SECTION 1983 (STILL) DISPLACES QUALIFIED IMMUNITY

PATRICK JAICOMO & DANIEL NELSON[1]

The rediscovery of a 150-year-old "lost clause" in America's foundational civil rights statute, 42 U.S.C. § 1983, has captured the attention of judges, scholars, and even The New York Times. *This clause appeared in the original text of Section 1983, which declared in 1871 that state actors "shall be liable" for rights violations, "any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding." This Notwithstanding Clause explicitly rejected extratextual defenses like "qualified immunity"—a doctrine created by the Supreme Court that has barred countless civil rights lawsuits. Yet three years after the statute's enactment, the clause was omitted when Congress compiled the federal laws into their first legal code. For a time, the clause was seemingly lost to history. Since its recent rediscovery, many have assumed the Notwithstanding Clause's omission altered Section 1983's meaning. It did not.*

Through an in-depth historical analysis, this Article explains what the clause means, why it was omitted from the text, and how its omission should affect our understanding of the law. Then, as now, Section 1983 displaces qualified immunity—the omission of its "lost clause" notwithstanding.

---

[1] Senior Attorney and leader of the Project on Immunity and Accountability at the Institute for Justice; Research Attorney for Legal History at the Institute for Justice. We are deeply grateful to everyone who offered comments throughout, including Alexander A. Reinert, William Baude, Joanna C. Schwartz, Scott Bullock, Dana Berliner, Robert McNamara, Sam Gedge, Dylan Moore, Jacob Harcar, Anthony Sanders, John Wrench, Michael Greenburg, Michael Fox, Tahmineh Dehbozorgi, Evan Lisull, and John Adams, who also provided invaluable research. Patrick also thanks Anya Bidwell, who leads the Project on Immunity and Accountability with him and is a constant source of inspiration. Daniel also thanks Elijah Milum for help rummaging through the archives.

TABLE OF CONTENTS

INTRODUCTION 153
I. NOTWITHSTANDING CLAUSES IN EARLY AMERICA 161
A. Reinforcing Text Over Contrary Law 161
1. Why Early Legislatures Used Notwithstanding Clauses .. 165
2. Why Notwithstanding Clauses (and Their Omissions) Do Not Alter Law 167
B. Reinforcing Text Over Contrary Common Law 168
1. "Law, Custom, or Usage" Covered Common Law 169
2. Where is the Common Law in "Law, Custom, or Usage"?..... 173
a. Common Law as "Custom" 173
b. Common Law as "Law" 175
C. Codifiers' "Immaterial" Omissions of Notwithstanding Clauses 176
II. SECTION 1983'S NOTWITHSTANDING CLAUSE 184
A. Reinforcing "Every Person" Over Contrary State Law 184
B. Reinforcing "Every Person" Over Contrary State Common Law 191
1. Original Understanding 192
2. Purpose 193
a. Remediating Unpunished Rights Violations 194
b. Displacing Immunities to Secure Remediation 197
c. Following in Other Legislatures' Footsteps 201
C. Congress's "Immaterial" Omission of the Notwithstanding Clause 205
1. The Revised Statutes Strove to Consolidate the Law Without Altering Its Operation..... 206
2. Congress Removed the Notwithstanding Clause for Concision, Not Substance..... 210
a. The Revisers and Thomas Durant 210
b. Congress and the Revision Committee 214
c. The Supreme Court 216
III. THE NOTWITHSTANDING CLAUSE TODAY 221
CONCLUSION 225

INTRODUCTION

Professor Alex Reinert's recent excavation of a 150-year-old "lost clause"[2] in 42 U.S.C. § 1983 has set off a growing dialogue, engaging judges like Justice Sonia Sotomayor and Judge Don Willett,[3] scholars like William Baude,[4] and writers at *The New York Times*.[5] The clause resides in Section 1 of the Civil Rights Act of 1871—now codified as Section 1983—a landmark statute which provides that "[e]very person" acting under state color of law who violates "any" other person's constitutional rights "shall be liable."[6] The clause reinforced the sweeping nature of Section 1983, confirming liability "any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding."[7] This "Notwithstanding Clause" has drawn attention because it repudiates qualified immunity, a controversial defense from liability (sourced from state

---

[2] Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*, 111 CALIF. L. REV. 201 (2023).

[3] Price v. Montgomery Cnty., 144 S. Ct. 2499, 2500 n.2 (2024) (mem.) (Sotomayor, J., statement respecting denial of certiorari); Rogers v. Jarrett, 63 F.4th 971, 980 (5th Cir.) (Willett, J., concurring).

[4] William Baude, *Codifiers' Errors and 42 U.S.C. 1983*, VOLOKH CONSPIRACY (June 12, 2023, 8:31 AM), https://reason.com/volokh/2023/06/12/codifers-errors-and-42-u-s-c-1983/ [https://perma.cc/SA8Z-4B7G]; *see also* Tyler B. Lindley, *Anachronistic Readings of Section 1983*, 75 ALA. L. REV. 897, 926 n.234 (2024); Adam Richardson, *Does the 'Lost Text' of Section 1983 Abrogate Common-Law Immunities? A Short Response to Alexander A. Reinert,* Qualified Immunity's Flawed Foundation, (May 15, 2023) (unpublished manuscript), https://ssrn.com/abstract=4449154 [https://perma.cc/V3MA-CA36]. The authors of this Article have also commented on this Clause. William Baude, *Jaicomo and Nelson Respond to Codifiers' Errors*, VOLOKH CONSPIRACY (July 24, 2023, 8:27 AM), https://reason.com/volokh/2023/07/24/jaicomo-and-nelson-respond-to-codifiers-errors/ [https://perma.cc/8LMQ-9GU2].

[5] Adam Liptak, *16 Crucial 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 [https://perma.cc/LEH7-QLHY].

[6] 42 U.S.C. § 1983.

[7] Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13.

common law) that the Supreme Court incorporated into Section 1983 in *Pierson v. Ray*.[8]

But the Notwithstanding Clause is no longer in Section 1983. It was removed just three years later when Section 1983 was reenacted in 1874 as part of the first compilation (or "codification") of the federal laws into one legal code.[9] No one has yet explained why this happened. Instead, commentators have supposed the explanation is "lost to history."[10] And more consequentially, commentators have assumed the Clause's removal walked back Section 1983's rejection of qualified immunity with the debate focusing solely on the question, "How much?" Some argue the omitted Clause "still speaks powerfully to Congress's intent" to displace (or "supersede") qualified immunity, supposing its omission was done in "error."[11] Several circuit judges share this view, having "appeal[ed] to the Supreme Court" to reconsider qualified

---

[8] 386 U.S. 547, 557 (1967) ("We hold that the defense of good faith and probable cause, which the Court of Appeals found available to the officers in the common-law action for false arrest and imprisonment, is also available to them in the action under § 1983.").

[9] *Compare* Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13 (including Clause), *with* REV. STAT. § 1979 (1874) (omitting Clause). Despite the Clause's omission, at least eleven Supreme Court majority opinions have quoted or discussed it. *See* Ngiraingas v. Sanchez, 495 U.S. 182, 188 n.8 (1990); Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701, 722–23 (1989); Wilson v. Garcia, 471 U.S. 261, 262 n.1 (1985); Chapman v. Hous. Welfare Rts. Org., 441 U.S. 600, 608 n.15 (1979); Butz v. Economou, 438 U.S. 478, 503 n.29 (1978); Monell v. Dep't of Soc. Servs., 436 U.S. 658, 691–92 (1978); Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero, 426 U.S. 572, 582 n.11 (1976); Monroe v. Pape, 365 U.S. 167, 181 n.27 (1961); Screws v. United States, 325 U.S. 91, 99 n.8 (1945); Hague v. Comm. for Indus. Org., 307 U.S. 496, 510 (1939); Civil Rights Cases, 109 U.S. 3, 16 (1883); *see also* Briscoe v. LaHue, 460 U.S. 325, 357 (1983) (Marshall, J., dissenting); Adickes v. S.H. Kress & Co., 398 U.S. 144, 203 n.15 (1970) (Black, J., concurring in judgment).

[10] *See* Rogers v. Jarrett, 63 F.4th 971, 980 (5th Cir. 2023) (Willett, J., concurring); *accord* Reinert, *supra* note 2, at 201–02.

[11] Reinert, *supra* note 2, at 238; *accord Jarrett*, 63 F.4th at 980 (Willett, J., concurring); Emily Nicole Janikowski, *The Illusion of Absolute Prosecutorial Immunity: The Supreme Court's Legislative Magic Trick*, 22 GEO. J.L. & PUB. POL'Y 675, 682 (2024) ("Because this clause was omitted, it is not good law, and can only speak to Congress's intent.").

immunity's place in Section 1983.[12] Others wonder if the Clause is defunct, because, error or not, the Clause is no longer in the text of Section 1983.[13] Still others, unsure of the Clause's implications,[14] have called for further study.[15]

This Article provides that further study. It is the first historical account of the Notwithstanding Clause, explaining why Congress inserted the Notwithstanding Clause into Section 1983, why it was omitted, and why its omission never undermined Section 1983's displacement of qualified immunity.

Although unfamiliar to us today, nineteenth-century legislatures used such clauses all the time to solve a problem in their day. At the time, courts "went to great lengths" to harmonize new statutes with existing laws, even at the expense of a new statute's text.[16] Legislatures thus needed more than plain text to ensure their statute prevailed over contrary laws. Their solution was to insert a notwithstanding clause into the statute to make "doubly sure" the new statutory text governed.[17] When courts saw a notwithstanding clause, they understood it as a clear directive to accord the statute its ordinary meaning and let it displace whatever law it

---

[12] McKinney v. Middletown, 49 F.4th 730, 756 n.9 (2d Cir. 2022) (Calabresi, J., dissenting); *see also* Stalley v. Cumbie, 124 F.4th 1273, 1322 n.7 (11th Cir. 2024) (Jordan, J., dissenting); Price v. Montgomery Cnty., 72 F.4th 711, 727 n.1 (6th Cir. 2023) (Nalbandian, J., concurring in part and in judgment), *cert. denied*, 144 S. Ct. 2499 (2024); *Jarrett*, 63 F.4th at 979, 981 (5th Cir. 2023) (Willett, J., concurring).

[13] *See, e.g.*, Baude, *supra* note 4 (expressing doubts); Lindley, *supra* note 4, at 926 n.234 ("[I]t is unclear what relevance that supposed evidence of intent has when Congress also removed that language and how that intent can override that deletion."); Richardson, *supra* note 4.

[14] Hollamon v. Cnty. of Wright, 2024 WL 3653092, at *19 n.26 (D. Minn. 2024); Williams v. Vannoy, 2023 WL 8791681, at *3 n.3 (M.D. La. 2023); *see also* Jacob Harcar, *The Original Meaning of Section 1983 and Official Immunity*, 73 U. KAN. L. REV. 357, 363 (2024).

[15] *See, e.g.*, Green v. Thomas, 734 F. Supp. 3d 532, 562 (S.D. Miss. 2024) ("No decisive judgment" has been reached on the Notwithstanding Clause's omission. "Hopefully the academic community will continue to investigate.").

[16] PLIVA, Inc. v. Mensing, 564 U.S. 604, 622 (2011).

[17] *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 127 (2012) (explaining function of notwithstanding clauses).

contradicted, including contrary common law.[18] Thus, notwithstanding clauses served only to reinforce, not modify, a statute's text. As such, they could be omitted without altering the statute's meaning.

Congress inserted Section 1983's Notwithstanding Clause for the same reason. Section 1983's unequivocal language, "every person shall be liable," was meant to redress rampant, state-sanctioned rights violations that had gone unpunished in the postwar South. To make "doubly sure" Section 1983 would fulfill its purpose, Congress inserted the Notwithstanding Clause, which repudiated any contrary state "law" or "custom"—words that, as we will see, had long been understood to repudiate common law, including its immunities.[19]

The Notwithstanding Clause was omitted in the Revised Statutes of 1874, the first-ever compilation (or "codification") of the federal laws.[20] Congress enacted the Revised Statutes to finally consolidate the federal laws into a single, unified code, thus replacing the confusing web of scattered and overlapping statutes.[21] Congress, however, did not itself omit the Notwithstanding Clause. A three-lawyer team they hired to draft the Revised Statutes (the "Revisers") did.[22] The Revisers' job was to compile all federal laws,

---

[18] Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 232 (2000) [hereinafter Nelson, *Preemption*].

[19] Reinert offers some evidence for the "fair inference" that the Notwithstanding Clause "meant to encompass state common law principles," including qualified immunity. Reinert, *supra* note 2, at 235; *see also* 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.66 (2022) (citing the Notwithstanding Clause as evidence of Section 1983's rejection of qualified immunity). We provide comprehensive evidence to affirm Reinert's inference. *See infra* Sections I.B. & II.B.

[20] *Compare* Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13 (including Clause), *with* REV. STAT. § 1979 (1874) (omitting Clause).

[21] Ralph H. Dwan & Ernest R. Feidler, *The Federal Statutes—Their History and Use*, 22 MINN. L. REV. 1008, 1012–13 (1938).

[22] 1 REVISION OF THE UNITED STATES STATUTES AS DRAFTED BY THE COMMISSIONERS APPOINTED FOR THAT PURPOSE (1872) [hereinafter REVISERS' 1872 DRAFT] (omitting

determine which had been amended or repealed, and reorganize the extant laws into a coherent, structured code. The Revisers omitted the Notwithstanding Clause in their draft. Congress did not undo the omission when it enacted the final draft as the Revised Statutes of 1874, which became official law, repealing the original enactments it revised.

Contrary to the prevailing assumption, the omission was no error. Instead, the Revisers omitted the Notwithstanding Clause for one, simple, non-substantive reason: concision. Without concision, codifying the federal law would have been "impossible."[23] Laws had to be reworded, rearranged, and drastically condensed to fit in one organized, printable book.[24] State codifiers faced the same struggle across the country. They were quick to omit wordy notwithstanding clauses, knowing the meaning of the revised statute would not be changed by an "alteration[] . . . merely designed to render the provisions more concise."[25] Congress's 1874 Revisers knew this too. As one Reviser put it, a statute that

---

Clause). As a note of minor clarification, the 1874 Revisers were a team of three, not a single Reviser as Reinert states. Act of June 27, 1866, ch. 140, § 1, 14 Stat. 74 (authorizing three-lawyer team); Dwan & Feidler, *supra* note 21, at 1013; *see also* Reinert, *supra* note 2, at 201–02. There was, however, a single Reviser for the Revised Statutes of 1878. Act of Mar. 2, 1877, ch. 82, § 1, 19 Stat. 268 (authorizing appointment of "one person" to draft "new edition" of the Revised Statutes); Dwan & Feidler, *supra* note 21, at 1016.

[23] 2 CONG. REC. 650 (1874) (statement of Rep. Lawrence) ("This volume does not undertake to present the text of the statutes on any one subject as enacted by Congress. . . . [I]t is impossible to collect these together and preserve the original text of the laws passed by Congress."); *id.* at 1619 (statement of Rep. Lawrence) (reiterating that "the revisers have necessarily translated the law into their own words so as to convey the idea intended").

[24] *Id.* at 1210 (statement of Rep. Poland) ("Of course the language in this revision is very much changed from the language of the existing statutes. No one can condense seventeen volumes into one and use precisely the same words that have been used in those seventeen. The language is necessarily changed.").

[25] THEODORE SEDGWICK, A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND APPLICATION OF STATUTORY AND CONSTITUTIONAL LAW 429 (New York, John S. Voorhies 1857).

contained a notwithstanding clause would retain its full effect—with or "without that clause."[26]

Courts of the period agreed. They were beginning to rely more on text and less on interpretive canons meant to harmonize contrary laws. They also understood that a revised statute's "omission" of a notwithstanding clause "does not lessen its significance in determining the intention of the legislature, or in fixing the meaning of the words of the statute."[27] Indeed, to quote the Supreme Court's remarks on the Revised Statutes' omission of Section 1982's near-identical notwithstanding clause, such omissions were, "of course, immaterial" to the statute's substance.[28]

Even though omitting a notwithstanding clause was, in substance, "immaterial," the original problem that prompted legislatures to use such clauses remained: courts could revert to disregarding a statute's text in favor of applying external contrary laws through various presumptions and harmonizing canons. By the mid-1800s, however, this trend was waning.[29] Moreover, the Revisers, like their state counterparts, had a contingency plan in case a court was inclined to disregard the text. They cited the original enactments next to the revised text.[30] This way, courts could readily "look to the original act to ascertain the legislative intent in cases of doubt."[31] There, courts would, and did, find the

---

[26] Ambassadors and Other Public Ministers, 7 Op. Att'y Gen. 186, 216 (1855); *see also* Dwan & Feidler, *supra* note 21, at 1013 (noting Caleb Cushing, former Attorney General, was Reviser chairman).

[27] Lehman v. Warren, 53 Ala. 535, 540 (1875).

[28] Jones v. Alfred H. Mayer Co., 392 U.S. 409, 422 n.29 (1968); *accord id*. at 453 (Harlan, J., dissenting) ("[S]ince intervening revisions have not been meant to alter substance, the intended meaning of § 1982 must be drawn from the words in which it was originally enacted.").

[29] *See infra* note 67 and accompanying text.

[30] 1 REVISERS' 1872 DRAFT, *supra* note 22, at 85 (reporting revised Section 1983 text, with marginal citation to original enactment of "20 April, 1871, ch. 22, § 1, vol. 17, p. 13"); *see also* REV. STAT. § 1979 (1874) (same).

[31] Doyle v. Wisconsin, 94 U.S. 50, 51 (1876); *accord* United States v. Lacher, 134 U.S. 624, 626–27 (1890); Johns v. Hodges, 33 Md. 515, 524 (1871) ("If the provision [of our revised statutes] is doubtful, reference to the antecedent law may aid in determining its

statute's notwithstanding clause—a clear signal of "the drafter's intention" to "supersede all other laws."[32]

Like the Revisers, Congress knew that omitting Section 1983's Notwithstanding Clause would not alter the statute's meaning. Their stated goal with the Revised Statutes of 1874 was to bring together and simplify, yet "preserve," the law as it was.[33] When the Revisers submitted their draft, Congress spent the next year undoing revisions that might alter the laws, while *preserving* "mere changes of phraseology not affecting the meaning of the law."[34] Congress did not undo the Revisers' omission of Section 1983's Notwithstanding Clause (or their omission of near-identical clauses in Sections 1981 and 1982)[35] because they knew the omission did not change the statute's meaning. The evidence preserved from Section 1983's revision process confirms its intentional but non-substantive omission over and over.

The Supreme Court unfortunately neglected this history of Section 1983 in *Pierson v. Ray*, when it incorporated qualified immunity, an unwritten defense, into the statute.[36] Even without

---

true intent and purpose."); J.G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION 210 (Chi., Callaghan & Co. 1891) ("[O]riginal statutes may be resorted to for ascertaining [the] meaning" of revised language.).

[32] *Cf.* Cisneros v. Alpine Ridge Grp., 508 U.S. 10, 18 (1993) (explaining the purpose of notwithstanding clauses). For decades before Section 1983's passage in 1871, courts routinely referred to a revised statute's original text. *See, e.g.*, Hargroves v. Chambers, 30 Ga. 580, 588 (1860) (quoting an 1818 statute containing a notwithstanding clause, without even mentioning the clause's omission in GA. REV. CODE ch. 20, § 19 (1848)); Hendricks v. Johnson, 6 Port. 472, 499 (Ala. 1838) (noting that a notwithstanding clause was "omitted in Mr. Aiken's digest, but the effect which they must have in restraining any action by the County court, will be apparent from a slight examination."). For more cases doing this, *see infra* Section I.C.

[33] 2 CONG. REC. 4220 (1874) (statement of Sen. Conkling).

[34] *Id.* at 646 (statement of Rep. Poland).

[35] *Compare* Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (guaranteeing rights "any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding"), *with* REV. STAT. § 1977 (1874) (omitting clause). *Compare* Act of May 31, 1870, § 16, 16 Stat. 144 (same clause), *with* REV. STAT. § 1977 (1874) (omitting clause).

[36] 386 U.S. 547 (1967). *Pierson* never mentioned the Notwithstanding Clause. But Pierson, the petitioner, did. Brief for Petitioners at *3 *n.9, Pierson v. Ray, 386 U.S. 547

the Notwithstanding Clause, Section 1983's text left no room for qualified immunity, broadly proclaiming: "[e]very" state actor who violates "any" person's constitutional rights "shall be liable."[37] Yet the Court disregarded the statutory text on the assumption that Congress meant to incorporate common-law defenses into Section 1983 and concluded that qualified immunity was one such defense.[38]

Pierson's assumption was wrong. To begin with, scholars like William Baude have demonstrated that Congress did not intend to incorporate qualified immunity because qualified immunity did not yet exist in state common law in 1871.[39] Yet even if it did, the Notwithstanding Clause confirms Section 1983 displaced it. The omission changed nothing, as everyone back then understood. Section 1983, therefore, still displaces qualified immunity.

This Article details the Notwithstanding Clause's function and omission as follows. Section I explains how and why nineteenth-century legislatures used, and later non-substantively omitted, notwithstanding clauses. Section II shows Section 1983's Notwithstanding Clause was used—and omitted—for the same reasons. Finally, Section III addresses the Notwithstanding Clause's importance today, given this history.

(1967) (Nos. 79 & 94), 1966 WL 100720, (arguing Notwithstanding Clause "textually made it even clearer that no . . . immunity was intended").

[37] 42 U.S.C. § 1983. The original 1871 text provided: "any person . . . shall . . . be liable." Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13. Among other revisions not relevant here, the statute was revised to the language we have today: "[e]very person . . . shall be liable." REV. STAT. § 1979 (1874). For readability, this Article generally removes the ellipsis to quote the phrase as "every person shall be liable."

