that discretionary aspect of the defendant's calculus does not justify application of the *Harlow* immunity. The victim's inability to pursue alternative remedies and the absence of any plausible policy-formation defense continue to argue for a ministerial characterization of a prison guard's use of force.

CONCLUSION

In addressing the qualified immunity of high officials performing discretionary functions, the *Harlow* Court did not articulate a liability rule for ministerial conduct. But the Court relied on a nineteenth-century model of full ministerial accountability that has been unthinkingly abandoned in subsequent cases. Operationalizing that model today poses challenges given ongoing efforts to define ministerial conduct in other contexts. Yet restoring an updated version of that model would contribute much to the rule of law, particularly as it applies to low-level law enforcement where criticisms of qualified immunity have been especially incisive.

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158 547 U.S. 250 (2006).

159 *Id.* at 258; *see also* Nieves v. Bartlett, 139 S. Ct. 1715, 1723–24 (2019) (holding the same for wrongful or retaliatory arrest claimant).

160 161 U.S. 483 (1896).

161 *See id.* at 493, 498.

162 *See* Whitley v. Albers, 475 U.S. 312, 319–21 (1986).

163 *See id.* at 321.

164 *See id.*