[38] *Pierson*, 386 U.S. at 554–55.

[39] William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45 (2018) [hereinafter Baude, *Unlawful?*]; *see also* James E. Pfander, *Zones of Discretion at Common Law*, 116 NW. U. L. REV. ONLINE 148 (2021); William Baude, *Is Quasi-Judicial Immunity Qualified Immunity?*, 74 STAN. L. REV. ONLINE 115 (2022); 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 (2022).

I. NOTWITHSTANDING CLAUSES IN EARLY AMERICA

Notwithstanding clauses were "ubiquitous" in early American and English law.[40] The Tea Act that prompted the Boston Tea Party had one.[41] So does the Supremacy Clause.[42] So did the Civil Rights Acts of 1866[43] and 1870,[44] which served as models for the Civil Rights Act of 1871.[45]

Nineteenth-century legislatures used these clauses to reinforce a statute's displacement of prior contrary law—including common law. As reinforcers, notwithstanding clauses did not alter the law. So their removal likewise left the law unchanged. This was thoroughly understood in the 1800s, which is why legislatures of the period routinely omitted notwithstanding clauses when codifying their laws.

A. Reinforcing Text Over Contrary Law

The origin of notwithstanding clauses dates back hundreds of years, when they were known by their Latin name, "*non obstante*" clauses. In the 1200s (if not before), the papacy used them in their

---

[40] Nelson, *Preemption*, *supra* note 18, at 239–40.

[41] Tea Act of 1773, 13 Geo 3, ch. 44, § 3 ("[A]ny thing in the said in part recited act, or any other law, to the contrary notwithstanding"); *see also* Townshend Acts of 1767, 7 Geo. 3, ch. 41, 46; 8 Geo. 3, ch. 22 (containing five notwithstanding clauses, four of which read "any law, custom, or usage to the contrary notwithstanding").

[42] U.S. CONST. art. VI, cl. 2. (ensuring federal supremacy "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding").

[43] Civil Rights Act of 1866, § 1, 14 Stat. 27 (guaranteeing rights "any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding").

[44] Civil Rights Act of 1870, § 16, 16 Stat. 144 (guaranteeing rights "any law, statute, ordinance, regulation, or custom to the contrary notwithstanding").

[45] CONG. GLOBE, 42d Cong., 1st Sess. app'x 68 (1871) (statement of Rep. Shellabarger, drafter of Section 1983); Chapman v. Hous. Welfare Rts. Org., 441 U.S. 600, 628 (1979) (noting Section 1983 was modeled after the 1866 Civil Rights Act); *see also id*. at 653 (White, J., concurring) ("[Section] 16 of the 1870 Act, [is] in essence a restatement of § 1 of the 1866 Act.").

decrees to override contrary law.[46] Soon after, the British Crown picked up their use to displace parliamentary statutes.[47] By the 1600s, the Crown had used and abused notwithstanding clauses so much that Parliament expressly banned their use by the Crown in the English Bill of Rights.[48] Parliament, however, continued to use them to ensure their statutes stood above contrary laws.[49] They were often a practical necessity in English law, as early courts abided by an old rule that instructed them to harmonize laws, "if possible," when the new statute lacked a "clause of *non obstante*."[50]

Colonial legislatures adopted notwithstanding clauses too.[51] Phraseology varied, but their shared purpose was to ensure a statute displaced whatever law they identified.[52] Some broadly

---

[46] C. GORDON POST, SIGNIFICANT CASES IN BRITISH CONSTITUTIONAL LAW 6–7 (1957); 6 EDWARD WAVELL RIDGES, CONSTITUTIONAL LAW OF ENGLAND 181–82 (6th ed. 1937); FORTUNATUS DWARRIS, A GENERAL TREATISE ON STATUTES: THEIR RULES OF CONSTRUCTION, AND THE PROPER BOUNDARIES OF LEGISLATION AND OF JUDICIAL INTERPRETATION 50 (2011).

[47] POST, *supra* note 46, at 6–7; RIDGES, *supra* note 46, at 181–82.

[48] An Act Declaring the Rights and Liberties of the Subject, and Settling the Succession of the Crown (Bill of Rights), 1 W. & M., ch. 2, § 2 (1689) ("And be it further declared and enacted [that] . . . no dispensation by *non obstante* of or to any statute or any part thereof shall be allowed . . . except a dispensation be allowed of in such statute, and except in such cases as shall be specially provided . . . ."); *see also* RIDGES, *supra* note 46, at 181–82 (providing history).

[49] *See, e.g.*, An Act for the Providing Necessary Carriages for His Majestie in His Royall Progresse and Removalls, 1 Jac. II, ch. 10, 6 Statutes of the Realm 12 (1685) ("Any Law Statute Custome or Usage to the contrary notwithstanding"); An Act against the Importation of Gun-powder Arms and other Ammunition and Utensils of Warr, 1 Jac. II, ch. 8, 6 Statutes of the Realm 11 (1685) ("Any Clause of Non Obstante or other Provision or Covenant to the contrary thereof in any wise notwithstanding"); An Act for the Confirming and Restoreing of Ministers, 12 Car. II, c. 17, 5 Statutes of the Realm 242–46 (1660) (containing several *non obstante* clauses).

[50] DWARRIS, *supra* note 46, at 533.

[51] *See, e.g.*, THE LAWS OF VIRGINIA: BEING A SUPPLEMENT TO HENING'S THE STATUTES AT LARGE, 1700–1750, at 398 (1971); THE CHARTERS AND GENERAL LAWS OF THE COLONY AND PROVINCE OF MASSACHUSETTS BAY 420 (1814); CHARTER TO WILLIAM PENN, AND LAWS OF THE PROVINCE OF PENNSYLVANIA, PASSED BETWEEN THE YEARS 1682 AND 1700, app'x at 374 (Staughton George, Benjamin M. Nead & Thomas McCamant eds., 1879); *see also* Nelson, *Preemption*, *supra* note 18, at 238–39 nn.42–43 (citing dozens of late-1700s American statutes with notwithstanding clauses).

[52] Nelson, *Preemption*, *supra* note 18, at 240–42.

identified "any law, custom or usage to the contrary"[53] or "all laws to the contrary."[54] Others more narrowly identified particular sources of law, like "anything in this act to the contrary"[55] or "any matter of form or practice in Courts heretofore in use to the contrary."[56] American legislatures used notwithstanding clauses to help displace every corner of contrary law: statutes,[57] local laws,[58] city charters,[59] court rules,[60] contracts,[61] judicial constructions of

---

[53] *See, e.g.*, Act of 1839, § 4, 1839 Wis. Laws 178–79 ("[A]ny law, custom or usage to the contrary notwithstanding"); *see also* Act of Feb. 19, 1846, ch. 89, § 1, 1845–1846 Va. Laws 65 ("[A]ny law, usage or custom to the contrary notwithstanding"); Act of Dec. 10, 1840, ch. 571, 1840 N.H. Laws 479 ("[A]ny law, usage or custom to the contrary notwithstanding"); Nelson, *Preemption*, *supra* note 18, at 238 n.43 (collecting dozens of statutes with same or similar phraseology).

[54] *See, e.g.*, Act of Jan. 22, 1858, ch. 394, § 1, 1857 Ala. Laws 372; Act of Mar. 5, 1856, ch. 457, § 2, 1855–1856 Ga. Laws 518; *see also* Nelson, *Preemption*, *supra* note 18, at 238 n.42 (collecting dozens of statutes with "any law to the contrary notwithstanding").

[55] *See* Mowry v. City of Providence, 10 R.I. 52, 54 (1871) (quoting the 1765 statute).

[56] *See* Bank of Chenango v. Curtiss, 19 Johns. 326, 327 (N.Y. Sup. Ct. 1822) (quoting state statute).

[57] *See* Brandt v. City of Milwaukee, 34 N.W. 246, 247 (Wis. 1887) (noting that a charter vesting city with exclusive power to vacate streets, "anything in any general law of the state to the contrary notwithstanding," superseded contrary statute); Adams Express Co. v. Louisville, 7 Ky. Op. 355, 356 (1873) (opining that the legislature "no doubt" inserted "any act, usage or law to the contrary notwithstanding" in a tax statute to supersede prior statutes barring the tax); Harrington v. Smith, 28 Wis. 43, 71–72 (1871) (finding that a statute's compensation of fifty cents for "every certificate" issued, "anything in chapter 159 of the general laws of 1863 to the contrary notwithstanding" displaced prior statute compensating twenty-five cents); Tongue v. Crissy, 7 Md. 453, 464 (1855) (statute declaring "*all* slaves shall be capable of receiving manumission . . . any law to the contrary notwithstanding" was a "clear" displacement of a contrary prior statute).

[58] *See* Dryden v. Commonwealth, 55 Ky. 598, 604 (1856) (holding that a federal statute authorizing pilotage on the Ohio River "any law, usage or custom to the contrary notwithstanding" preempted local law requiring separate license).

[59] *See* Kelly v. Faribault, 85 N.W. 720, 720 (Minn. 1901) (finding a statute that conditioned licenses, "'anything in the charter of any city to the contrary, notwithstanding' . . . supersede[d] all inconsistent charter provisions").

[60] *See Ex parte* Fisk, 113 U.S. 713, 720 (1885) (holding that a statute modified court rules, "anything in the rules of courts to the contrary notwithstanding").

[61] *See* Equitable Life Assurance Soc'y v. Pettus, 140 U.S. 226, 233 (1891) ("The manifest object" of a statute mandating insurance terms "'anything in the policy to the contrary

statutes,[62] rules of construction,[63] customs having the force of law,[64] and the common law.[65]

In contrast to early English courts, however, American courts did not require a statute to contain a notwithstanding clause to displace contrary authorities. A few American courts referenced the old rule on occasion.[66] But the rule was firmly abandoned by the mid-1800s.[67] By that time, legislatures and courts both understood that statute's plain text could displace contrary laws all on its own.

---

notwithstanding' . . . is to prevent insurance companies" from "inserting in their policies" terms beyond what "the statute permits."); Cravens v. N.Y. Life Ins. Co., 50 S.W. 519, 525 (Mo. 1899), *aff'd*, 178 U.S. 389 (1900).

[62] *See* Middleton v. Summers, 3 Serg. & Rawle 549, 550 (Pa. 1817) (finding that a statutory amendment with "any construction heretofore given to the act to which this is a supplement, to the contrary notwithstanding" was meant to "rectify [judicial] misconstruction").

[63] *See* Van Rensselaer v. Smith, 27 Barb. 104, 154 n.c (N.Y. Gen. Term. 1858) ("[T]here can hardly be framed any more direct and express declaration of intent" than the words, "the remedies thereby given *shall be construed to extend* to leases in fee reserving rents, *any law, usage or custom to the contrary thereof notwithstanding*." (emphasis in original)), *aff'd sub nom.* Van Rensselaer v. Hays, 19 N.Y. 68 (1859).

[64] *See* Union P. Ry. Co. v. Rollins, 5 Kan. 167, 175 (1869) ("[I]t would take more than a custom of the country to repeal" a trespass statute containing clause "any *custom or usage* to the contrary notwithstanding" (emphasis in original)); Stallings v. Foreman, 11 S.C. Eq. (2 Hill Eq.) 401, 407–08 (Ct. App. L. & Eq. 1835) (assessing a statute displacing practice among executors, "any practice to the contrary notwithstanding").

[65] *See infra* Sections I.B. & II.B.

[66] *See, e.g.*, Doolittle's Lessee v. Bryan, 55 U.S. 563, 566 (1852) (citing English rule to reject implied repeal of statute); Brunswick Cnty. Tr. v. Woodside, 31 N.C. (9 Ired.) 496, 501 (1849) (finding partial, not total, repeal of a contrary statute given the absence of a *non obstante* clause); Rawls v. Kennedy, 23 Ala. 240, 250 (1853) (noting the absence of a *non obstante* clause but resting on "stronger argument[s]" of statutory text and purpose to reject implied repeal).

[67] *See, e.g.*, Prendergast v. Anthony, 11 Tex. 165, 166–67 (1853) (rejecting appellant's argument that the absence of a *non obstante* clause precluded repeal; the new statute's repealing effect was "too clear . . . to be disregarded"); Norris v. Crocker, 54 U.S. 429, 431–32, 436 (1851) (holding a statute impliedly repealed prior law despite the absence of a *non obstante* clause); *see also* Nelson, *Preemption*, *supra* note 18, at 244 (citing cases only up to the 1850s that cited this rule). The English likewise were abandoning this rule by the mid-1800s. *See, e.g.*, Truscott v. Merchant Tailors' Co., 156 Eng. Rep. 1079, 1082 (1856) ("If the enactment had stopped there, it would have repealed any statute giving the same right as is claimed by this custom . . . but to prevent any doubt . . . the

1. Why Early Legislatures Used Notwithstanding Clauses

If notwithstanding clauses were no longer needed to displace prior laws, why did 1800s legislatures still use them? To us, they seem superfluous: new statutes automatically displace prior contrary law. But, as Professor Caleb Nelson explains, early courts readily employed the canon(s) that "a new statute should not be read to contradict an earlier statute" (the presumption against implied repeal) or "a common-law rule" (the derogation canon) "if the two laws can possibly be harmonized."[68] Courts harmonized to avoid implied repeals, which they "went to great lengths" to do, even if it meant disregarding the ordinary meaning of statutory text.[69]

These harmonizing canons thus posed a problem for early legislatures. Sometimes legislatures "*wanted* a new statute to supersede whatever prior law it might contradict."[70] To ensure courts applied the law according to the statutory text, legislatures would insert a notwithstanding clause to send a "clear signal[]" to courts that the statute was meant to supersede contrary law.[71] So when a statute contained one, courts "did not have to struggle . . . to give the statute its natural meaning and let it displace whatever law it contradicted."[72]

---

legislature goes on to say, 'any local usage or custom to the contrary notwithstanding.'"); *see also* GEORGE COODÉ, ON LEGISLATIVE EXPRESSION: OR, THE LANGUAGE OF THE WRITTEN LAW 67–68 (London, William Benning & Co. 1845) (English lawyer criticizing relying on notwithstanding clauses, among other archaic phrases).

[68] Nelson, *Preemption*, *supra* note 18, at 240–41; *see also* SCALIA & GARNER, *supra* note 17, at 327–34 (explaining the presumption against implied repeal); Reinert, *supra* note 2, at 205 (explaining the derogation canon).

[69] PLIVA, Inc. v. Mensing, 564 U.S. 604, 622 (2011); *see* Nelson, *Preemption*, *supra* note 18, at 241–42.

[70] Nelson, *Preemption*, *supra* note 18, at 241 (emphasis in original).

[71] Cisneros v. Alpine Ridge Grp., 508 U.S. 10, 18 (1993).

[72] Nelson, *Preemption*, *supra* note 18, at 232; *accord PLIVA*, 564 U.S. at 623 ("The *non obstante* clause of the Supremacy Clause indicates that a court need look no further than the 'ordinary meaning' of federal law, and should not distort federal law to accommodate conflicting state law.").

Notwithstanding clauses thus reinforced a statute's text against external sources of law that judges might apply to contravene the text's ordinary meaning. Used this way, "notwithstanding" (*i.e.*, despite) is what linguists call a "concessive postposition"[73]—a word that follows an object, which has "the appearance of . . . withstanding" something else—"yet [] does not."[74] Courts might think contrary law found elsewhere might apply and distort a statute's text; notwithstanding clauses were legislatures' "fail-safe"[75] way of telling judges they did not apply.[76]

Notwithstanding clauses also served another important function. They assured readers that no unknown prior law constrained the new statute. This assurance mattered a great deal prior to the codification of state and federal laws. At that time, it was practically impossible to identify with confidence all relevant written laws and their potential effect on each other.[77] It was often just as difficult to

---

[73] *Concessive*, OXFORD ENGLISH DICTIONARY (2023), https://doi.org/10.1093/OED/2832812267 [https://perma.cc/B9KJ-AV6Z] (explaining that a concessive term "introduce[es] a phrase or clause which might be expected to preclude the action of the main verb but does not"); *Notwithstanding*, OXFORD ENGLISH DICTIONARY (2024), https://doi.org/10.1093/OED/4947952593 [https://perma.cc/VTA5-ER75]; *see also Postposition*, OXFORD ENGLISH DICTIONARY (2023), https://doi.org/10.1093/OED/1322239994 [https://perma.cc/R82V-UXMM] (explaining that a postposition may "hav[e] the function of a preposition but follow[] instead of preced[e] its object").

[74] WILLIAM WARD, AN ESSAY ON GRAMMAR 436 (London, Robert Horsfield 1765) (defining "concessive"); *see also* SAMUEL HIGGS GAEL, A PRACTICAL TREATISE ON THE ANALOGY BETWEEN LEGAL AND GENERAL COMPOSITION 99 (London, H. Butterworth 1840) (stating "notwithstanding" is used "to anticipate and remove a probable conflict or opposition of laws, rules, etc., by declaring which shall not withstand; that is, which shall give way").

[75] SCALIA & GARNER, *supra* note 17, at 127.

[76] Courts often regard extra-textual sources of law as applicable given the "defeasibility" of language. *See* William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1101 (2017). That language is defeasible is why "phrases like 'any person' coexist peacefully with unnamed defenses." *Id.* Legislatures used notwithstanding clauses to defeat defeasibility.

[77] *See* Nelson, *Preemption*, *supra* note 18, at 235 (noting notwithstanding clauses were important because "official records were often poor, and legislators might not be aware of all the existing laws on a particular subject"); Dwan & Feidler, *supra* note 21, at 1012

ascertain the common law in any given state, which was frequently mired in "uncertainty, complexity, and inaccessibility."[78]

As we explain later, these justifications for notwithstanding clauses abated around the mid-1800s. By then, legislatures were collecting their laws into cohesive codes. So courts began to rely more on text and less on harmonizing canons when interpreting statutes.[79]

2. Why Notwithstanding Clauses (and Their Omissions) Do Not Alter Law

To fully understand why legislatures used notwithstanding clauses, it's vital to understand what they do *not* do. Such clauses do *not add* substance to a statute; instead, they *reinforce* the substance already there.[80] Recall, their job was to fend off judicial misconstruction of text—which courts did by injecting extra-textual background principles into the statute. A statute's substantive text could be displaced; its notwithstanding clause was a surefire way of making sure judges did not disregard that text.[81] Take out a notwithstanding clause, and the statute still says what it says. And, of course, a statute can displace contrary laws on its own if its ordinary meaning so dictates.[82]

(noting that "making a thorough search of" federal statutes pre-codification "was almost a practical impossibility").

[78] Aniceto Masferrer, *The Passionate Discussion Among Common Lawyers About Postbellum American Codification: An Approach to Its Legal Argumentation*, 40 ARIZ. ST. L.J. 173, 184 (2008).

[79] *See infra* notes 170 & 263–284 and accompanying text.

[80] *See* 2 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1832) (defining the prefix "re" as denoting "return, repetition, iteration").

[81] *See* SCALIA & GARNER, *supra* note 17, at 127.

[82] For example, several state statutes in the 1800s declared something like, "every railroad shall be liable for all damages caused by fire or steam." Though these statutes lacked notwithstanding clauses, courts, including the Supreme Court, uniformly held that they displaced all contrary common law defenses. *See infra* Section II.B.2.c; *cf.* Miles v. Apex Marine Corp., 498 U.S. 19, 23–24 (1990) (observing no notwithstanding clause in statute with "unambiguous" abrogation of common law bar on maritime wrongful death suits).

For these reasons, the omission of a notwithstanding clause from a statute does not impact the statute's displacement of contrary law.[83] As we detail below, this was well understood in the 1800s. This understanding is reflected by legislatures and codifiers who routinely omitted notwithstanding clauses from statutes they codified—and by judges who held that such omissions left a statute's substance unchanged.[84]

B. Reinforcing Text Over Contrary Common Law

The common law permeated the legal landscape throughout the 1800s.[85] But much of it had become outdated, unclear, or otherwise in need of reform.[86] Early legislatures displaced (or modified or abrogated) common law rules with legislation.[87] Routinely, they

---

[83] Indeed, a statute is not limited to displacing only the laws named in its notwithstanding clause: "[s]ingling out one potential conflict . . . generally does not imply anything about other, unaddressed conflicts, much less that they should be resolved in the opposite manner." NLRB v. SW Gen., Inc., 580 U.S. 288, 302 (2017) (finding that a "[notwithstanding] clause confirms rather than constrains breadth.").

[84] *See infra* Sections I.C & II.C.

[85] *See* Kunal M. Parker, *Law "In" and "As" History: The Common Law in the American Polity, 1790–1900*, 1 U.C. IRVINE L. REV. 587, 594–96 (2011) ("From the American Revolution until the very end of the nineteenth century, the common law was an integral mode of governance and public discourse in America."); Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 GEO. L.J. 341, 396–97 (2010) (noting the early predominance of common law over statutory law); MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY 10, 12 (1992).

[86] *See* Gunther A. Weiss, *The Enchantment of Codification in the Common-Law World*, 25 YALE J. INT'L L. 435, 499 (2000) ("By the end of the eighteenth century . . . [t]he American lawyers criticized their English legal heritage in form and substance. It was regarded as labyrinthine, inaccessible, uncertain, overly technical, mysterious, complex, and of alien identity."); *see also* Masferrer, *supra* note 78, at 184 (highlighting the same); Roscoe Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 407 (1908) ("The new principles are in legislation. The old principles are in common law. . . . The public cannot be relied upon permanently to tolerate judicial obstruction or nullification of the social policies to which more and more it is compelled to be committed.").

[87] DAVID DUDLEY FIELD, AN ADDRESS DELIVERED BEFORE THE LAW ACADEMY OF PHILADELPHIA 9 (Philadelphia, Law Academy 1886) ("The statutes are full of

used notwithstanding clauses to make common law displacements clear to courts. Like Section 1983's Notwithstanding Clause, these clauses regularly contained the phrase, "law, custom, or usage" (or some variation) "to the contrary notwithstanding."[88]

1. "Law, Custom, or Usage" Covered Common Law

That the phrase "law, custom, or usage" covered contrary common law is well-illustrated by caselaw of the era. One particularly insightful example is *Hardin v. Lumpkin*.[89] The case concerned a Georgia statute that limited awards in slander suits: any plaintiff awarded less than forty cents in damages was allowed "only so much [court] costs as the damage[s] so given . . . any law, statute, custom, or usage to the contrary in any wise notwithstanding."[90] Lumpkin, who prevailed in his slander suit against Hardin, was awarded ten cents in damages—and so just ten cents in court costs.[91]

Lumpkin appealed, arguing he was entitled to more than ten cents in court costs, based on an exception at English common law. His argument was compelling. The Georgia statute was, "in substance, a copy" of an English Statute; the common law exception applied to the English statute; and Georgia had generally adopted English common law.[92] Nevertheless, the Georgia Supreme Court concluded England's common law exception was "not an exception to *our* Statute," which "embrace[d] '*all* actions upon the case for slanderous words.'"[93] As further support, the Court added: "[a]nd to put aside all previous laws upon this subject, the Legislature

enactments . . . changing rules of the common law."); Gerald J. Postema, *Classical Common Law Jurisprudence (Part 1)*, 2 OXFORD U. COMMONWEALTH L.J. 155, 164–65 (2002) (explaining that early Parliamentary statutes were "typically remedial or declaratory, correcting some anomaly in the common law").

[88] *See* Nelson, *Preemption*, *supra* note 18, at 239 & n.43 (collecting statutes).

[89] 5 Ga. 452 (1848).

[90] *Id.* at 454–55.

[91] *Id.* at 453.

[92] *Id.* at 453–54.

[93] *Id.* at 454–55.

add[ed] this very specific repealing clause, 'any law, Statute, custom or usage to the contrary, in any wise, notwithstanding.'" Thus, the statute's notwithstanding clause did its job: it clearly signaled to the Court that the legislature "intended to exclude" the "Common Law."[94]

Notwithstanding clauses targeted various other common law rules—unsurprising given their ubiquity in statutes and the abundance of outdated common law rules in need of reform. Often, they targeted old rules limiting rights and remedies. Statutes with these clauses displaced common law prohibitions on marriage between slaves[95]—and later helped free them.[96] They promoted "equality and justice" by erasing a rule which forced survivors in a joint debt obligation to bear the full cost of shared debt.[97] Still other notwithstanding clauses targeted onerous common law rules by expanding permissible land claims,[98] allowing appeals from new

---

[94] *Id.* at 455. Notwithstanding clauses do not repeal contrary law; they simply declare that contrary law does not apply. *See* Nelson, *Preemption*, *supra* note 18, at 235 (noting the distinction between notwithstanding and repealing clauses). However, notwithstanding clauses can have a similar effect by displacing a law within the same jurisdiction that serves no broader purpose.

[95] Brown v. Cheatham, 17 S.W. 1033, 1034 (Tenn. 1892) (finding a statute displaced common law prohibitions on marriage between slaves, "any law, usage, or custom to the contrary notwithstanding" (citing Marbletown v. Kingston, 20 Johns. 1 (N.Y. Sup. Ct. 1822))).

[96] Jackson v. Bulloch, 12 Conn. 38, 45, 52, 54 (1837) (freeing a slave who entered the state because its statute "destroy[ed]" the "great evil" of slavery, "'any law, usage or custom to the contrary, notwithstanding'").

[97] Brown v. Clary, 2 N.C. (1 Hayw.) 107, 110 (1794) (finding that a statute with "any law, usage or custom to the contrary notwithstanding" displaced any "inconvenience" wrought by "the common law"); *see also* Hargroves v. Chambers, 30 Ga. 580, 588 (1860) (noting similar "mischief" of the "common law" remedied by statute with clause "any law, custom, or usage to the contrary notwithstanding").

[98] Aldridge v. Kincaid, 12 Ky. 390, 393 (1822).

trial motions,[99] and reforming dowry law.[100] Naturally, litigants invoked notwithstanding clauses to argue a statute had displaced the common law.[101]

Legislatures even used them to signal the displacement of civil liability and immunities at common law. One New Jersey statute, for example, immunized a school district from liability for a girl's death on a playground.[102] This immunity broke from a common law rule.[103] However, it was "clear[]" to the state's common-law court that the legislature meant to "modify the common law," given the statute's "simple words" providing immunity.[104] This was made "further clear," the Court said, "from the fact that such law is to apply, *'any law to the contrary notwithstanding*.'"[105]

On the flipside, an Illinois statute was passed to "obviate the[] inconveniences" of a "common law" rule, which provided that devisees and heirs were "not liable for the debts of [a] testator."[106] Devisees were not liable, period; heirs were not liable if they

---

[99] Chi. & Alton Ry. Co. v. Heinrich, 41 N.E. 860, 862 (Ill. 1895) ("At common law . . . the granting or refusing a new trial . . . could not be assigned for error" but a later statute let party "assign for error any opinion so excepted to, any usage to the contrary notwithstanding.").

[100] Flowers v. Flowers, 15 S.E. 834, 834 (Ga. 1892) ("It is true that at common law no acts of the husband during coverture, without the concurrence of the wife, could defeat dower. . . . But by our statute . . . it was provided that 'all conveyances . . . made by the husband alone, during the coverture, shall be legal and valid . . . any law, usage, custom, or rule of the court to the contrary notwithstanding . . . ."); McCaulley v. McCaulley, 30 A. 735, 741 (Del. Super. Ct. 1884) (Houston, J., concurring) (holding that a dower statute with the clause "any law, usage, or custom to the contrary notwithstanding" displaced "the early and rigid rulings in the courts of England").

[101] *See, e.g.*, Lord v. Wormword, 29 Me. 282, 284 (1849); Stokes v. Winslow, 31 Miss. 518, 519 (1856); Ketchum v. Walsworth, 5 Wis. 95, 101–02 (1856); *see also* Norris v. Crocker, 54 U.S. 429, 431–32, 439–40 (1852) (finding a repeal by implication, despite plaintiff's argument against repeal given the absence of a *non obstante* clause).

[102] Falcone v. Bd. of Educ., 4 A.2d 687, 689 (Essex County Ct. 1939).

[103] *Id.* at 688–89.

[104] *Id.* at 689; *see also* 1 EDWARD QUINTON KEASBEY, THE COURTS AND LAWYERS OF NEW JERSEY: 1661–1912, at 206 (1912) (noting New Jersey's Court of Common Pleas decided "all causes at common law of every nature" in the state).

[105] *Falcone*, 4 A.2d at 689 (emphasis added).

[106] Ryan *ex rel.* Thomas v. Jones, 15 Ill. 1, 3 (1853).

"aliened the lands before suit" (even fraudulently).[107] The Illinois statute changed this rule, allowing people to recover debts by invalidating such common-law land transfers and holding that even bona fide alienators were "personally liable" for the land's value—"any other matter or thing to the contrary notwithstanding."[108]

This history reflects the common understanding among nineteenth-century legislatures, lawyers, and judges that a statute displaced "an established rule of the common law" with a clear expression of a contrary rule, which could be made even clearer when the statute "conclude[d] with the words, 'any former law or usage to the contrary notwithstanding'" (or some variation).[109] These "law, custom, or usage" phrases had been used since at least the 1600s to encompass the entire span of the law—including the common law.[110]

---

[107] *Id.* at 4.

[108] *Id.* at 3–4. Nineteenth-century statutes frequently displaced common law defenses without notwithstanding clauses too. *See supra* Section II.B.2.c. (discussing railroad statutes). The federal government can, of course, waive its sovereign immunity, which is rooted in common law. *See, e.g.*, Federal Tort Claims Act, 28 U.S.C. § 2674; *see also* 28 U.S.C. § 1346(b)(1); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 69 (1996) (recognizing its common law roots). Sometimes, the federal government underscores such a waiver with a notwithstanding clause. *See, e.g.*, Bankruptcy Code, 11 U.S.C. § 106(a) ("Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section . . . .").

[109] McGowan v. Elroy, 28 App. D.C. 188, 199 (1906) (concluding the common law rule on revocable wills was "unimportant" given "the provision of our Code, which declares the manner in which wills shall be revoked, and concludes with the words, 'any former law or usage to the contrary notwithstanding'").

[110] *See, e.g.*, Trade with France Act 1692, 4 W. & M. c. 25, § 20. (Eng.) ("Any law custom or usage to the contrary notwithstanding"); *see also* Nelson, *Preemption*, *supra* note 18 at 238 n.43 (collecting early American statutes using this clause or similar iterations). The all-encompassing nature of "law, custom, or usage" is reflected in the early English treatises. *See* THE TREATISE ON THE LAWS AND CUSTOMS OF THE REALM OF ENGLAND COMMONLY CALLED GLANVILL xi (G.D.G. Hall ed., 1965); *see also* BRACTON ON THE LAWS AND CUSTOMS OF ENGLAND (1997). In later centuries, English jurists like Matthew Hale and Blackstone divided the laws of England "into two kinds:" first, the written law (statutes); second, the unwritten law formed "by immemorial usage or custom." MATTHEW HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND 1–2 (Dublin, James Moore 1792); *accord* 1 WILLIAM BLACKSTONE, COMMENTARIES *63 .

2. Where is the Common Law in "Law, Custom, or Usage"?

To a modern legal audience, the absence of an explicit reference to common law might seem odd. But it wasn't to contemporary legislatures and courts. They understood that "custom," "law," or both referenced contrary common law. We briefly take each in turn.

a. Common Law as "Custom"

Today, most think of the common law as judge-made law.[111] But to people in the 1800s, "the common law was not man-made;" instead, "judges uncovered the law (or 'found' it)."[112] As such, judicial "decisions were not sources of law, but simply evidence as to what the law was."[113] The source of this law was custom. Before statutes, before the Crown's common law courts, there was custom: common practice or "usage" that, through long-standing and consistent acceptance by the community, gained the force of law, whether or not judicially noticed.[114] Early common law developed

---

[111] *See* Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 44 (1985) ("Common law rules are judge-made rules . . . ."). Qualified immunity is judge-made. *See* Golden v. Thompson, 11 So.2d 906, 907 (1943) (adopting qualified immunity as state law); Pierson v. Ray, 352 F.2d 213, 218–19 (5th Cir. 1965) (applying *Golden*'s state "common-law" doctrine of qualified immunity to state tort claim but not federal Section 1983 claim); Pierson v. Ray, 386 U.S. 547, 556–57 (1967) (incorporating qualified immunity into Section 1983).

[112] LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW xxiii (4th ed. 2019).

[113] JOHN H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 172 (5th ed. 2019); Swift v. Tyson, 41 U.S. 1, 18 (1842) ("[T]he decisions of courts . . . are, at most, only evidence of what the laws are, and are not, of themselves, laws.").

[114] "Usages" referred to more localized customs, often specific to particular trades, or to common practices less deeply rooted than customs. *See* Barnard v. Kellogg, 77 U.S. 383, 390–91 (1871); Byrd. v. Beall, 43 So. 749, 751 (Ala. 1907). All customs were usages; not all usages were customs. *See* Currie v. Syndicate Des Cultivators Des Oignons a'Fleur, 104 Ill. App. 165, 169 (1902).

to regularize and enforce these customs, initially through local juries.[115]

For centuries, leading English commentators, themselves active lawyers and judges, thus framed the common law as a reflection of custom.[116] Seventeenth-century lawyer John Davies described "the Common law of England [as] nothing else but the Common Custome of the Realm."[117] John Selden, jurist and historian of the same century, likewise conceived of the common law as "essentially customary law."[118] The source of common law, observed Edward Coke, was "immemorial custom."[119]

In his *Commentaries*, Blackstone propounded the accepted theory that general customs formed the common law.[120] While some distinguished "customs" from "rules and maxims," Blackstone

---

[115] James Q. Whitman, *Why Did the Revolutionary Lawyers Confuse Custom and Reason?*, 58 U. CHI. L. REV. 1321, 1352–53 (1991).

[116] Caleb Nelson, *The Legitimacy of (Some) Federal Common Law*, 101 VA. L. REV. 1, 10 (2015) [hereinafter Nelson, *Legitimacy*]; John Hasnas, *Hayek, the Common Law, and Fluid Drive*, 1 N.Y.U. J.L. & LIBERTY 79, 89–90 (2005); ARTHUR R. HOGUE, ORIGINS OF THE COMMON LAW 190–91 (1966) ("[F]or six centuries everybody who had occasion to consider the matter believed that 'the Common Law is a customary law . . . .'").

[117] JOHN DAVIES, LES REPORTS DES CASES & MATTERS EN LEY, RESOLVES & ADJUDGES EN LES COURTS DEL ROY EN IRELAND iii (London, E. Flesher, J. Streater & H. Twyford 1674).

[118] Harold J. Berman, *The Origins of Historical Jurisprudence: Coke, Selden, Hale*, 103 YALE L.J. 1651, 1700 (1994).

[119] *Id.* at 1694. Many others drew the same relationship between custom and common law. *See, e.g.*, CHARLES H. MCILWAIN, CONSTITUTIONALISM, ANCIENT AND MODERN 113 (1940) (reporting a 1621 statement of Sir Thomas Wentworth) ("The common Lawes are but custome, and wee claime our liberties by the same title as we doe our estates, by custome."). Others, like Thomas Hedley, recognized the common law as "*reasonable* usage." Whitman, *supra* note 115, at 1356–57 (emphasis added). That is, a custom had to be reasonable to be common law. *Id.* The reasonableness of customs was determined by the common law judges. *Id.* According to James Whitman, Hedley's "mingling" of custom, reason, equity to define the common law was typical. *Id.* Whitman provides extensive history showing that, as local customs grew more difficult to ascertain, courts began to "appl[y] 'reason' and 'natural law' to fill gaps in the customary system." *Id.* at 1366. However, the legal community still held onto the idea that their law remained "fundamentally customary." *Id.*

[120] 1 BLACKSTONE, COMMENTARIES, *62–64.

took "these to be one and the same thing."[121] The "only method" of proving a common law rule, he asserted, was to show "it hath always been the custom to observe it."[122] Blackstone's articulation of common law as accepted custom were "taken to be standard" well through the nineteenth-century,[123] despite some vocal dissenters (most notably Jeremy Bentham).[124] It is no wonder, then, that the term "common law" did not appear in notwithstanding clauses of the period. Our modern conception of judge-made law was "foreign to the classic common law."[125]

b. Common Law as "Law"

Even when a notwithstanding clause lacked reference to custom, but repudiated contrary "law," courts understood it as identifying contrary common law. For example, courts understood that the clause "any law or statute to the contrary notwithstanding" encompassed not just statutes—but rules of equity and judicial precedent.[126] Courts similarly understood that the clause "any law to the contrary notwithstanding" served as a clear signal of the

---

[121] *Id.* at 63.

[122] *Id.*

[123] George Rutherglen, *Custom and Usage as Action Under Color of State Law: An Essay on the Forgotten Terms of Section 1983*, 89 VA. L. REV. 925, 930 (2003); *see also* Schick v. United States, 195 U.S. 65, 69 (1904) ("Blackstone's *Commentaries* are accepted as the most satisfactory exposition of the common law of England."); Charles E. Carpenter, *Court Decisions and the Common Law*, 17 COLUM. L. REV. 593, 593–94 (1917) (stating the "Blackstonian" conception of the common law "was once apparently universally accepted by the legal profession, and is still generally adhered to by it," despite twentieth-century scholars increasingly abandoning this view).

[124] Carpenter, *supra* note 123, at 593–94 (noting the once universal acceptance of the "Blackstonian" conception of the common law); Nelson, *Legitimacy*, *supra* note 116, at 14–15 (2015); William D. Bader, *Some Thoughts on Blackstone, Precedent, and Originalism*, 19 VT. L. REV. 5, 12–13 (1994) (noting nineteenth-century acceptance of Blackstone over Bentham).

[125] FRIEDMAN, *supra* note 112, at xvi.

[126] *See, e.g.*, Salisbury v. Salisbury, 4 S.W. 717, 719 (Mo. 1887) (construing a statute barring appeals of divorce decrees as having "clear[ly]" displaced rules permitting otherwise, because of clause "any *law* or *statute* to the contrary notwithstanding" (emphasis in original)).

legislature's "inten[t] to modify the common law."[127] Both the Fifth Circuit and the Texas Supreme Court, for instance, understood a Texas statute that eased evidentiary rules in ejectment actions "all laws to the contrary notwithstanding" as closing a common-law loophole that had let people without any real claim to land hold off rightful owners who struggled to prove title under old Mexican land grants.[128]

Ultimately, courts in the 1800s did not fixate on the precise phrasing of broad phrases like "all laws" or "any law, custom, or usage to the contrary notwithstanding." They weren't parsing whether a common law rule counted as a "law" or "custom" or "usage."[129] (American legal thought on the relationship among these sources of law was always "chaotic."[130]) Courts instead simply understood these types of notwithstanding clauses as all-encompassing, as legislatures intended them to be.

C. Codifiers' "Immaterial" Omissions of Notwithstanding Clauses

By the late-1800s, the ubiquitous notwithstanding clause had begun to fall out of favor. Their utility was diminishing. They also were contributing to a big problem: the law was proving unwieldy, and both the legal community and general public were

---

[127] Falcone v. Bd. of Educ., 4 A.2d 687, 689 (Essex Cnty. Ct. 1939).

[128] McMullen v. Hodge, 5 Tex. 34, 57–58 (1849); *see also* Thompson v. Dumas, 85 F. 517, 522 (5th Cir. 1898) (The clause "'all laws to the contrary notwithstanding' . . . has reference to the common law, which had then but recently been adopted.").

[129] *See, e.g.*, Kelley v. State, 25 Ark. 392, 402–03 (1869) (equating the 1866 Civil Rights Act's reference to "any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding" as "any statutes or *law* to the contrary notwithstanding." (emphasis added)); *see also* Chi. & A.R. Co. v. Heinrich, 157 Ill. 388, 394 (1895) (recognizing that a statute with the clause "any usage to the contrary notwithstanding" displaced a "common law" rule permitting appeals for new trial denials).

[130] *See* Whitman, *supra* note 115, at 1321 (explaining America's intermixing of reason, custom, and common law).

complaining profusely about it.[131] Old statutes were railed against for their long and unapproachable prose.[132] The volumes containing the laws (and the reports synthesizing them) were "heavy"[133] and "alarmingly numerous,"[134] making it nearly impossible to sort out what the law was.[135] Resorting to the unwritten common law was too uncertain, too complex, and too English.[136] The solution, proffered by the likes of Joseph Story and David Dudley Field,[137] was to codify the law—*i.e.*, gather, simplify, and topically rearrange all the laws in force into one legal code.[138] Persistent pushes for reform eventually spurred a nationwide codification movement,

---

[131] Weiss, *supra* note 86, at 502–03 (noting widespread complaints); *see also* Nathan M. Crystal, *Codification and the Rise of the Restatement Movement*, 54 WASH. L. REV. 239, 240 (1979) (noting the "uncertainty" and "complexity" plaguing late-1800s law).

[132] J. Lyn Entrikin, *The Death of Common Law*, 42 HARV. J.L. & PUB. POL'Y 351, 384–86 (2019).

[133] 8 CHARLES SUMNER, HIS COMPLETE WORKS 1 (1900).

[134] CHARLES WARREN, A HISTORY OF THE AMERICAN BAR 520–21 (1911) (reprinting 1821 statement of law professor David Hoffman).

[135] States were emphatic about this issue. *See, e.g.*, MINN. REV. STAT., at vii (1851) ("[Our] various acts were scattered through some nine or ten almost impossible to procure a full set of [the] publications, leaving magistrates and the people, without any adequate means of knowing what the law was."); MICH. REV. STAT., at iii (1838) (lamenting state's "confused mass of enactments"); PA. REV. CODE, at iii (1837) (lamenting the "difficulties" in identifying relevant laws); *see also* Dwan & Feidler, *supra* note 21, at 1012 (noting "practical impossibility" of ascertaining the federal laws before the Revised Statutes of 1874).

[136] Masferrer, *supra* note 78, at 184; Weiss, *supra* note 86, at 499; *see also* FRIEDMAN, *supra* note 112, at xiii ("English law . . . was complex and difficult" even by colonial times).

[137] Entrikin, *supra* note 132, at 403; Masferrer, *supra* note 78, at 213–14.

[138] Will Tress, *Lost Laws: What We Can't Find in the United States Code*, 40 GOLDEN GATE U. L. REV. 129, 131–32 (2010); *see also* R. FLOYD CLARKE, THE SCIENCE OF LAW AND LAWMAKING 26–27 (1898) (summarizing "the cry of the codifiers" for simpler, more concise laws).

beginning in the mid- to late-1800s,[139] to distill statutes into a "more concise" form that was "plain and perfect."[140]

As part of this process, codifiers routinely omitted notwithstanding clauses. Alabama's Revised Code of 1867 removed "[a]ny law to the contrary notwithstanding" from an act enacted just four years prior.[141] Mississippi's Revised Code of 1871 removed the same phrase from an 1859 law.[142] Wisconsin's Revised Statutes of 1849 removed "any law, custom or usage to the contrary notwithstanding" from its 1838 territorial statutes.[143] Connecticut's Public Statute Laws of 1821 removed "any law or usage to the contrary notwithstanding" from an 1807 statute,[144] which according to the State's supreme court, left the statute "substantially unchanged."[145] The list goes on and on.[146]

---

[139] For more on America's codification history, *see* Entrikin, *supra* note 132, at 398–415; Dru Stevenson, *Costs of Codification*, 2014 U. ILL. L. REV. 1129, 1139–40; Weiss, *supra* note 86, at 498–514.

[140] *See* Act of Feb. 20, 1846, ch. 34, § 1, 1845–1846 Va. Acts 26, 26–27 ("[T]o provide for the revisal of the civil code of the commonwealth . . . ."). Other codifiers stressed the need for simpler, condensed text too. *See, e.g.*, GA. REV. CODE, Preface, at iii (1861) (stating that the revisers worked to "condense, and arrange, the verbose, and somewhat chaotic mass of the Statutes of Georgia"); DEL. REV. STAT., Preface, at iii (1852) (asserting that the revisers were told to "compress" the law "into the smallest practicable volume" and make language "more perspicuous"); ME. REV. STAT., at 43 (1840) (revising for "concise, plain and intelligible" language); PA. REV. CODE, Advertisement to Vol. I, at iii (1837) (similar).

[141] *Compare* ALA. REV. CODE § 796(5) (1867), *with* Act of Nov. 27, 1863, ch. 66, § 3, 1863 Ala. Laws 66.

[142] *Compare* MISS. REV. CODE § 503 (1871), *with* Act of Dec. 14, 1859, ch. 110, § 2, 1859 Miss. Laws 149.

[143] *Compare* WIS. REV. STAT. ch. 56, § 44 (1849), *with* Act of 1839, § 4, 1839 Wis. Laws 178–179.

[144] *Compare* CONN. PUB. STAT. XXXII, ch. 1, § 41 (1821), *with* Act of Oct. 1807, § 2, 1808 CONN. LAWS 277.

[145] *In re* Merwin's Est., 63 A. 784, 784 (Conn. 1906).

[146] *Compare* Act of Feb. 19, 1846, ch. 89, § 1, 1845–1846 Va. Laws 65 (including clause), *with* VA. REV. CODE § 3993 (1887) (omitting clause); *compare* Act of Dec. 10, 1840, ch. 571, 1840 N.H. Laws 479 (including clause), *with* N.H. REV. STAT. ch. 142, § 8 (1843) (omitting clause); *compare* Act. of Nov. 7, 1833, ch. 1, § 1, Vt. Laws 3 (including clause), *with* VT. REV. STAT. ch. 46, §§ 1, 5 (1851) (omitting clause); *compare* Act of Feb. 22, 1830, § 2, 1838

Why were all these recodified statutes omitting notwithstanding clauses? They were low-hanging fruit to codifiers for three, interdependent, reasons.

First: Notwithstanding clauses were archaic[147] and clunky.[148] They thwarted the concision people had come to demand of statutory law.[149] (Even the English grew to complain about them.)[150] And they littered the law books. Georgia and New Hampshire had session laws with three notwithstanding clauses on a single page.[151] North Carolina's 1834–1835 session laws had seven consecutive acts with notwithstanding clauses, including five on one page.[152] A single

---

N.J. Laws 63 (including clause), *with* N.J. REV. STAT. IV. ch. 2, § 43 (1847) (omitting clause); *compare* Act of Jan. 4, 1825, § 3, Mo. Stat. 522 (including clause), *with* MO. REV. STAT. § 2554 (1909) (omitting clause); *compare* Act of Dec. 19, 1818, § 1, 1818 Ga. Laws 164–165 (including clause), *with* GA. REV. CODE ch. 20, § 19 (1848) (omitting clause); *compare* Act of Jan. 15, 1810, 1809 Ky. Laws 32 (including clause), *with* KY. REV. STAT. ch. 28, § 7 (1852) (omitting clause); *compare* CONN. PUB. STAT. LX, ch. 3, § 1 (1808) (including clause), *with* CONN. REV. STAT. X, ch. 2, § 48 (1866) (omitting clause). Most omitted clauses were all-encompassing and read something like "any law, usage or custom" or "any law to the contrary notwithstanding."

[147] The word "notwithstanding" is centuries old; however, its use "has experienced a steady decline in use since about 1760." BRYAN A. GARNER, GARNER'S MODERN ENGLISH USAGE 756, 760 (5th ed. 2022); *see also id.* at 474–75, 756 (lamenting the overuse of "stuff[y]," "formal words," such as notwithstanding).

[148] *See, e.g.*, Act of Feb. 27, 1809, ch. 19, § 1, 2 Stat. 525 ("[A]ny thing in the ordinance for the government of the said territory to the contrary notwithstanding"); Act of Feb. 12, 1831, ch. 23, § 1, 4 Stat. 441 ("[A]ny thing in the act to which this is an amendment to the contrary notwithstanding"); Act of Jul. 4, 1834, 1834 N.H. Sess. Laws 160 ("[A]ny acts or parts of acts inconsistent with the provisions of this act to the contrary notwithstanding"); *see also* Medina v. Planned Parenthood S. Atl., 145 S. Ct. 2219, 2240 (2025) (Thomas, J., concurring) (omitting Section 1983's Notwithstanding Clause from block quotation of original text).

[149] Legislatures and codifiers were adamant about simplifying text. *See, e.g.*, ILL. REV. STAT., Preface, at xi. (1845) (stating that the reviser made the laws "plain and intelligible," "relieving them from that smothering load of useless verbiage," while preserving legislative intent); IND. REV. STAT., Preface, at v (1843) (stating that reviser simplified the "long," "intricate," and "unintelligible" statutes for a useful codification of the state laws).

[150] *See, e.g.*, COODÉ, *supra* note 67, at 67–68 (advocating for statutes with "simple" and "direct expression" over frequent "an-tick phrases" that overwhelmed statutes, like notwithstanding clauses).

[151] 1857 Ga. Laws 300; 1838 N.H. Laws 363.

[152] 1834–1835 N.C. Laws 65–66.

Pennsylvania 1806 act contained sixteen such clauses.[153] Alabama's 1849 session laws had over seventy of them.[154] Examples are innumerable. There were thousands of these clauses leading up to codification. To codify these "excruciatingly long"[155] laws, codifiers had to condense by "nearly one half," if not more.[156] And to condense by that much, wordy phrases, like notwithstanding clauses, had to go.

Second: Notwithstanding clauses could be omitted without altering a statute, as explained above.[157] Codifiers knew this. A "cardinal and controlling maxim" was that the meaning of a statute would not change by "alterations . . . merely designed to render the provisions more concise."[158] As such, codifiers readily omitted notwithstanding clauses as part of their broader effort to "omit . . . all unnecessary preambles [and] enacting and repealing clauses;" though they retained such language "in all doubtful cases."[159]

Still, codifiers had to address the problem that prompted legislatures to use a notwithstanding clause in the first place. What if a court saw fit to incorporate contrary law with a notwithstanding clause now gone? Codifiers had their own solution to this problem. They cited the original statute beside its revised version.[160] This

---

[153] 1806 Pa. Laws 268–75.

[154] *See generally* 1849 Ala. Laws.

[155] Entrikin, *supra* note 132, at 385.

[156] N.H. REV. STAT., Advertisement, at iv (1851) (stating that revisers "condense[d]" the length of text by "nearly one half"); *see also* GA. REV. CODE, Preface, at viii (1848) (reviser "omit[ted] . . . all unnecessary preambles, enacting and repealing clauses, and all obsolete or superseded laws"—except "in all doubtful cases").

[157] See *supra* Section I.A.

[158] SEDGWICK, *supra* note 25, at 428–29.

[159] *See* GA. REV. CODE, Preface, at viii (1848) (explaining revisions the reviser made).

[160] *See, e.g.*, VA. REV. CODE, Preface, at iii (1887) (highlighting marginal cites meant to provide "a clear understanding of the statutes"); ME. REV. STAT., Preface, at vi (1847) (marginal cites added "to the usefulness and convenience of the work"); MASS. REV. CODE, Advertisement, at vi (1836) (highlighting marginal cites meant "to facilitate a reference to the statutes which are herein revised"); PA. REV. CODE, Advertisement to Vol. I, at v (1837) (highlighting citations meant to "facilitate the means of reference" for "the Legislator, the Judge, the Lawyer, the Magistrate, and the Private Citizen").

way, courts could "look to the original act to ascertain legislative intent in cases of doubt."[161] There, courts would find the original act's notwithstanding clause—confirmation of the drafter's intention to "supersede all other laws."[162]

One 1851 Vermont reviser gave this very reasoning when explaining to his state legislature why he removed repealing clauses:

> I have generally omitted those sections . . . which provided for the repeal of former laws, and the preservation of rights accrued under them; believing that a recurrence to such provisions would be rare, *except in cases where resort must necessarily be had to the original publication of the law, and that,*

Codifiers used various techniques to avoid judicial misconstruction of revised statutes. For example, they left original acts intact if separating their provisions risked rendering "the construction . . . doubtful." *See, e.g.*, TENN. REV. CODE, Preface, at iii (1831).

[161] Doyle v. Wisconsin, 94 U.S. 50, 51 (1876); *accord* United States v. Lacher, 134 U.S. 624, 626–27 (1890); Johns v. Hodges, 33 Md. 515, 524 (1871) ("If the provision [of our revised statutes] is doubtful, reference to the antecedent law may aid in determining its true intent and purpose."); SUTHERLAND, *supra* note 31, at 210 ("[O]riginal statutes may be resorted to for ascertaining . . . meaning" of revised language.). Even prior to Section 1983's 1871 enactment, courts looked to the original enactment to aid in construction. Courts did this with revised statutes that omitted notwithstanding clauses. *See, e.g.*, Hargroves v. Chambers, 30 Ga. 580, 588 (1860) (quoting an 1818 statute containing a notwithstanding clause, without even mentioning its omission in GA. REV. CODE ch. 20, § 19 (1848)); Hendricks v. Johnson, 6 Port. 472, 499 (Ala. 1838) (noting a notwithstanding clause was "omitted in Mr. Aiken's digest, but the effect which they must have in restraining any action by the County court, will be apparent from a slight examination."). Likewise, courts referred to original enactments to ascertain whether the revised statute displaced contrary common law. For example, the Illinois Supreme Court referred to "four distinct enactments, passed at different times" for "a more perfect understanding" of whether a revised statute displaced the common law rules on enclosures. Seeley v. Peters, 10 Ill. 130, 140 (1848). After detailing the history of the four original enactments, the Court concluded the revised statute had displaced the common law. *Id.* at 143; *see also id.* at 158 (Caton, J., dissenting) (agreeing that a proper construction of the revised statute necessitated reference to the original enactments).

[162] Cisneros v. Alpine Ridge Grp., 508 U.S. 10, 18 (1993).

> *on this account, no inconvenience would arise from their omission*.[163]

The Vermont reviser reassured the legislature that his omissions of repealing clauses (functional analogs to notwithstanding clauses[164]) "preserved entire[ly]" the original acts' substance.[165] And to the extent they offered important interpretative guidance, courts would find them anyway upon turning to original text in cases of doubt.[166]

Third: The need for notwithstanding clauses was disappearing by the mid-1800s. The derogation canon was dwindling, meaning statutes could just rely on their substantive text to displace contrary common law rules.[167] Codification had begun, obviating the need to fend off laws of which a legislature might be unaware. And federal statutes, given their supremacy, "need[ed] no *non obstante* clause" to displace contrary state statutes.[168] Finally, courts had firmly abandoned the old English rule that disfavored displacement or the repeal of prior laws in the absence of a notwithstanding clause.[169]

Nineteenth-century courts fully understood that codifiers' omissions of a notwithstanding clause did not change a statute's substance. Illustrating this fact well is the 1875 Alabama Supreme Court decision *Lehman v. Warren*, which relied on a statute's omitted

---

[163] VT. COMP. STAT., Compiler's Report, at v–vi (1851) (emphasis added). Vermont's 1851 reviser also omitted notwithstanding clauses. *Compare* Act of Nov. 7, 1833, ch. 1, § 1, Vt. Laws 3 ("[A]ny law or usage to the contrary notwithstanding"), *with* VT. REV. STAT. ch. 46, §§ 1, 5 (1851) (omitting clause).

[164] *See* Nelson, *Preemption*, *supra* note 18, at 235–36 (explaining legislatures used notwithstanding clauses when a repealing clause could not efficiently (or possibly) identify "all the existing laws on a particular subject" or risked "inadvertently. . . repealing a useful law").

[165] VT. COMP. STAT., Compiler's Report, at vi (1851).

[166] Doyle v. Wisconsin, 94 U.S. 50, 51 (1876).

[167] *See* Reinert, *supra* note 2, at 218–34 (explaining the declining use of the derogation canon in the 1800s).

[168] Gibbons v. Ogden, 22 U.S. 1, 30–31 (1824) (Daniel Webster on behalf of petitioner).

[169] *See supra* notes 66–67 and accompanying text.

notwithstanding clause to conclude the statute displaced contrary common law.[170] The case pitted a cotton seller against the buyer's creditors who, having won an earlier attachment suit against the buyer, claimed the cotton was now theirs. For support, the creditors invoked a common-law rule that ownership transferred upon delivery, despite the buyer's non-payment.[171]

The Alabama Supreme Court, however, ruled for the seller. Why? A state statute specified ownership would not transfer until the cotton was "fully paid for."[172] The statute's original text reinforced that holding, requiring full payment, "any order for the cotton, law, custom or usage to the contrary notwithstanding."[173] Though this notwithstanding clause "was omitted in revising the Code," the Court concluded "its omission does not lessen its significance in determining the intention of the legislature, or in fixing the meaning of the words of the statute."[174]

Lehman's articulation of omitted notwithstanding clauses was echoed by other courts around this time. Courts understood the omission left the statute "unchanged in substance."[175] The revised statute's text still superseded all contrary law.

---

[170] Lehman v. Warren, 53 Ala. 535, 540 (1875).

[171] *Id.* at 539–40.

[172] *Id.*

[173] *Id.* at 540.

[174] *Id.*

[175] *See* Smith v. Berryman, 199 S.W. 165, 166 (Mo. 1917); *see also* Bos. Ice Co. v. Bos. & Me. Ry., 86 A. 356, 358 (N.H. 1913) (calling the revised statute that omitted notwithstanding clause "somewhat simplified"); *In re* Merwin's Est., 63 A. 784, 784 (Conn. 1906) (holding that a notwithstanding clause's omission left statutory meaning "substantially unchanged"); Goldmark v. Magnolia Metal Co., 65 N.J.L. 341, 344 (Sup. Ct. 1900) (relying on a notwithstanding clause despite its omission in New Jersey's Revised Statutes of 1874); Fitch v. Commonwealth, 92 Va. 824, 829–31 (1896) (noting original 1846 statute containing notwithstanding clause "dispense[d]" with onerous common law rules for perjury indictments, while making no mention of clause's later omission); Appeal of Buel, 22 A. 488, 489 (Conn. 1891) (finding the omission of "any law or usage to the contrary notwithstanding" left revised statute "substantially [in] the same form"); Lehman v. Warren, 53 Ala. 535, 540 (1875); Hargroves v. Chambers, 30 Ga. 580, 588 (1860) (quoting 1818 statute containing notwithstanding clause, without even mentioning clause's omission in GA. REV. CODE ch. 20, § 19 (1848)); Hendricks v.

II. SECTION 1983'S NOTWITHSTANDING CLAUSE

With the above history, we can now delve into the meaning and omission of Section 1983's Notwithstanding Clause. This Part proceeds parallel to the first and demonstrates how Section 1983's Notwithstanding Clause traces the same path as its above counterparts.

Section A explains that the Notwithstanding Clause, consistent with how its counterparts functioned,[176] reinforced the text's clear statement that "every person shall be liable," by defending against external, contrary state law that could distort the ordinary meaning of those words. Section B explains that the Clause displaced state common law immunities, just as other similarly worded notwithstanding clauses had.[177] Finally, Section C explains that Congress did what other legislatures did before them. Congress removed the Notwithstanding Clause for concision, with the full understanding—shared by the Supreme Court soon after—that the omission did not alter Section 1983's displacement of contrary state law.

A. Reinforcing "Every Person" Over Contrary State Law

Section 1983's Notwithstanding Clause reinforced its text just as all contemporaneous notwithstanding clauses did. Then, as now, Section 1983 broadly proclaimed, in unconditional terms:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That any

---

Johnson, 6 Port. 472, 499 (Ala. 1838) (noting a notwithstanding clause was "omitted in Mr. Aiken's digest, but the effect which they must have in restraining any action by the County court, will be apparent from a slight examination."); *see also infra* Section II.C.2.c (collecting Supreme Court cases recognizing "immaterial" omissions of the Civil Rights Acts' notwithstanding clauses, including Section 1983's). *But see* Pierson v. Ray, 386 U.S. 547, 554–55 (1967).

[176] *See infra* Section II.A.

[177] *See infra* Section II.B.

> 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 redress; such 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 the ninth of April, eighteen hundred and sixty-six, 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.[178]

As is evident from this text, the Notwithstanding Clause reinforced the statute's proclamation that "every person . . . shall be liable" by defending against contrary state law that could curtail the ordinary meaning of those words.

Compared to its counterparts, Section 1983's Notwithstanding Clause was unusually detailed. Whereas most clauses displaced "all laws to the contrary" or "any law, custom, or usage," Section 1983's Notwithstanding Clause targeted any contrary State "law, statute, ordinance, regulation, custom, or usage." Those other clauses were no less comprehensive, of course. But Congress's

[178] Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13 (first emphasis in original).

apparent goal with extra specificity was a "fail-safe"[179] redundancy in the face of a fiercely resistant postwar South.[180]

Indeed, to be effective, Section 1983 needed to be comprehensive in the state power it displaced. The well-documented violence and civil rights violations that prompted the Civil Rights Act of 1871 penetrated every corner of state action. State legislatures enacted the Black Codes "'to replicate, as much as possible, a system of involuntary servitude.'"[181] Police "hunted down" black people, issued "baseless warrants"[182] against them, and ransacked their houses "[u]nder the pretext of effecting arrests or searching for weapons" and "turned a blind eye" to Ku Klux Klan violence against them, no matter how heinous the offense.[183] Juries, infiltrated by the Klan, acquitted or refused to indict wrongdoers

---

[179] SCALIA & GARNER, *supra* note 17, at 127.

[180] The Civil Rights Acts of 1866 and 1870 likewise were replete with textual redundancies, including their own sets of notwithstanding clauses. Civil Rights Act of 1866, § 1, 14 Stat. 27; Civil Rights Act of 1870, § 16, 16 Stat. 144. Their redundancies went even beyond the text. Congress reenacted the 1866 Act with the 1870 Act—this time under the newly ratified Fourteenth Amendment—because the 1866 Act's constitutionality under the Thirteenth Amendment had been questioned. Civil Rights Act of 1870, § 18, 16 Stat. 140, 144; John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1389 (1992). Moreover, Section 1983 is much a copy of its criminal counterpart, § 17 of the 1870 Act. 16 Stat. 144.

[181] Timbs v. Indiana, 586 U.S. 146, 153 (2019) (quoting Paul Finkelman, *John Bingham and the Background to the Fourteenth Amendment*, 36 AKRON L. REV. 671, 681 (2003)); *see also* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 234 (2023) (Thomas, J., concurring) ("Soon after the Thirteenth Amendment's adoption, the reconstructed Southern States began to enact the 'Black Codes,' which circumscribed the newly won freedoms of blacks.").

[182] David H. Gans, *"We Do Not Want to Be Hunted": The Right to Be Secure and Our Constitutional Story of Race and Policing*, 11 COLUM. J. RACE & L. 239, 282 n.180, 329 (2021) [hereinafter Gans, *Hunted*].

[183] *Id.* at 282, 284; *see also* Letter from Maj. T.W. Gilbreth to Maj. O.O. Howard (May 22, 1866), *in Records of the Assistant Commissioner for the State of Tennessee*, FREEDMAN'S BUREAU ONLINE, https://www.freedmensbureau.com/tennessee/outrages/memphisriot.htm [https://perma.cc/HM37-V3XN] ("Negroes were hunted down by police, firemen and other white citizens, shot, assaulted, robbed, and in many instances their houses searched under the pretense of hunting for concealed arms . . . .").

(including murderers and arsonists).[184] State militias "indiscriminately" robbed and hunted black people.[185] Jailers "routinely whipped Republican inmates."[186] *Firemen* joined deadly mobs against black people.[187] The "distrusted"[188] local judges—whom Congress accused of being "bribed,"[189] "despotic" "little Kings"[190]—excluded black people "from participation at all levels of the legal process."[191] The veneer of state sanction shielded all manner of abuse and abuser.

The anti-Reconstructionists were not just comprehensive in their rights-violating campaigns. They were conniving. And Congress knew this. They already had spent the past six years fighting, tooth and nail, against whatever "ingenious methods" the resistant Southern states could think of.[192] Congress could not confidently

---

[184] ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877, at 261–62 (updated ed. 2014); Tiffany R. Wright, Ciarra N. Carr & Jade W.P. Gasek, *Truth and Reconciliation: The Ku Klux Klan Hearings of 1871 and the Genesis of Section 1983*, 126 DICK. L. REV. 685, 700 (2022).

[185] Gans, *Hunted*, *supra* note 182, at 279–80.

[186] FONER, *supra* note 184, at 421.

[187] Wright, Carr & Gasek, *supra* note 184, at 701; Gans, *Hunted*, *supra* note 182, at 283.

[188] Gene R. Nichol, Jr., *Federalism, State Courts, and Section 1983*, 73 VA. L. REV. 959, 993 (1987).

[189] CONG. GLOBE, 42d Cong., 1st Sess. 429 (1871) (statement of Rep. Beatty).

[190] *Id.* at 186 (statement of Rep. Platt).

[191] HOWARD N. RABINOWITZ, RACE RELATIONS IN THE URBAN SOUTH, 1865–1890, at 31 (1978).

[192] *Cf.* FONER, *supra* note 184, at 323, 422 (detailing the "ingenious methods" Southern officials devised to thwart Reconstruction efforts and the newly ratified constitutional amendments). When Congress ratified the Thirteenth Amendment to end slavery, the Southern States enacted Black Codes to in effect reinstitute it. *Id.* at 199–201. When Congress passed the Civil Rights Act of 1866 to end the Black Codes, cement certain rights, and impose criminal liability, the Southern States contested its constitutionality. *Id.* at 243–57. When Congress drafted the Fourteenth Amendment to cement the 1866 Act's constitutionality and more fully guarantee the rights of freedmen, the Southern States refused to ratify it. *Id.* at 257, 268–69, 276. When Congress passed the Reconstruction Acts mandating ratification for reentry into the Union, the Southern States refused to enforce the newly ratified Fourteenth Amendment's constitutional guarantees. *Id.* at 413–59 (detailing enforcement challenges). The South's response to Reconstruction had devolved to an endless game of whack-a-mole, which the 42nd Congress hoped to end with an "Act to enforce the [] Fourteenth Amendment." Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13.

anticipate all contrary state machinations. This is why the Notwithstanding Clause was useful. Legislatures used them when they "might not be aware of all the existing laws on a particular subject"[193] or where the sources of contrary law might be "unclear."[194]

Of course, the contrary state law to be displaced often would be one a defendant state actor acted "under color of" law. But the Notwithstanding Clause would have served no real use if it merely pointed to such laws, which are clearly displaced by Section 1983's text and the Supremacy Clause.[195]

---

[193] Nelson, *Preemption*, *supra* note 18, at 235.

[194] SCALIA & GARNER, *supra* note 17, at 127. If Congress had anticipated only a few specific sources of conflicting state law, they likely would have addressed them explicitly in a clause resembling a repealing provision. *See* Nelson, *Preemption*, *supra* note 18, at 235.

[195] Some, in response to Reinert's article, argue the Notwithstanding Clause simply refers to the state law acted "under color of," and thus does not encompass other contrary state laws, like immunity doctrines. *See, e.g.*, Lindley, *supra* note 4, at 926; Richardson, *supra* note 4, at 3–6. Their argument hinges on their perceptive identification of the word "such":

> That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, [who violates a person's rights] shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable . . . . Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13.

We agree that "such" refers to what comes before. The question is: does "such" merely refer to the specific law the state official acted "under color of" (meaning *only* that one contrary state law is displaced) or to the identical, antecedent phrase as a whole (meaning all contrary state laws are displaced)? History confirms the latter.

The models for Section 1983's Notwithstanding Clause are the near-identical clauses in the 1866 and 1870 Civil Rights Acts. Both Acts broadly displaced "any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding." 14 Stat. 27, § 1 (1866); 16 Stat. 144, § 16 (1870). Neither used "any such" because neither contained any identical antecedent phrase for its notwithstanding clause to reference. The 1871 Act, by contrast, *does* contain such a phrase—"any law, statute, ordinance, regulation, custom, or usage of any State." Its Notwithstanding Clause repeats the phrase and uses "such" simply to point back to it. The use of "such" did not divorce the Clause from its near-identical models by restricting it to a single contrary law. This becomes even

The real value of the Notwithstanding Clause was that it identified contrary state law that, to courts, might have had "the appearance of . . . withstanding" the ordinary meaning of "every person shall be liable" (or the Supremacy Clause) but did not.[196] State laws indirectly thwarting Section 1983's remedial objectives through things like defenses, immunities, and restrictions on damages were not obviously displaced.[197] For these laws, the line between what was preempted and what is not was "fuzz[y]": whether Section 1983 preempts these laws "is basically one of

---

clearer when we consider who inserted "such"—Ohio Representative Samuel Shellabarger.

Shellabarger often is described as the author of § 1 of the 1871 Civil Rights Act (now Section 1983). But he did not write the first draft. He instead worked from New Jersey Senator Theodore Frelinghuysen's draft, which did not contain "such": "[t]hat whenever, under pretense of any law, custom, or usage of any State . . . any act of any State legislature, custom, usage, or law to the contrary notwithstanding."

It is implausible that Shellabarger aimed to radically narrow the scope of displaced contrary law by adding "such." Shellabarger was "far more radical than Frelinghuysen." David Achtenberg, *A "Milder Measure of Villainy": The Unknown History of 42 U.S.C. § 1983 and the Meaning of "Under Color of" Law*, 1999 UTAH L. REV. 1, 56 [hereinafter Achtenberg, *History*]. He "consistently expanded, rather than contracted, the scope of [Frelinghuysen's draft]." *Id.* He even expanded the Notwithstanding Clause by adding the "more inclusive phrase 'law, statute, ordinance, regulation, custom, or usage.'" *Id* at 58.

Shellabarger's insertion of "such" was no accident either. He used "such" this way *forty-eight* times in the Civil Rights Act of 1871. *See, e.g.*, Civil Rights Act of 1871, ch. 22, § 2, 17 Stat. 13 (stating that "such rights and privileges" refers to "any right or privilege of a citizen"). Shellabarger's use of "such" simply reflects his intentional, albeit "baroque," drafting style—not the complete undoing of a Clause that otherwise tracked its models. This use of "such" is thus "of interest only to students of bad writing." Achtenberg, *History*, *supra* note 195, at 51.

[196] WARD, *supra* note 74, at 436 (defining "concessive"); *see also* GAEL, *supra* note 74, at 99 (stating that "notwithstanding" is used "to anticipate and remove a probable conflict or opposition of laws, rules, etc., by declaring which shall not withstand; that is, which shall give way").

[197] *See* Pierson v. Ray, 386 U.S. 547, 555 (1967) (incorporating immunities indirectly thwarting Section 1983's remedial objectives under presumption that Congress did not intend to displace them); *see also id.* at 560 (Douglas, J., dissenting) (criticizing this presumption because it wrongly "assumes that Congress could and should specify in advance all the possible circumstances to which a remedial statute might apply . . . .").

congressional intent."[198] This question is tricky because it cannot "automatically" be assumed "that Congress wants to displace all state law that gets in the way of [a federal statute's] purposes."[199] After all, Congress might sometimes wish to craft narrow remedies by preserving existing immunities—or largely retain the status quo by preserving the scope of relevant state law, common law, or prior federal statutes. So to infer that Congress wanted to displace all state laws that impede Section 1983's purposes, "one would need additional information about the particular statute in question."[200]

Section 1983's Notwithstanding Clause provided this additional information. It reinforced the ordinary meaning of the statute's text by defending against "any" contrary state law[201].[202] The Clause was Congress's unmistakable way of telling courts, "Section 1983 *really* means what it says: contrary state law *shall not withstand* the ordinary meaning of 'every person shall be liable.'"

One final point before moving on. Given Section 1983's supremacy, the Notwithstanding Clause displaced not just prior state laws, but future state laws as well.[203] It had to for Section 1983 to work. Imagine all the "ingenious methods" states could devise to thwart Section 1983 from day one.[204] State legislatures could "absolutely immune[ize]" state actors "otherwise . . . subject to § 1983 liability" (one state tried this),[205] impose discriminatory

---

[198] Nelson, *Preemption*, *supra* note 18, at 231, 276–77 (quoting Barnett Bank of Marion Cnty., N.A. v. Nelson, 517 U.S. 25, 30 (1996)).

[199] *Id.* at 281.

[200] *Id.*

[201] Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13.

[202] *Cf. Pierson*, 386 U.S. at 556 ("[W]e presume that Congress would have specifically so provided had it wished to abolish [immunity] doctrine[s].").

[203] When the 42nd Congress wanted to displace only contrary *prior* laws, they specified it. *See, e.g.*, Act of Mar. 3, 1873, ch. 234, § 12, 17 Stat. 566, 571 ("[A]ny provisions of this act, or of any previous act, to the contrary notwithstanding"); Act of June 1, 1872, ch. 246, 17 Stat. 195 ("[A]ny existing law to the contrary notwithstanding"); Act of May 31, 1872, ch. 246, 17 Stat. 666 ("[A]ny existing law to the contrary notwithstanding").

[204] *Cf.* FONER, *supra* note 184, at 323, 422.

[205] Howlett *ex rel.* Howlett v. Rose, 496 U.S. 356, 377, 383 (1990) (striking down a Florida law doing this); *see also* Martinez v. California, 444 U.S. 277, 284 n.8 (1980)

limitations periods (other states tried this),[206] or recoup damages awards through various state statutes (still another state tried this).[207] State courts could devise, or "find," new common law rules or immunities to do the same—as courts *have* done.[208] Congress was attuned to these (since realized) risks, as detailed later.[209] The Notwithstanding Clause was their "way of ensuring that [Section 1983]" would "absolutely, positively prevail" over contrary state law, wherever, and whenever, its source.[210]

B. Reinforcing "Every Person" Over Contrary State Common Law

Section 1983's Notwithstanding Clause displaced contrary state common law, including common law immunities. We know this for two reasons. First, the original understanding in the 1800s was that a notwithstanding clause's reference to "law, custom, or usage" encompassed contrary state common law. We've already discussed

---

(refusing to apply California absolute immunity statute because conduct "wrongful under 42 U.S.C. § 1983 . . . cannot be immunized by state law.").

[206] Johnson v. Davis, 582 F.2d 1316, 1317, 1319 (4th Cir. 1978) (striking down Virginia's "special one-year limitation period for § 1983 actions" as "unreasonable discrimination" between Section 1983 and state actions enjoying a two-year limitation period); *see also* Burnett v. Grattan, 468 U.S. 42, 53 n.15 (1984) (citing *Johnson* with approval); Felder v. Casey, 487 U.S. 131, 153 (1988) (striking down Wisconsin's rule that Section 1983 plaintiffs must notice defendants 120 days before filing suit as "inconsistent in both purpose and effect with the remedial objectives" of Section 1983).

[207] Williams v. Marinelli, 987 F.3d 188, 201 (2d Cir. 2021) (striking down a state attempt to recoup "at least 60%" of Section 1983 damages award).

[208] *See, e.g.*, Anderson v. Creighton, 483 U.S. 635, 645 (1987) ("*Harlow* . . . completely reformulated qualified immunity along principles not at all embodied in the common law"); Imbler v. Pachtman, 424 U.S. 409, 421, 422 (1975) (affording absolute immunity to prosecutors which did not exist at common law until decades after Section 1983); Pierson v. Ray, 386 U.S. 547, 555 (1967) (relying on mid-1900s treatises to find state common law immunity); Pierson v. Ray, 352 F.2d 213, 219 (5th Cir. 1965) (relying on a "minority" state common law rule to find immunity), *rev'd on other grounds*, 386 U.S. 547 (1967); *see also* Baude, *Unlawful?*, *supra* note 39, at 55 (showing qualified immunity did not exist in 1871).

[209] *See infra* Section II.B.2.b.

[210] SCALIA & GARNER, *supra* note 17, at 127.

that courts and other legislatures understood this.[211] The 42nd Congress understood this too. Second, Congress would have known that state common law immunities were among the contrary state laws that threatened Section 1983's remedial purpose. This Section addresses original understanding and Section 1983's purpose, in turn, below.

1. Original Understanding

The 42nd Congress did not debate the function of the Notwithstanding Clause. They didn't need to. They understood the function of these "ubiquitous" clauses.[212] In fact, this same Congress used them in statutes they passed alongside Section 1983.[213]

Congress likewise would've "taken for granted" the sources of law identified in the Notwithstanding Clause: "law, statute, ordinance, regulation, custom or usage."[214] Like their contemporaries, they understood that the terms "law . . . custom usage" encompassed *all* contrary state law, including state common law.[215] They referenced these sources of law throughout the

---

[211] *See supra* Section I.B.

[212] *See* Nelson, *Preemption*, *supra* note 18, at 239–40.

[213] Act of April 17, 1872, ch. 104, 17 Stat. 53 (providing that "any thing in the proviso contained in the thirty-fifth section of the act entitled 'An act to revise, consolidate, and amend the statutes relating to patents and copyrights,' approved July eighth, eighteen hundred and seventy, to the contrary notwithstanding"); Act of May 3, 1872, ch. 139, 17 Stat. 61 ("[A]ny law of any State to the contrary notwithstanding"); Act of June 1, 1872, ch. 246, 17 Stat. 195 ("[A]ny existing law to the contrary notwithstanding"); Act of June 1, 1872, ch. 255, § 5, 17 Stat. 196, 197 ("[A]ny rule of court to the contrary notwithstanding"); Act of Mar. 3, 1873, ch. 234, § 12, 17 Stat. 566, 571 ("[A]ny provisions of this act, or of any previous act, to the contrary notwithstanding"); Act of Mar. 3, 1873, ch. 268, 17 Stat. 602 (providing that "any contract to the contrary notwithstanding"); Act of May 31, 1872, ch. 246, 17 Stat. 666 ("[A]ny existing law to the contrary notwithstanding").

[214] Rutherglen, *supra* note 123, at 940.

[215] *See supra* Section I.B. (explaining courts and other legislatures understood "law, custom, usage" as all-encompassing and encompassing the common law). In later

debates. And they cited the Blackstonian linkage of custom and common law,[216] just like the 39th Congress that drafted the Notwithstanding Clause's 1866 model.[217]

A recent article by Jacob Harcar confirms Congress's understanding that Section 1983 displaced state common law immunities.[218] Harcar examines the congressional debates on Section 1983—and its model, Section 2 of the Civil Rights Act of 1866. He also is the first to thoroughly examine newspapers that wrote about both provisions leading up to and at their passage. His conclusion: everyone understood that Section 1983 abrogated state common law immunities.[219]

2. Purpose

Congress enacted Section 1983 to remediate the rampant, unpunished Fourteenth Amendment violations persisting in the

---

drafts, Congress added "statute, ordinance, regulation" to Section 1983's Notwithstanding Clause, presumably as an extra precaution. Achtenberg, *History*, *supra* note 195, at 52, 61.

[216] *See, e.g.*, CONG. GLOBE, 42d Cong., 1st Sess. app'x at 217 (1871) (statement of Sen. Thurman) ("[Section 1983] refers to a deprivation under color of law, either statute law or 'custom or usage' which has become the common law."). The 42nd Congress frequently invoked Blackstone in general. *See, e.g.*, *id.* at 332–33 (statement of Rep. Hoar) ("Sir William Blackstone, in several passages which I have before me, asserts distinctly and positively, that the rights to life, liberty, and property are the rights which the Government owes to the citizen and if the citizen fails to receive from the Government his obligation to allegiance is gone."); *id.* at 390 (statement of Rep. Elliott) (citing Blackstone for same proposition); *id.* at 362 (statement of Rep. Swann) (criticizing appointments of "[b]ogus judges, who had never read the first page of Blackstone" to Southern courts); *id.* at 296 (1871 statement of Rep. Sumner); *id.* at 581 (statement of Sen. Trumbull).

[217] CONG. GLOBE, 39th Cong., 1st Sess. 1598 (1866) (statement of Sen. Trumbull) (posing the question, "What is the common law of this country?" and answering it is made of "the usages and customs" of England).

[218] Harcar, *supra* note 14.

[219] *Id.* at 375, 384 (reaching a conclusion on 1866 debates); *id.* at 396, 401 (reaching a conclusion on 1871 debates).

postwar South. Remediation was Congress's stated purpose for the Act.[220]

Remediation is the "essential element" to understanding why Congress truly meant "every person shall be liable"—and why they inserted a Notwithstanding Clause to help fend off state laws that could undermine those words.[221] We detail the statute's remedial purpose below and end with this final point: had Congress not displaced state immunities, they would have failed to secure remediation. Congress knew this, which is why they inserted a Notwithstanding Clause to insure against them.

a. Remediating Unpunished Rights Violations

The major impetus for the Civil Rights Act of 1871 was not just the "unrestrained,"[222] "untold outrages" in the South—but that they went "entirely unpunished."[223]

The 42nd Congress criticized the Southern state governments for their "most monstrous" failure in their "administration of the

---

[220] *See, e.g.*, CONG. GLOBE., 42d Cong., 1st Sess. app'x 68 (1871) (statement of Section 1983 drafter, Rep. Shellabarger) (referring to Section 1983 as "remedial" and that therefore "it ought to be construed liberally, and it is generally adopted in the interpretation of laws."); Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13 (titled "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other Purposes"); *see also* Lake Country Ests., Inc. v. Tahoe Reg'l Plan. Agency, 440 U.S. 391, 400 n.17 (1979) (stating same).

[221] *See* SCALIA & GARNER, *supra* note 17, at 127.

[222] CONG. GLOBE, 42d Cong., 1st Sess. 483 (1871) (statement of Rep. Wilson) (criticizing Democrats' denial of "the reports of unrestrained and unpunished lawlessness" that spurred the Civil Rights Act of 1871).

[223] *Id.* at 436–40 (statement of Rep. Cobb) (calling on Congress to pass the 1871 Civil Rights Act to redress the "untold outrages" which "have gone entirely unpunished in the courts of justice."); *see also id.* at 459 (statement of Rep. Coburn) (calling for legislation to redress "systematic failure to make arrests, to put on trial, to convict, or to punish offenders against the rights of a great class of citizens"); *id.* at 369–70 (statement of Rep. Monroe) (similar). The Supreme Court recognized this fact long ago. Monroe v. Pape, 365 U.S. 167, 176 (1961) ("There was, it was said, no quarrel with the state laws on the books. It was their lack of enforcement that was the nub of the difficulty."), *overruled by* Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978).

laws."[224] The "[r]ecords of the [state] tribunals," observed Representative Lowe, "are searched in vain for evidence of effective redress."[225] In Representative Perry's words: "[s]heriffs, having eyes to see, see not; judges, having ears to hear, hear not; witnesses conceal the truth or falsify it; grand and petit juries act as if they might be accomplices."[226]

We could go on. "The debates on the Civil Rights Act overflow with concern for protecting individual rights."[227] Congress worried the Fourteenth Amendment that they fought so hard for would wither into "a practical nullity" without legislation to enforce it.[228] Section 1983, as explained by one of its drafters, was "meant to protect and defend and give remedies" to prevent this potentiality.[229]

By necessity, then, protection of individual rights was, for the 42nd Congress, a "hierarchically superior purpose."[230] Ceding to competing concerns, like adherence to common law rules ("which had not proven effective to protect constitutional rights"[231]) or the sanctity of the Southern states' rights, would effect no change. Both radical and moderate Republicans made that clear during the debates. Vermont Senator George Edmunds, a moderate who led discussion in the Senate, had this to say just before the initial vote: "the Government [is] to preserve the liberties and the rights of its citizens . . . and when it has refused to do that it has failed, and it is

---

[224] CONG. GLOBE, 42d Cong., 1st Sess. 505 (1871) (statement of Sen. Pratt).

[225] *Id.* at 374 (statement of Rep. Lowe).

[226] *Id.* at app'x 78 (statement of Rep. Perry).

[227] David Achtenberg, *Immunity Under 42 U.S.C. § 1983: Interpretive Approach and the Search for the Legislative Will*, 86 NW. U. L. REV. 497, 540 (1992) [hereinafter Achtenberg, *Immunity*].

[228] CONG. GLOBE, 42d Cong., 1st Sess. 439 (1871) (statement of Rep. Cobb).

[229] *Id.* at app'x 68; *see also* Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13 ("An Act to enforce the Provisions of the Fourteenth Amendment").

[230] Achtenberg, *Immunity*, *supra* note 227, at 539.

[231] Lawrence Rosenthal, *Defending Qualified Immunity*, 72 S.C. L. REV. 547, 554 (2020).

not entitled to be called a complete or just Government at all; and it ought to be put down by revolution or otherwise."[232]

Senator Edmunds's "belief resonated throughout the debates."[233] Indiana Representative John Shanks argued that citizens ceded certain freedoms in exchange for the government's protection of "life, liberty and property."[234] To New York Representative Ellis Roberts, "[o]bligations are mutual. Allegiance presupposes protection."[235]

These statements, rooted in Lockean principles and the "American liberal tradition . . . cannot be dismissed as mere rhetoric."[236] As Professor David Achtenberg chronicles, the supporters of Section 1983 were "vehement" about their "'sacred duty'" to secure people's rights and of the need "to go to the outermost verge of [their] constitutional authority" to fulfill it.[237] Failure, they argued, made the Government itself "valueless and a failure."[238]

The idea that Congress intended to immunize state actors—some absolutely—for civil rights violations is irreconcilable with Section 1983's text, purpose, and history, as a growing consensus has recognized.[239] Congress put the redressability of civil rights above

---

[232] CONG. GLOBE, 42d Cong., 1st Sess. 691 (1871); *see also* Richard E. Welch, Jr., *George Edmunds of Vermont: Republican Half-Breed*, 36 VT. HIST. 64 (1968).

[233] Achtenberg, *Immunity*, *supra* note 227, at 543.

[234] CONG. GLOBE, 42d Cong., 1st Sess. app'x 141 (1871).

[235] *Id.* at 414.

[236] Achtenberg, *Immunity*, *supra* note 227, at 542, 545.

[237] *Id.* at 541.

[238] CONG. GLOBE, 42d Cong., 1st Sess. app'x 141 (1871) (statement of Rep. Shanks).

[239] *See, e.g.*, Harcar, *supra* note 14, at 418 ("[Section] 1983 was most likely originally understood to abrogate all existing common law official immunity defenses . . . ."); Teressa Ravenell, *Unincorporating Qualified Immunity*, 53 LOY. U. CHI. L.J. 371, 392 (2022) ("A review of § 1983 legislative history . . . strongly suggests [*Pierson*'s] factual assumption" that Congress meant to retain common-law immunities "is wrong."); David H. Gans, *Repairing Our System of Constitutional Accountability: Reflections on the 150th Anniversary of Section 1983*, 2022 CARDOZO L. REV. DE NOVO 90, 102–03 ("[T]he historical record provides strong support for taking the authors of Section 1983 at their word" when they "sought to provide a framework to ensure constitutional

the concerns of the Southern states who were permitting (or sanctioning) these violations. They enacted sweeping text that contains no trace of immunities—*every person shall be liable, any contrary state law notwithstanding*—to ensure this. The evident (and stated) reason for this language was to ensure that rights violations would no longer, in effect, be immunized by state nonenforcement and complicity. And both supporters and opponents of Section 1983 (and of its predecessor in the 1866 Civil Rights Act) *stated* their understanding that Section 1983 erased common law immunities.[240] If Congress intended to shield state actors—some absolutely—for civil rights violations they hid their intentions masterfully.

b. Displacing Immunities to Secure Remediation

Congress had to displace contrary state common law immunities. Otherwise, it risked, or ensured, thwarting Section 1983's paramount, remedial purpose. The doctrine of qualified immunity

---

accountability, not . . . impunity.") [hereinafter Gans, *Repairing*]; Eric A. Harrington, *Judicial Misuse of History and § 1983: Toward a Purpose-Based Approach*, 85 TEX. L. REV. 999, 1023–24 (2007) ("[A]n examination of the record and the history surrounding passage of the Klan Act makes plain that Congress was motivated by a deep distrust of the state courts. . . ."); Michael Wells, *Constitutional Remedies, Section 1983 and the Common Law*, 68 MISS. L.J. 157, 177 (1998) ("[A] realistic inquiry into the intent of the framers of the statute would not yield a directive to follow the common law. The legislative history . . . indicat[es] that Congress intended to enact a sweeping remedy in order to deal with the serious problem that prompted the statute."); David Achtenberg, *Immunity*, *supra* note 227, at 548 (arguing the "current immunity doctrine" is "utterly inconsistent with the value structure of the 42nd Congress."); Nichol, Jr., *supra* note 188, at 1009 ("[T]he legislative history of the Civil Rights Act of 1871" shows it is "very unlikely" that Congress "would have supported . . . immunities and shields" from liability.); Pierson v. Ray, 386 U.S. 547, 561 (1967) (Douglas, J., dissenting) ("The position that Congress did not intend to change the common-law rule of judicial immunity ignores the fact that every member of Congress who spoke to the issue assumed that the words of the statute meant what they said and that judges would be liable."). Even some defenders of qualified immunity join this consensus. *See, e.g.*, Rosenthal, *supra* note 231, at 554 ("[T]here is little indication that the legislators who crafted § 1983 were concerned with preserving historically-recognized immunities.").

[240] Harcar, *supra* note 14, at 371–88 (discussing statements made during 1866 debates); *id.* at 396, 393–400 (discussing statements made during 1871 debates).

alone—whether framed under today's "clearly established" test or under *Pierson*'s "good faith and probable cause" test—would have nullified Section 1983 from the start. Under today's qualified immunity doctrine, a nineteenth-century plaintiff would have had to provide on-point precedent showing the defendant state actor violated "clearly established" law. What precedent? Precedent on the Fourteenth Amendment, ratified just three years prior, didn't exist. "The idea that victims of abuse of power would be required to show that those acting under color of law violated clearly established legal precedents would have strangled the statute at birth."[241]

Pierson's good faith and probable cause standard for qualified immunity presents a fundamental problem of its own. This standard morphs Section 1983 from a statute focused on whether a state actor violated constitutional rights into one preoccupied with the state actor's motives for the constitutional violation.

In the end, had Congress incorporated qualified immunity, it would have enacted a statute no more "efficacious than the common law, which had not proven effective to protect constitutional rights."[242] That is not what Congress hoped to do when it passed "An Act to enforce the Provisions of the Fourteenth Amendment . . .."[243] And all this is to say nothing of the absolute immunity *Pierson* afforded the very "distrusted" state judges Congress complained of.[244] Here too, Congress would have

---

[241] Gans, *Hunted*, *supra* note 182, at 330.

[242] Rosenthal, *supra* note 231, at 554; *see also* SEDGWICK, *supra* note 25, at 41 ("Remedial acts are those made . . . to supply defects in the existing law.").

[243] Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13 (titled "An Act to enforce the Provisions of the Fourteenth Amendment"); *see also* Gans, *Repairing*, *supra* note 239, at 102 ("Congress was not trying to federalize tort law, but to ensure accountability when state officials participated in or condoned racial violence and trampled on fundamental constitutional rights. . . .").

[244] *See* Nichol, Jr., *supra* note 188, at 993.

reenacted the very common law maxim they had complained about: those "despotic" "little kings" can do no wrong.[245]

Let's now turn to state judges, who presented one more vital reason to displace state common-law immunities: They could continue to devise, or "find," such immunities even after Section 1983's enactment. Congress knew this. Congress's distrust of the state courts is what led to Section 1983's federal cause of action in the first place. As Senator Osborn put it, "[i]f the State courts had proven themselves competent . . . to maintain law and order, we should not have been called upon to legislate."[246]

Proponents of the Civil Rights Act of 1871 voiced their distrust throughout the debates. In their view, state judges were, at best, "under the control" of the anti-Reconstructionists and therefore "notoriously powerless to protect life, person and property."[247] At worst, they were "secretly in sympathy"[248] with the Klan, or "bribed"[249] to perpetuate injustice—or Klan members themselves.[250] One representative described local judges to be "wholly inimical to the impartial administration of law and equity."[251] Another fiercely denounced them as performing the "partisan demands of the Legislature which elected them" by committing a "catalogue of wrongs" against Republicans "without regard to law or justice."[252]

These statements embodied more than mere political grandstanding. "The refusal of state courts to protect the

---

[245] CONG. GLOBE, 42d Cong., 1st Sess. app'x 186 (1871) (statement of Rep. Platt) (referring to state judges); *see also* CONG. GLOBE, 39th Cong., 1st Sess. 1758 (1866) (statement of Sen. Trumbull) (arguing, during 1866 Civil Rights Act debates, that immunizing "State judges . . . is akin to the maxim of the English law that the King can do no wrong."); Pierson v. Ray, 386 U.S. 547, 565 (1967) (Douglas, J., dissenting) ("The argument that the actions of public officials must not be subjected to judicial scrutiny . . . is but a more sophisticated manner of saying 'The King can do no wrong.'").

[246] CONG. GLOBE, 42d Cong., 1st Sess. 374–76 (1871).

[247] *Id.* at 322 (statement of Rep. Stoughton).

[248] Nichol, Jr., *supra* note 188, at 975 (quoting statement of Rep. Rainey).

[249] CONG. GLOBE, 42d Cong., 1st Sess. 429 (1871) (statement of Rep. Beatty).

[250] Gans, *Hunted*, *supra* note 182, at 329 (citing congressional statements and other sources).

[251] CONG. GLOBE, 42d Cong., 1st Sess. 394 (1871) (statement of Rep. Rainey).

[252] *Id.* at app'x 186 (statement of Rep. Platt).

fundamental human liberties of both Unionists and the newly freed slaves was a major focus of the legislative debates on [Section 1983]."[253] Congress had, after all, heard voluminous sworn testimony from victims, and even Republican Southern judges, detailing the broken judicial system.[254] They received petitions from citizens pleading for redress from judges who "in three fourths of the counties of [their] State were opposed to men of color or fear to give judgment in their favor."[255] The Freedmen's Bureau (established by Congress to provide on-the-ground aid to Reconstruction efforts, in part by propping up its own local court system) reported its struggles to "persuad[e] the Southern states to recognize racial equality in their own judicial proceedings."[256]

Congress was not so naïve to empower those they "regarded . . . as central players in the southern tragedy"[257] to devise, or "find," common law immunities that could bind federal courts and obstruct Section 1983 remedies. On the contrary, supporters of the 1871 Act rebuked state judges' weaponization of the common law to deprive freedmen's rights.[258] Moreover, the state courts had already fooled Congress once before. After resisting the Civil Rights Act of 1866—which among other things cemented black people's right to testify—the Southern state courts "revised [their] judicial proceedings precisely to rid themselves of [Freedmen's] Bureau courts."[259] Believing the state courts "were making

---

[253] Nichol, Jr., *supra* note 188, at 974.

[254] *See, e.g.*, CONG. GLOBE, 42d Cong., 1st Sess. 320 (1871) (statement of Rep. Stoughton); *see also* Wright et al., *supra* note 184, at 701–03 (detailing testimony).

[255] *Id.* at 150–51 (statement of Sen. Sumner) (quoting petition from Georgians).

[256] FONER, *supra* note 184, at 149; *see also* OLIVER O. SAMUEL, REPORT OF THE COMMISSIONER OF THE BUREAU OF REFUGEES, FREEDMEN, AND ABANDONED LANDS 2 (1866) (reporting the "unfairness of [state] courts").

[257] Nichol, Jr., *supra* note 188, at 976.

[258] *See, e.g.*, CONG. GLOBE, 42d Cong., 1st Sess. 571 (1871) (statement of Sen. Ames) ("The honorable Senator had the taste, peculiar to himself, to name the person whom above all others Mississippi should send here, a man who as judge decided that by the common law of Mississippi a master could not set free his own children, his slaves, by a valid will!").

[259] FONER, *supra* note 184, at 149–50.

noteworthy progress towards securing equal rights," the Bureau ceded jurisdiction back to the local courts.[260] But the Bureau "very shortly discovered that the equal rights granted . . . were frequently not translated from the law books into courtroom practice."[261] Having reobtained jurisdiction, the local courts "entirely disregarded" the Civil Rights Act of 1866, reverting to their general practice of discrimination.[262] These same courts would not have hesitated to weaponize the common law to thwart Section 1983.

c. Following in Other Legislatures' Footsteps

Section 1983 was (in certain respects) a "novel remedial statute" upon its enactment.[263] Yet it was not alone among 1800s statutes that responded to a crisis by displacing common law defenses to secure new remedies. In fact, a multitude of state statutes enacted broad remedial statutes, with sweeping text mirroring Section 1983's to displace common law defenses that were creating a crisis of their own: railroad accidents.

Railroads were the backbone of nineteenth-century America. Trains connected cities, transformed commerce, and spurred westward expansion.[264] "Yet, trains were also wild beasts; they roared through the countryside, killing livestock, setting fire to houses and crops, smashing wagons at grade crossings, mangling passengers and freight."[265] They fueled "an accident crisis like none

---

[260] GEORGE R. BENTLEY, A HISTORY OF THE FREEDMEN'S BUREAU 156 (1955).

[261] *Id.* at 157.

[262] *Id.* at 157–58; *see also* SAMUEL, *supra* note 256, at 14–15 (noting the need to reestablish Bureau courts given the state courts' inadequacy of protecting freedmen's rights).

[263] Reinert, *supra* note 2, at 217. *But see* Baude, *Unlawful?*, *supra* note 39, at 58 (showing Section 1983 incorporated "founding-era" logic of strict liability for government officials); Jaicomo & Bidwell, *Unqualified Immunity*, *supra* note 19, at 733–43 (detailing same).

[264] FRIEDMAN, *supra* note 112, at 351.

[265] *Id.*

the world had ever seen and like none any Western nation has witnessed since."[266]

This accident crisis, in turn, produced a slew of lawsuits.[267] Judges, though, were hesitant (for various reasons) to impose liability on railroads regardless of fault.[268] So they began to amplify, revive, and devise common law rules and defenses that could restrain liability like negligence, contributory negligence, assumption of risk, and the fellow-servant rule.[269] Judges even dug up old common law rules that made no sense in the 1800s, like the maxim "a personal action dies with the person," which barred spouses and children of dead workers from bringing wrongful death suits.[270] These were "harsh doctrine[s]" for plaintiffs, who often could not obtain redress, even against negligent railroads.[271] By the mid-1800s, these doctrines "taken as a whole, came close to the position that [railroads] should be flatly immune from actions for personal injury."[272]

Legislatures responded with remedial statutes to abolish these common law defenses in railroad-accident cases. Neatly illustrative are statutes that imposed absolute liability on railroads for the fires

---

[266] John Fabian Witt, *Toward a New History of American Accident Law: Classical Tort Law and the Cooperative First-Party Insurance Movement*, 114 HARV. L. REV. 690, 694 (2001); *accord* Donald G. Gifford, *Technological Triggers to Tort Revolutions: Steam Locomotives, Autonomous Vehicles, and Accident Compensation*, 11 J. TORT L. 71, 87–88 (2018) (detailing the "staggering" death and destruction wrought by railroads).

[267] FRIEDMAN, *supra* note 112, at 351; JAMES W. ELY, JR., RAILROADS AND AMERICAN LAW 211 (2001).

[268] ELY, JR., *supra* note 267, at 211.

[269] FRIEDMAN, *supra* note 112, at 352–53; Gifford, *supra* note 266, at 83–85 (explaining mid-nineteenth century move from strict liability to negligence to accommodate railroads).

[270] FRIEDMAN, *supra* note 112, at 355; *see also* Arthur L. Corbin, *Waiver of Tort and Suit in Assumpsit*, 19 YALE L.J. 221, 236–38 (1910).

[271] *See* FRIEDMAN, *supra* note 112, at 353. Proving negligence was "made onerous by the railroad's control of the evidence behind most accidents. . . . Even when company negligence could be shown, the injured claimant still faced a potent battery of common-law defenses that operated to prevent any recovery." ELY, JR., *supra* note 267, at 213–14.

[272] FRIEDMAN, *supra* note 112, at 356.

that train engines and sparks set to land, crops, and homes.[273] Like Section 1983, they were sweeping, and read something like: "[e]very railroad corporation shall be liable for all damages . . . to any person or property within this State, by fire or steam, from any locomotive or other engine on such road."[274]

As courts themselves stressed, these fire statutes could be read in one of two ways. Either "every railroad shall be liable" really meant what it said—or common law rules and defenses applied to constrain the ordinary meaning of those words.[275]

---

[273] These fire statutes were not the only instances where legislatures abolished common law defenses. By the mid-1800s, "states began to enact laws abolishing or curtailing the fellow servant rule for railroad accidents." ELY, JR., *supra* note 267, at 215. By the late-1800s, Congress displaced contributory negligence and assumption of risk when railroads violated the Safety Appliance Act. *Id.* at 218. Legislatures of the period also displaced the common law with statutes making "railroads absolutely liable for injury to livestock upon unfenced track." *Id.* at 120–22.

[274] N.H. REV. STAT. ch. 142, § 8 (1843); *see also, e.g.*, MO. REV. STAT. § 2615 (1889) ("Each railroad corporation owning or operating a railroad . . . shall be held responsible in damages to every person and corporation whose property may be injured or destroyed by fire . . . ."); S.C. GEN. STAT. § 1511 (1882) ("Every railroad corporation shall be responsible in damages to any person or corporation whose buildings or other property may be injured by fire communicated by its locomotive engines . . . ."); Act of Jan. 13, 1874, § 3, 1874 Colo. Sess. Laws 225–26 ("That every railroad corporation . . . shall be liable for all damages by fire that is set out or caused by operating any such line of road or any part thereof . . . ."); IOWA CODE § 1289 (1873) ("[A]ny corporation operating a railway shall be liable for all damages by fire that is set out or caused by operating any such railway . . . ."); Act of Mar. 7, 1842, ch. 9, § 5, 1842 Me. Laws 6 ("[A]ny rail road corporation . . . shall be held responsible in damages" when "any injury is done to a building or other property of any person, or corporation, by fire . . . ."); Act of Mar. 23, 1840, ch. 85, § 1, 1840 Mass. Acts 228 ("[A]ny rail-road corporation . . . shall be held responsible in damages" when "any injury is done to a building or other property, or any person or corporation, by fire . . . ."). Some states, like Connecticut, enacted similar statutes but with certain qualifications to railroads' absolute liability, like contributory negligence. *See, e.g.*, Act of Apr. 12, 1881, ch. 92, § 1, 1881 Conn. Pub. Acts 48. Other states, like Massachusetts and Connecticut, initially passed narrower remedial statutes but quickly repealed them in favor of stronger ones to ensure sufficient remedies. *See* St. Louis & S.F. Ry. Co. v. Mathews, 165 U.S. 1, 10, 13–14 (1897).

[275] *See, e.g.*, Martin v. N.Y. & New Eng. Ry. Co., 25 A. 239, 240 (Conn. 1892) ("There are two views that may be taken of this statute": either it incorporates common law negligence or "it eliminates the matter of negligence entirely.").

Courts uniformly applied the "ordinary meaning" of these sweeping statutes, "instead of restricting the obvious meaning" of their words.[276] They understood the "manifest intent and design" of these "remedial" statutes[277] was to make "liability of the railroad . . . absolute"—to allow "[n]o question of care or negligence"[278]—even if absolute liability seemed "severe"[279] or imposed "great hardship upon the corporations."[280] The goal of these statutes was to ensure the loss of people's land and homes would not go unredressed. These statutes *really* meant "every railroad shall be liable."

The ordinary meaning of these statutes controlled even absent notwithstanding clauses, which none of them ever had. That is, except one: an 1840 New Hampshire statute[281] with language resembling Section 1983's and, like Section 1983, lost its notwithstanding clause upon revision three years after its enactment:

---

[276] Town of Hooksett v. Concord Ry., 38 N.H. 242, 243 (1859).

[277] *Mathews*, 165 U.S. at 11 (quoting Hart v. W. Ry. Corp., 54 Mass. (13 Met.) 99, 105 (1847)); *accord* Welch v. Concord Ry., 44 A. 304, 305 (N.H. 1895); *Martin*, 25 A. at 240.

[278] Rowell v. Ry., 57 N.H. 132, 136 (1876) (opinion of Ladd, J.); *see also id.* at 139 (opinion of Cushing, C.J.) (similar).

[279] *Mathews*, 165 U.S. at 16 (quoting Rodemacher v. Milwaukee & St. Paul Ry. Co., 41 Iowa 297, 309 (1875)).

[280] *Town of Hooksett*, 38 N.H. at 246.

[281] Act of Dec. 10, 1840, ch. 571, 1840 N.H. Laws 479.

> That every Rail Road Corporation or Company now established, or which may hereafter be established within the limits of this State, shall be deemed and held liable to pay full for all damages which shall hereafter accrue to any person or property within the same, by reason of fire or steam from any locomotive or other engine, used, or to be used upon said roads respectively, for purpose of transportation or otherwise . . . any law, usage or custom to the contrary notwithstanding. *Id.*

See also Smith v. Berryman, 199 S.W. 165, 166 (Mo. 1917) (noting that the statute's notwithstanding clause, which followed a proviso, was probably placed there in error and meant to apply to the statute's substance).

> Every railroad corporation shall be liable for all damages which shall accrue to any person or property within this State, by fire or steam from any locomotive or other engine on such road.[282]

For decades, New Hampshire courts, including the state supreme court, repeatedly held that this revised statute displaced common law defenses to impose absolute liability. These courts never so much as mentioned the omission of its notwithstanding clause.[283] Only seventy years later did the New Hampshire Supreme Court quote the original statute, including its notwithstanding clause, before casually observing the "language of the statute was somewhat simplified in the Revision of 1842."[284] The notwithstanding clause's omission was so plainly immaterial that the Court never even raised the issue. It was obvious the statute's text—"every railroad corporation shall be liable for all damages"—displaced contrary common law defenses to impose absolute liability.

This brings us to Section 1983's omitted Notwithstanding Clause.

C. Congress's "Immaterial" Omission of the Notwithstanding Clause

Given the Notwithstanding Clause's useful, reinforcing function, why did Congress remove it from Section 1983 just three years after enacting it, in the Revised Statutes of 1874, the first-ever codification of the federal laws? The prevailing assumption is that the "Revisers" (the team of lawyers that drafted the Revised Statutes) omitted the Notwithstanding Clause in "error" for

---

[282] *Compare* N.H. REV. STAT. ch. 142, § 8 (1843), *with* 42 U.S.C. § 1983 ("Every person, who, under color of any [state law], subjects or causes . . . the deprivation of any rights, privileges, or immunities . . . shall be liable . . . .").

[283] Bos. Ice Co. v. Bos. & Me. Ry., 86 A. 356, 359 (N.H. 1913) (collecting cases).

[284] *Id.* at 358.

"unknown reasons" and that Congress failed to catch it.[285] Further, it has been assumed by some that the omission of the Notwithstanding Clause undermines Section 1983's displacement of qualified immunity now that the Clause is no longer in the text.[286] But we know these assumptions are incorrect.[287]

In any event, Section 1983's Notwithstanding Clause was not omitted in error. The historical record of the Revised Statutes of 1874 reveals the true reason for the omission: concision. The Revisers followed the state codifiers before them. And everyone involved in Section 1983's revision, Congress included, recognized the omission did not alter Section 1983's meaning. This becomes clear when we (1) understand that the Revised Statutes of 1874 were meant to consolidate, not alter, the law and (2) examine the evidence left by those involved with the revisions to Section 1983.

1. The Revised Statutes Strove to Consolidate the Law Without Altering Its Operation

Before the Revised Statutes, there existed no official codification of the federal laws. People had to painstakingly sort through a mess of seventeen volumes of congressional acts just to figure out what the law was.[288] Even for the diligent, ascertaining the status of the law "was almost a practical impossibility."[289] So much of it was obsolete, modified, or repealed.[290] Moreover, the federal law's

---

[285] *See* Reinert, *supra* note 2, at 207, 237. Reinert's presumption of error is partly based on the fact that the Revised Statutes of 1874 did indeed contain errors. Dwan & Feidler, *supra* note 21, at 1014.

[286] REV. STAT. § 5596 (1874) ("All acts of Congress passed prior [to the Revised Statutes of 1874], any portion of which is embraced in any section of said revision, are hereby repealed . . . ."); *see also supra* notes 10–13 and accompanying text.

[287] *See supra* Section I (detailing that notwithstanding clauses merely serve to reinforce, not alter, a statute's meaning, such that the Notwithstanding Clause's omission, error or not, does not affect Section 1983's meaning).

[288] Dwan & Feidler, *supra* note 21, at 1012.

[289] *Id.*

[290] *Id.*

"heavy volumes" were "swelling" to an unmanageable scale.[291] For years, there was an earnest push for the official codification of the federal laws.[292]

Eventually, in 1866, Congress passed "An Act to provide for the Revision and Consolidation of the Statute Laws of the United States."[293] The goal was to gather all the federal public laws and "revise, simplify, arrange, and consolidate" them into one bill that would officially recodify and repeal all the laws before it.[294] Per the statute, President Andrew Johnson appointed a three-lawyer commission (the "Revisers") to create the first draft.[295] These Revisers were to "bring together all statutes . . . omitting redundant or obsolete enactments, and making such alterations as may be necessary to reconcile the contradictions, supply the omissions, and amend the imperfections of the original text."[296] Further, they were to—and did—provide comments beside any substantive "suggestions" they made, explaining why and how they substantively altered the "original text."[297]

The Revisers completed their draft in 1872 and presented it to Congress's Committee on the Revision of the Laws (the "Revision Committee").[298] The Revision Committee was not satisfied with the draft. Though the Revisers were statutorily "authorized to make changes to some extent," the Revision Committee decided against accepting any substantive changes, concluding "it was not

---

[291] SUMNER, *supra* note 133, at 3.

[292] Dwan & Feidler, *supra* note 21, at 1012–13; *see also* President Abraham Lincoln, First Annual Message (Dec. 3, 1861) ("It seems to me very important that the statute laws should be made as plain and intelligible as possible, and be reduced to as small a compass as may consist with the fullness and precision of the will of the Legislature and the perspicuity of its language."); *Id.* (similar).

[293] Act of June 27, 1866, ch. 140, 14 Stat. 74.

[294] *Id.* § 1.

[295] Dwan & Feidler, *supra* note 21, at 1013; *see also* Act of June 27, 1866, ch. 140, § 1, 14 Stat. 74 (empowering the President to form the commission).

[296] Act of June 27, 1866, ch. 140, § 2, 14 Stat. 74.

[297] *Id.* ch. 140, § 3 (describing a statutory directive); Chapman v. Hous. Welfare Rts. Org., 441 U.S. 600, 629 (1979) (Powell, J., concurring).

[298] *See* 1 & 2 REVISERS' 1872 DRAFT, *supra* note 22.

advisable to attempt any change whatever in the existing law."[299] Substantive amendments would invite endless debate on the House and Senate floors, making passage of the Revised Statutes "utterly impossible."[300]

So Congress hired another lawyer, Thomas Durant, to spend the next nine months undoing substantive changes the Revisers made, while *leaving in* "mere changes of phraseology not affecting the meaning of the law."[301] Durant handed his draft to the Revision Committee, which then presented their draft to the House of Representatives.[302]

Revision Committee member Representative Benjamin Butler introduced the draft to the House, stressing:

> [Y]our committee felt it their bounden duty not to allow, so far as they could ascertain, any change of the law. This embodies the law as it is. The temptation, of course, was very great, where a law seemed to be imperfect, to perfect it by the alteration of words or phrases, or to make some changes. But that temptation has, so far as I know and believe, been resisted. We have not attempted to change the law, in a single word or letter, so as to make a different reading or different sense. All that has been done is to strike out the obsolete parts and to condense and consolidate except in so far as it is human to err . . . .[303]

Fellow Revision Committee member, Representative Luke Poland, followed those remarks by echoing the Committee's

---

[299] 2 CONG. REC. 646 (1874) (statement of Rep. Poland).

[300] *Id.*; *see also id.* at 648 (The Revision Committee "became satisfied that it was physically impossible to make a revision of the laws which should contain any amendment, because if you allow one amendment in way of substance, the bill is open to the amendment of every member. . . . Therefore the best that could be done was to confine themselves to reporting a bill which should codify the existing laws, and nothing more.").

[301] *Id.* at 646.

[302] *Id.*

[303] *Id.* at 129.

"endeavor[] to have this revision a perfect reflex of the existing national statutes."[304]

Given the sheer volume of the draft, reviewing it in its entirety was not viable.[305] Even so, the House convened during "two special night sessions . . . each week for as long as necessary to allow all Members . . . to scrutinize the bill" for substantive revisions.[306] All throughout these sessions, House representatives emphasized over and over their aim "to reproduce the law as it is,"[307] while acknowledging that language was "necessarily changed" to condense and rearrange seventeen volumes of law.[308] They also adopted "many amendments . . . each on the understanding that it was restorative of the original meaning of the Statutes at Large, and not an amendment to existing law."[309]

Upon passage in the House, Senator Roscoe Conkling (another member of the Revision Committee) introduced the draft to the Senate, citing the effort "to preserve absolute identity of meaning" and "not to change the law in any particular, however minute," but to condense the statutes into the first-ever codification of federal public laws.[310] After just a few minutes of discussion, the Senate

---

[304] *Id.* After Rep. Poland's remarks, Rep. Wood asked: "will [there] be anything in this revision of the laws that have not already in the Statutes at Large?" *Id.* Representative Butler answered: "Nothing; at least we do not intend there shall be." *Id.*

[305] *Id.* at 650 (1874) (statement of Rep. Lawrence).

[306] Chapman v. Hous. Welfare Rts. Org., 441 U.S. 600, 638–39 (1979) (Powell, J., concurring).

[307] 2 CONG. REC. 647 (1874) (statement of Rep. Dawes); *see also id.* at 649 (Rep. Holman) ("I consider it necessary that this revision should be carefully examined, to ascertain whether, upon any given subject, there has been an alteration of the law."); *id.* at 826 (Rep. Lawrence) ("It was the purpose of Mr. Durant's revision to present the actual state of the law as it existed on the 1st day of December, 1873 . . . .").

[308] *Id.* at 1210 (statement of Rep. Poland); *see id.* at 646 (statement of Rep. Poland) (stating the Revised Statutes consolidated the first seventeen volumes of the Statutes at Large); *id.* at 650 (statement of Rep. Lawrence) ("This volume does not undertake to present the text of the statutes on any one subject as enacted by Congress. That would be utterly impossible. You have a half dozen statutes on a different subject, one modifying another, and a subsequent statute modifying both, and it is impossible to collect these together and preserve the original text of the laws passed by Congress.").

[309] *Chapman*, 441 U.S. at 638–39 (Powell, J., concurring).

[310] 2 CONG. REC. 4220 (1874) (statement of Sen. Conkling).

passed the Revised Statutes of 1874 into law.[311] Thus, at every step of the process—from drafting to codification—Congress demonstrated its intent to not change the law.

Given the non-substantive aims of the Revised Statutes, the Supreme Court repeatedly held "it will not . . . infer[] that the legislature, in revising and consolidating the laws, intended to change their policy, unless such intention be *clearly expressed*."[312]

2. Congress Removed the Notwithstanding Clause for Concision, Not Substance

Far from any "clear expression" of substantive change, the Revisers deliberately removed the Notwithstanding Clause simply for concision, and everyone who reviewed the work viewed this change as non-substantive, in line with the Revised Statutes' goal of simplifying and rearranging, yet preserving, the law as it was.

a. The Revisers and Thomas Durant

There are three possible explanations for why the Revisers omitted the Notwithstanding Clause: their omission was (1) unintended, (2) deliberate and substantive, or (3) deliberate and non-substantive.

We can rule out the first possibility. The Revisers removed nearly identical notwithstanding clauses contained in the Civil Rights Acts

---

[311] *Id.*; *Chapman*, 441 U.S. at 639 n.22 (Powell, J., concurring) (noting brief Senate debate); Runyon v. McCrary, 427 U.S. 160, 168 n.8 (1976) ("When the [Revisers] were exercising their § 3 power of recommendation, they so indicated, in accordance with the requirements of § 3.").

[312] United States v. Ryder, 110 U.S. 729, 739–40 (1884) (emphasis added); *see also* Fourco Glass Co. v. Transmirra Prods. Corp., 353 U.S. 222, 227 (1957) (citing cases); *cf.* SEDGWICK, *supra* note 25, at 428–29 (reciting the "cardinal and controlling maxim" that "mere change[s] of phraseology shall not be deemed or construed a change of the law, unless such phraseology evidently purport an intention in the legislature to work a change").

of 1866 and 1870.[313] The Revisers did not commit the same mistake thrice over.

We also can rule out the second possibility: a deliberate attempt to upend Section 1983 a year after its enactment (by, of all means, the mere omission of a reinforcing clause).[314] In a report to Congress that detailed their interpretation of their statutory role, the Revisers made clear their commitment to reproducing "[e]very essential provision of the existing laws" and "to omit nothing which is neither obsolete nor redundant."[315] The Revisers did report having *added* potentially substance-altering language. Yet, they did so only when they felt a statute's "intended effect" required it,[316] and even then, such changes were "minor."[317]

Further, the Revisers were directed, by statute, to leave explanatory comments beside any of their potentially substantive "suggestions."[318] They satisfied this directive,[319] leaving marginal comments even beside revisions they made to the 1866 and 1870 Civil Rights Acts.[320] Yet they left no marginal comments beside their

---

[313] *Compare* Civil Rights Act of 1866, § 1, 14 Stat. 27, *with* REV. STAT. § 1978 (1874) (now 42 U.S.C. § 1982); *compare* Civil Rights Act of 1870, § 16, 16 Stat. 144, *with* REV. STAT. § 1977 (1874) (codified at 42 U.S.C. § 1981).

[314] The Revisers submitted their draft to Congress in 1872, a year after the Civil Rights Act of 1871's passage. *See* 1 REVISERS' 1872 DRAFT, *supra* note 22.

[315] WILLIAM P. JOHNSTON & CHARLES P. JAMES, REPORT OF THE COMMISSIONERS TO REVISE THE STATUTES OF THE UNITED STATES, H.R. Misc. Doc. No. 40-31, at 2 (1869) [hereinafter REVISERS' REPORT]. Only two Revisers signed the report, as the third, Caleb Cushing, had resigned. *Id.* at 3.

[316] *Id.* at 2.

[317] SUPERINTENDENT OF DOCUMENTS, 1 CHECKLIST OF U.S. PUBLIC DOCUMENTS 1789–1909, at 969 (3d ed. 1911) [hereinafter CHECKLIST OF U.S. PUBLIC DOCUMENTS].

[318] Act of June 27, 1866, ch. 140, § 3, 14 Stat. 74.

[319] Runyon v. McCrary, 427 U.S. 160, 169 n.8 (1976) ("When the [Revisers] were exercising their § 3 power of recommendation, they so indicated, in accordance with the requirements of § 3."); *accord* Chapman v. Hous. Welfare Rts. Org., 441 U.S. 600, 629 (1979) (Powell, J., concurring); 1 CHECKLIST OF U.S. PUBLIC DOCUMENTS, *supra* note 317, at 969 (stating that the Revisers "made many minor changes in the wording of the statutes, though such changes were noted in the margins.").

[320] For example, the Revisers recommended removing the phrase "or such portion of the land or naval forces" in what is now 42 U.S.C. § 1989 to accord with the "inten[t]

edits to Section 1983.[321] They did, however, cite to the original act in the margins, as codifiers before them did, so that courts could look to the original text for guidance on legislative intent.[322] By referring to the Act, courts would find the Notwithstanding Clause, a clear signal of "the drafter's intention" that Section 1983 "supersede all [contrary state] laws."[323]

That leaves our final possibility—really, the only one that makes any sense. The Revisers removed the Notwithstanding Clause for the same, non-substantive reason other nineteenth-century codifiers removed theirs: "[b]revity."

"Brevity" was the Revisers' watchword when discussing their work.[324] Like the codifiers before them, the Revisers strove to revise with "language to which [everyone] are accustomed"[325] and trim the bulky legalese that comprised the law's "heavy volumes."[326] Congress hired the Revisers precisely to "arrange" and "simplify" the federal laws.[327] They did just that. By our estimates, the Revisers condensed over 13,000 pages of statutes to under 2,700 pages.[328] The

---

[of] Congress." 1 REVISERS' 1872 DRAFT, *supra* note 22, at 950. Elsewhere, the Revisers recommended removing a phrase in since-repealed 42 U.S.C. § 1993 after surmising the phrase either was of "very questionable constitutional validity" or "on the other hand . . . evidently useless." *Id.* at 951–52.

[321] *Id.* at 947; *cf.* Muniz v. Hoffman, 422 U.S. 454, 455 (1975) ("Absent an express provision or any indication in the Revisers' Note . . . that a substantive change in the law was contemplated, no intention on Congress' part to change its original intention . . . is shown . . . .").

[322] 1 REVISERS' 1872 DRAFT, *supra* note 22, at 947 (reporting revised Section 1983 text, with marginal citation to original enactment of "20 April, 1871, ch. 22, § 1, vol. 17, p. 13"); *see also* REV. STAT. § 1979 (1874) (same).

[323] *Cf.* Cisneros v. Alpine Ridge Grp., 508 U.S. 10, 18 (1993).

[324] REVISERS' REPORT, *supra* note 315, at 2, 3.

[325] *Id.* at 2.

[326] *See* SUMNER, *supra* note 133, at 3.

[327] Act of June 27, 1866, ch. 140, § 1, 14 Stat. 74.

[328] *See generally* 1 & 2 REVISERS' 1872 DRAFT, *supra* note 22. The Revisers were directed by Congress to codify all the federal public laws from the first seventeen volumes of the U.S. Statutes at Large (excluding, it seems, volumes six through eight, which cover private laws and treaties). These fourteen volumes totaled over 13,000 pages. The Revisers' ability to condense down to under 2,700 pages is largely due to obsolete laws,

Revisers rearranged and simplified Section 1983 too. They rearranged Section 1983 by separating its substantive provision from its jurisdictional provisions.[329] Then, they simplified the substantive part where they could—such as by removing the Notwithstanding Clause, which merely reinforced the plain text they preserved: "Every person . . . shall be liable."

The Revisers were accomplished lawyers, judges, treatise authors, and some "of the great compilers of digests and of statutes in American legal history."[330] They no doubt understood the "cardinal and controlling maxim" that a statute would not change "by such alterations as are merely designed to render the provisions more concise."[331] They no doubt understood the meaning of the "ubiquitous" notwithstanding clause too.[332] The Revisers even spoke on their function. Reviser Benjamin Vaughan Abbott, in his legal dictionary, defined a notwithstanding clause as an "instrument . . . to preclude in advance any construction contrary to certain declared purposes."[333] Reviser Caleb Cushing observed that omitting one did not change a statute's meaning. In an opinion issued as Attorney General, Cushing explained that a statute providing a June 30 effective date, "any law or laws of the

---

which they did not need to codify. Without question though, the Revisers also lowered the page count by substantially simplifying text where they could. That is clear by comparing their revisions to any number of statutes as originally enacted in the Statutes at Large. *Compare* Act of Apr. 30, 1790, ch. 9, § 10, 1 Stat. 1790 (containing 124 words as originally enacted), *with* REV. STAT. § 5323 (1874) (containing 42 words as revised), *and* 2 REVISERS' 1872 DRAFT, *supra* note 22, at 2561 (reducing to 25 words). The Revisers also removed unnecessary formal words wherever they could. *Compare* Act of Feb. 9, 1871, ch. 22, § 1, 16 Stat. 594 ("That the President be, and he hereby is, authorized and required to appoint . . . ."), *with* 2 REVISERS' 1872 DRAFT, *supra* note 22, at 2113 ("There shall be appointed by the President"), *and* REV. STAT. § 4395 (1874) (same).

[329] *Compare* Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13, *with* REV. STAT. § 1979 (1874) (addressing substance), REV. STAT. § 563(12) (1874) (addressing district court jurisdiction), *and* REV. STAT. § 629(16) (1874) (addressing circuit court jurisdiction).

[330] Dwan & Feidler, *supra* note 21, at 1013; *see also, e.g.*, 2 BENJAMIN VAUGHAN ABBOTT, A TREATISE UPON THE UNITED STATES COURTS AND THEIR PRACTICE (1871).

[331] SEDGWICK, *supra* note 25, at 428–29.

[332] *See* Nelson, *Preemption*, *supra* note 18, at 239–40.

[333] 2 ABBOTT, *supra* note 330, at 178.

United States to the contrary notwithstanding," would take effect on that date with or "without that clause."[334]

Thomas Durant, the lawyer who deleted the Revisers' substantive edits, viewed the Revisers' omission as non-substantive, too. In his report to Congress, Durant assured that "wherever it has been found that a section contained any departure from the meaning of Congress as expressed in the Statutes at Large, such change has been made as was necessary to restore the original signification."[335] He made well over a hundred revisions to that effect.[336] Yet he made no changes to Section 1983.[337]

b. Congress and the Revision Committee

Given the sheer size of revisions to review, it might seem improbable that Congress seriously considered the changes to Section 1983. But they did. During one special session, Revision Committee member Representative William Lawrence carefully compared the original and revised versions of various provisions in the Civil Rights Acts—including Section 1983. He lauded the revised provisions "as a fair specimen of the manner in which the work had been done."[338] No House member objected to the revisions, "indicat[ing] [their] understanding that no change in substance had been effected."[339] Their silence spoke volumes

---

[334] Ambassadors and Other Public Ministers, 7 Op. Att'y Gen. 186, 215–16 (1855); Dwan & Feidler, *supra* note 21, at 1013 (noting that Caleb Cushing, former Attorney General, was chairman of the Revisers). Cushing left the Revisers in 1868, so he didn't omit the 1871-enacted Notwithstanding Clause. *See id.* He may have omitted the 1866 Civil Rights Act's notwithstanding clause, however. Whatever the case, the point here is to further underscore that nineteenth-century lawyers, legislatures, and judges understood the non-substantive function of these clauses.

[335] *See* THOMAS DURANT, REPORT OF THE COMMITTEE OF THE SENATE AND HOUSE OF REPRESENTATIVES OF THE REVISION OF LAWS 1 (1873) [hereinafter DURANT 1873 DRAFT].

[336] *See id.*

[337] *See id.*

[338] 2 CONG. REC. 827–28 (1874).

[339] Chapman v. Hous. Welfare Rts. Org., 441 U.S. 600, 639 n.23 (1979) (Powell, J., concurring).

because the House was "convened for the sole purpose of detecting language in the revision that changed the meaning of existing law."[340]

We found no evidence that Congress scrutinized the omission of Section 1983's Notwithstanding Clause in particular. But they did review notwithstanding clauses in other statutes. For example, the Revisers' draft retained the clause "anything in the law or regulations respecting consular fees to the contrary notwithstanding" in a statute about such fees. Congress omitted that clause, evidently deeming it unnecessary, given that all the laws "respecting consular fees" were now together, in the Revised Statutes of 1874.[341]

Conversely, the Revisers omitted the clause "any decision of any such court rendered since the adoption and passage of such constitution and laws to the contrary notwithstanding." Congress put that clause back in, evidently worried that the preemptive effect of certain bankruptcy exemptions on future state court decisions would be nonobvious to courts.[342]

Evidently, Congress, like the Revisers, viewed Section 1983's preemptive effect as self-evident. The statute's purpose was to override contrary state law and state action; its text, even without the Notwithstanding Clause, made that clear: "[e]very person" who acts "under color of any statute, ordinance, regulation, custom, or usage of any State . . . shall be liable" for violating a person's rights "secured by the Constitution and laws."[343]

Given Congress's attention to notwithstanding clauses in consular and bankruptcy laws, it's implausible that they

---

[340] *Id.* at 639.

[341] *Compare* Act of Aug. 5, 1861, ch. 49, 12 Stat. 315 (containing the clause "anything in the law or regulations respecting consular fees to the contrary notwithstanding"), *with* 1 REVISERS' 1872 DRAFT, *supra* note 22, at 815 (same), *and* REV. STAT. § 1720 (1874) (removing clause).

[342] *Compare* Act of Mar. 3, 1873, ch. 235, 17 Stat. 577 (containing clause), *with* 2 REVISERS' 1872 DRAFT, *supra* note 22, at 2414 (omitting clause), *and* REV. STAT. § 5045 (1874) (reinserting clause).

[343] REV. STAT. § 1979 (1874).

overlooked the omission of the three notwithstanding clauses in the three momentous Civil Rights Acts they had recently passed. Yet, even if Congress somehow overlooked the omission, that does not change the fact that a notwithstanding clause's role is merely to reinforce—not alter—a statute's meaning. Indeed, Congress has recognized this fact for decades, having omitted dozens of notwithstanding clauses in the U.S. Code "as unnecessary."[344] The absence of Section 1983's Notwithstanding Clause, therefore, works no substantive change either way.

c. The Supreme Court

The Supreme Court has recognized the Notwithstanding Clause's omission as non-substantive. Just nine years after the Revised Statutes of 1874, the Supreme Court recognized the Notwithstanding Clause's omission as non-substantive in the *Civil Rights Cases*.[345] It did so by explaining the function, and omission, of Section 1981's notwithstanding clause, the apparent model for Section 1983's Notwithstanding Clause:

> In the Revised Statutes, it is true, a very important clause, to-wit, the words 'any law, statute, ordinance, regulation, or custom to the contrary not-withstanding,' which gave the

[344] *See, e.g.*, 31 U.S.C. § 1110 (1982) (Historical and Revision Notes) ("The words 'Notwithstanding any other provision of law' are omitted as unnecessary."). Congress even omitted the clause "any laws to the contrary notwithstanding" "as unnecessary" in the 1966 supplement to the U.S. Code, a year before *Pierson*'s incorporation of qualified immunity into Section 1983. 5 U.S.C. § 2902 note (1982) (Historical and Revision Notes).

Often, Congress omits broad, all-encompassing clauses (like Section 1983's Notwithstanding Clause), while retaining narrower clauses where omission would obscure meaning. *See, e.g.*, 49 U.S.C. § 80503 (Historical and Revision Notes) (1994) (retaining the narrow clause, "Notwithstanding section 451 of the Tariff Act of 1930" but omitting the broad clause, "Notwithstanding any other provision of law" "as unnecessary because of [codification]"); H.R. REP. No. 109-170, at 136–37 (2005), *reported in* 2006 U.S.C.C.A.N. 972, 1041 (omitting ten broad notwithstanding clauses "as unnecessary," yet retaining "Notwithstanding subsection (c)(2) of this section").

[345] Civil Rights Cases, 109 U.S. 3, 16–17 (1883).

> declaratory section its point and effect, are omitted; but the penal part, by which the declaration is enforced, and which is really the effective part of the law, retains the reference to State laws by making the penalty apply only to those who should subject parties to a deprivation of their rights under color of any statute, ordinance, custom, etc., of any State or Territory, *thus preserving the corrective character of the legislation*.[346]

Like any other notwithstanding clause, Section 1981's clause served to underscore the statute's displacement of contrary laws, which was "preserv[ed]" despite its omission.[347] Later, in 1939, the Court commented on Section 1983's revisions, observing that changes made to accommodate codification "were not intended to alter the scope of the provision."[348]

Finally—just one year after the Court overlooked the Notwithstanding Clause to created qualified immunity in *Pierson v. Ray*—every Justice on the Court underscored the non-substantive purpose and omission of Section 1982's near-identical notwithstanding clause:

> It is, of course, immaterial that § 1 ended with the words "any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding." The phrase was obviously inserted to . . . emphasiz[e] the supremacy of the 1866 statute over inconsistent state or local laws, if any. It was

---

[346] *Id.* (emphasis added).

[347] *Id.*

[348] Hague v. Comm. for Indus. Org., 307 U.S. 496, 510 (1939); *accord* SEDGWICK, *supra* note 25, at 428–29 (citing the "cardinal and controlling maxim" that a statute would not change "by such alterations as are merely designed to render the provisions more concise.").

> deleted, presumably as surplusage, in § 1978 of the Revised Statutes of 1874.[349]

The Court could not have been more emphatic, nor the non-substantive nature of the omission more "obvious."[350] Section 1982's notwithstanding clause reinforced the plain meaning of "all persons . . . shall have the same right[s] . . . enjoyed by white citizens" against contrary state law, "if any."[351] The 1874 omission, "of course," never changed the statute's supremacy over state law.[352]

The Revisers deliberately removed the Notwithstanding Clause to simplify and condense Section 1983, just as many codifiers before them had long done. They knew this would not change Section 1983. So did Congress.

The contrary view is untenable. It would compel the conclusion that, against all the historical evidence, Congress intended to

---

[349] Jones v. Alfred H. Mayer Co., 392 U.S. 409, 422 n.29 (1968); *id.* at 453 (Harlan, J., dissenting) ("[S]ince intervening revisions have not been meant to alter substance, the intended meaning of § 1982 must be drawn from the words in which it was originally enacted."). It is true the Supreme Court has on occasion declined to take "at face value" the "customary stout assertions of the codifiers that they had merely clarified and reorganized without changing substance." Maine v. Thiboutot, 448 U.S. 1, 8 n.5 (1980) (quoting United States v. Price, 383 U.S. 787, 803 (1966)). Those occasions, however, concerned the *addition* of a phrase in the Revised Statutes, which is far different than an "immaterial" *omission* of a Clause meant only to reinforce the text the Revisers preserved in Section 1983. *See id.* at 5–6 (interpreting addition of "and laws" in Section 1983); *Price*, 383 U.S. at 803 (interpreting broader language in what is now 18 U.S.C. § 242).

[350] Brief for United States as Amicus Curiae Supporting Respondents at 41–42, Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) (No. 645) ("[I]t seems obvious that the [notwithstanding clause] merely declare the supremacy of the federal statute over inconsistent local laws, if "any" there be. . . . Clearly, the compilers of the Revised Statutes were fully warranted in deleting these words as wholly superfluous in 1874 when the supremacy of federal statutes implementing the postwar Amendments was more clearly understood.").

[351] The Supreme Court's use of "if any" indicates its understanding that the Notwithstanding Clause targeted unknown or future laws, not just the law under which a state official acted "under color of." *See supra* note 195 and accompanying text.

[352] *Alfred Mayer*, 392 U.S. at 422 n.29.

impliedly repeal a substantive portion of momentous civil rights legislation they had just enacted in the wake of a Civil War and constitutional crisis, merely by omitting a clause that just reinforced Section 1983's preserved plain language—during a codification process meant to condense, yet preserve, the federal laws. Although the decision to omit the Clause may be perplexing today, it was not in 1874. Codification was "impossible" without taking these risks.[353] "No one" could "condense seventeen volumes into one," printable volume, "and use precisely the same words that have been used in these seventeen."[354] Condensation was a must; language was "necessarily changed."[355] But the goal was to keep everything "precisely as it was"[356]—just to shorten the length.

Despite Section 1983's Notwithstanding Clause having just been enacted, the Revisers and Congress knew they could omit it. Courts no longer depended on notwithstanding clauses to let new law supersede the old.[357] Instead, courts were focusing more on the statute's text, as statutes began to predominate over the unwritten common law. The codification movement produced simpler, more concise statutes that were doing away with archaic, clunky clauses. And courts' reflexive reliance on the derogation canon, which courts used to incorporate common law doctrines like qualified immunity, was waning. The canon's usefulness had "'entirely passed away' by the mid-nineteenth century."[358] Indeed, the

---

[353] 2 CONG. REC. 1619 (1874) (statement of Rep. Lawrence) (noting it is "utterly impossible to select any words of the existing statutes which would convey the present state of the law," given the multitude of amendments affecting any one law); *see also id.* at 650 ("This volume does not undertake to present the text of the statutes on any one subject as enacted by Congress. That would be utterly impossible. You have a half dozen statutes on a different subject, one modifying another, and a subsequent statute modifying both, and it is impossible to collect these together and preserve the original text of the laws passed by Congress.").

[354] *Id.* at 1210 (statement of Rep. Poland).

[355] *Id.*

[356] *Id.* at 650 (statement of Rep. Lawrence).

[357] *See supra* notes 66–79 and accompanying text.

[358] Reinert, *supra* note 2, at 219; *see also id.* at 221–34 (surveying courts' waning reliance on the derogation canon).

Revisers themselves renounced the derogation canon *in their draft*, proposing this enactment: "[t]he rule of the common law, that statutes in derogation of that law are to be strictly construed, has no application to the enactments contained in [these Revised Statutes]."[359] Their reason was clear: federal laws were "not founded upon the idea that they are modifications grafted upon the common law previously adopted as the basis of jurisprudence."[360] The Revisers understood that Section 1983 should stand on its own terms—"every person shall be liable"—and not be bound by unmentioned common law rules.

Why would the 43rd Congress remove a Notwithstanding Clause the 42nd Congress had just enacted? The answer lies in their differing objectives. In contrast to the 42nd Congress—which used broad, redundant, precautionary language to ensure the Civil Rights Act of 1871's effectiveness during a national "emergency"—the 43rd Congress needed to drastically condense the federal laws for codification. Though the emergency remained in 1874, Section 1983's original text had been set in stone. Thus, the 43rd Congress could excise cautiously redundant language for codification. They replaced the Notwithstanding Clause with a simpler safeguard: a marginal citation to the original text they revised. That way, the original text of Section 1983 would always be there for courts to refer to "in cases of doubt" to "ascertain legislative intent."[361] Upon referring to the original text, a court would find Congress's "clear[]

---

[359] 1 REVISERS' 1872 DRAFT, *supra* note 22, at 13.

[360] *Id.* Thomas Durant excised the Revisers' "Rules of Construction" Chapter (which contained the Revisers' proposal for an anti-Derogation statute). He did so only because the Chapter was not formerly a part of the Statutes at Large. DURANT 1873 DRAFT, *supra* note 335, at 2.

[361] Doyle v. Wisconsin, 94 U.S. 50, 51 (1876); *accord* United States v. Lacher, 134 U.S. 624, 626–27 (1890); Johns v. Hodges, 33 Md. 515, 524 (1871) ("If the provision [of our revised statutes] is doubtful, reference to the antecedent law may aid in determining its true intent and purpose."); SUTHERLAND, *supra* note 31, at 210 (asserting that "original statutes may be resorted to for ascertaining [their] meaning" of revised language); *see also supra* note 175 (collecting cases doing this); *supra* Section I.C. (same).

signal[]" of their "intention" that *every person shall be liable, any contrary state law notwithstanding*.[362]

III. THE NOTWITHSTANDING CLAUSE TODAY

The Notwithstanding Clause's "implications are unambiguous."[363] As Reinert concludes in his article, the Clause "directly undermines *Pierson*," which incorporated qualified immunity into Section 1983 based solely on Mississippi common law (as of 1943).[364] This Article has shown the Clause's omission changes nothing. The Notwithstanding Clause was never necessary for Section 1983's displacement of qualified immunity. Section 1983's text did that on its own with the words "every person shall be liable." The Notwithstanding Clause merely reinforced those words by instructing courts not to override them with contrary state laws. Its omission never changed the words it reinforced. So its omission cannot justify disavowing their ordinary meaning.

There is simply no textual, or historical, justification for qualified immunity. There is no intent-based justification for qualified immunity either, given that the Notwithstanding Clause signaled Congress's intent for Section 1983 to supersede all contrary state laws.

That leaves the Supreme Court with justifying *Pierson*'s incorporation of qualified immunity on policy grounds or stare decisis. The Supreme Court has been emphatic on the policy front: "[w]e do not have a license to establish immunities from §

---

[362] *Cf.* Cisneros v. Alpine Ridge Grp., 508 U.S. 10, 18 (1993).

[363] Reinert, *supra* note 2, at 236.

[364] *Id.*; *see also* Pierson v. Ray, 386 U.S. 547, 554–55 & n.11 (1967) (citing Golden v. Thompson, 11 So. 2d 906 (Miss. 1943)). In *Golden*, the Mississippi Supreme Court adopted a common law immunity doctrine that it said was the "minority" rule. *Golden*, 11 So. 2d at 907.

1983 actions in the interests of what we judge to be sound public policy."[365]

What about stare decisis? It is, of course, "not an inexorable command"[366] but is itself a "policy judgment."[367] Indeed, the Supreme Court has, on multiple occasions, disregarded stare decisis for policy considerations in the interest of qualified immunity.[368] The Court also has disregarded stare decisis where, as here, Section 1983's text and history demonstrates precedent to be wrong.[369] *Pierson* was not just wrong but flagrantly wrong. Section 1983's plain text did not incorporate common-law immunities and defenses; it expressly excluded them. Nevertheless, the Court professed unjustifiable "doubt" that Congress intended the ordinary meaning of Section 1983's text.[370]

Yet, even if the Court's doubt was justified, "cases of doubt" are resolved by review of "the original act to ascertain legislative

---

[365] Tower v. Glover, 467 U.S. 914, 922–23 (1984); Burns v. Reed, 500 U.S. 478, 493 (1991); *see also* Ziglar v. Abbasi, 582 U.S. 120, 159–60 (2017) (Thomas, J., concurring) ("Our qualified immunity precedents . . . represent precisely the sort of 'freewheeling policy choice[s]' that we have previously disclaimed the power to make." (alteration in original) (quoting Rehberg v. Paulk, 556 U.S. 356, 363 (2012))).

[366] Pearson v. Callahan, 555 U.S. 223, 233 (2009) (quoting State Oil Co. v. Kahn, 522 U.S. 3, 20 (1997)).

[367] Agostini v. Felton, 521 U.S. 203, 235 (1997).

[368] *See, e.g.*, Harlow v. Fitzgerald, 457 U.S. 800, 819 (1982) (replacing *Pierson*'s good-faith and probable cause standard with the more robust "clearly established" test); *Pearson*, 555 U.S. at 233 (overruling Saucier v. Katz, 533 U.S. 194 (2001), to hold that courts may first consider the "clearly established" prong of qualified immunity before determining whether a constitutional violation occurred, thus allowing courts to avoid creating precedent that would "clearly establish" constitutional limits).

[369] *See, e.g.*, Monell v. Dep't of Soc. Servs., 436 U.S. 658, 659, 690–93 (1978) ("Considerations of *stare decisis* do not counsel against overruling *Monroe v. Pape*" based on "the language" and "legislative history" of § 1983). *But see* Baxter v. Bracey, 140 S. Ct. 1862, 1864 n.2 (2020) (mem.) (Thomas, J., dissenting from the denial of certiorari) (suggesting the *Monroe-Monell* debate is ongoing).

[370] Pierson v. Ray, 386 U.S. 547, 555 (1967); *contra* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 421–22 (1968) (rejecting respondents' argument that "Congress cannot possibly have intended" "so literal a reading of § 1982," after examining "the relevant history," including the original text).

intent."[371] Had the Court in *Pierson* properly reviewed Section 1983's original text, Congress's intent to displace qualified immunity would have been obvious. After all, the same Justices unanimously recognized Section 1982's notwithstanding clause as an "obvious[]" expression of "supremacy . . . over inconsistent state or local laws," and its omission as "immaterial."[372] The same must be said of its counterpart, Section 1983's Notwithstanding Clause.[373]

But the Court instead ignored the text, overlooked the original enactment, and applied the defunct derogation canon, whose application "for a novel remedial statute like Section 1983 is unprecedented."[374] Whatever life the derogation canon might have had left by 1871, the Notwithstanding Clause confirmed that Section 1983 "derogate[d]" state common law immunities.[375]

Ultimately, *Pierson* rested on the presumption that if Congress had intended to displace such immunities, it "would have specifically so provided."[376] In other words, Congress needed to itemize every conceivable state obstacle to liability, "present or future,"[377] known or "unclear."[378] What *Pierson* missed is that the

---

[371] Doyle v. Wisconsin, 94 U.S. 50, 51 (1876). This was the Supreme Court's standard practice leading up to *Pierson*. *See, e.g.*, United States v. Bowen, 100 U.S. 508, 513 (1879); Merchants' Nat'l Bank of Balt. v. United States, 214 U.S. 33, 40 (1909); Fourco Glass Co. v. Transmirra Prods. Corp., 353 U.S. 222, 227–28 (1957); City of Greenwood, Miss. v. Peacock, 384 U.S. 808, 815–16 (1966).

[372] *Alfred Mayer*, 392 U.S. at 422 n.29. Justice Fortas sat for *Pierson*; Justice Marshall replaced him and sat for *Alfred Mayer*. The *Pierson* and *Alfred Mayer* benches were otherwise identical.

[373] *Compare* Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13 (codified at 42 U.S.C. § 1983) (guaranteeing rights "any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding"), *with* Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (codified at 42 U.S.C. § 1982) (guaranteeing rights "any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding").

[374] Reinert, *supra* note 2, at 217.

[375] *See* SCALIA & GARNER, *supra* note 17, at 126 (explaining derogating function of notwithstanding clauses).

[376] Pierson v. Ray, 386 U.S. 547, 554–55 (1967).

[377] Brief for United States as Amicus Curiae Supporting Respondents at 41–42, Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) (No. 645).

[378] SCALIA & GARNER, *supra* note 17, at 127.

Notwithstanding Clause served "to avoid the burden," and impossibility, "of having to list" all contrary state laws.[379]

The Supreme Court has only compounded *Pierson*'s errors in ensuing years. Just fifteen years later, in *Harlow v. Fitzgerald*, the Court "completely reformulated qualified immunity along principles not at all embodied in the common law."[380] *Harlow*'s reformulation of qualified immunity has made it even harder for victims to vindicate their constitutional rights. Now, a plaintiff must show the defendant state actor violated their "clearly established" rights, a demanding and finicky standard that usually requires same-circuit precedent with nearly identical facts.

Reversing *Pierson*'s error, and restoring Section 1983's original meaning, is vitally important. More than what William Eskridge and John Ferejohn call a "super-statute,"[381] Section 1983 is a statute of constitutional significance—in its own words, it is "An Act to enforce the Provisions of the Fourteenth Amendment."[382] Such legislation was vital to securing the Amendment's newly guaranteed rights and, ultimately, to preserving the American constitutional system.[383] Section 1983's original meaning and history should prevail over errant precedent that has eroded Americans' ability to redress even the most egregious violations of their constitutional rights.

In many respects, Congress gave the Supreme Court no easy task in interpreting Section 1983 or other provisions of the Civil Rights

---

[379] Nelson, *Preemption*, *supra* note 18, at 235–36.

[380] 457 U.S. 800 (1982); Anderson v. Creighton, 483 U.S. 635, 645 (1987) (finding that "*Harlow* . . . completely reformulated qualified immunity along principles not at all embodied in the common law").

[381] William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1225–26 (2001); *see also id.* at 1216 (coining "super-statutes" to describe statutes that seek a "new normative or institutional framework for state policy" and "have a broad effect on the law.").

[382] Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13 (titled "An Act to enforce the Provisions of the Fourteenth Amendment").

[383] *Cf.* U.S. CONST. amend. XIV, § 5 (empowering Congress to "enforce" the Fourteenth Amendment by "appropriate legislation").

Acts.[384] But Congress gave the Court clear instructions when it came to state common law immunities: [a]pply the words "every person shall be liable," not contrary state laws that distort the ordinary meaning of those words. Some Justices on the Court have, in one form or another, begun to take notice of the flaws in qualified immunity's foundation.[385] Now that this Article has shown the doctrine has no foundation at all, the Court should finally tear it down.

CONCLUSION

The 42nd Congress passed Section 1983 to redress rampant, state-sanctioned rights violations that had gone "entirely unpunished."[386] To ensure redress, they used sweeping language: "[e]very person shall be liable." To ensure courts would not disregard that text, they told courts: every means every, *any contrary state law notwithstanding*—including the state common law defense of qualified immunity. Section 1983's substantive text displaced qualified immunity on its own; the Notwithstanding Clause's job was to ensure courts understood that.

The 43rd Congress strove to finally complete an eight-year project that was decades overdue: compiling all the federal laws into a

---

[384] *See* Harcar, *supra* note 14, at 418 (raising questions of causation and intent in Section 1983 claims); Nelson, *Preemption*, *supra* note 18, at 297 (observing the Civil Rights Act of 1866 contains ambiguities but concluding "it would have been odd for courts to conclude that each ambiguity should be resolved in favor of maximizing state authority").

[385] *See, e.g.*, Price v. Montgomery Cnty., 144 S. Ct. 2499, 2500 n.2 (2024) (mem.) (Sotomayor, J., statement respecting denial of certiorari) ("[Reinert's] new scholarship reinforces why, at a minimum, this immunity doctrine should be employed sparingly."); Ziglar v. Abbasi, 582 U.S. 120, 159–60 (2017) (Thomas, J., concurring) ("Because our analysis is no longer grounded in the common-law backdrop against which Congress enacted the 1871 Act, we are no longer engaged in 'interpre[ting] the intent of Congress in enacting' the Act. Our qualified immunity precedents instead represent precisely the sort of 'freewheeling policy choice[s]' that we have previously disclaimed the power to make." (alterations in original) (first quoting Malley v. Briggs, 475 U.S. 335, 342 (1986); and then quoting Rehburg v. Paulk, 566 U.S. 356, 363 (2012))).

[386] CONG. GLOBE, 42d Cong., 1st Sess. 436, 440 (1871) (statement of Rep. Cobb).

single, printable book.[387] Drastic condensation was necessary. Clunky, archaic clauses that merely reinforced plain text—and whose omissions were thus "immaterial" to a statute's meaning—were the first to go.[388] So Congress deliberately omitted the Notwithstanding Clause for concision, not substance, just as other legislatures had done to their notwithstanding clauses for decades.

Congress could omit the Notwithstanding Clause with full confidence that courts of the period would not misread the omission. Courts were relying more on statutory text, and omitting the Clause was not the same as never enacting it. It remained in Section 1983's original 1871 text. Congress cited the original text in the 1874 revision, which courts would "look to . . . in cases of doubt" to "ascertain the legislative intent."[389] Upon reviewing the original text, courts would find the Notwithstanding Clause, Congress's "clear[] signal[]" that Section 1983 was to "supersede" all contrary state laws.[390] Everyone—the Revisers, Thomas Durant, the Revision Committee, Congress, and soon after, the Supreme Court—recognized that omitting the Notwithstanding Clause did not change Section 1983. What was apparent to everyone in the 1800s was missed, decades later, by the Supreme Court in *Pierson*.

Qualified immunity's foundation—already "shoddy,"[391] already "flawed"[392]—cannot withstand Section 1983's Notwithstanding Clause. The Clause's omission did not alter the

---

[387] *Compare* Act of June 27, 1866, ch. 140, § 2, 14 Stat. 74 (commencing drafting of Revised Statutes), *with* Act of June 20, 1874, ch. 333, 18 Stat. 113 (enacting the Revised Statutes).

[388] Jones v. Alfred H. Mayer Co., 392 U.S. 409, 422 n.29 (1968); *accord* Lehman v. Warren, 53 Ala. 535, 540 (1875) (holding that a notwithstanding clause's "omission does not lessen its significance in determining the intention of the legislature, or in fixing the meaning of the words of the statute"); SEDGWICK, *supra* note 25, at 428–29 (citing the "cardinal and controlling maxim" that a statute would not change "by such alterations as are merely designed to render the provisions more concise.").

[389] Doyle v. Wisconsin, 94 U.S. 50, 51 (1876).

[390] *Cf.* Cisneros v. Alpine Ridge Grp., 508 U.S. 10, 18 (1993); *see also supra* notes 170–175 and accompanying text (collecting cases doing this).

[391] *Baude, Unlawful?*, *supra* note 39, at 46.

[392] *Reinert*, *supra* note 2, at 202.

words it merely reinforced. "Every person . . . shall be liable" *still* displaces qualified immunity.