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DON R. WILLETT & AARON GORDON

## Rights, Structure, and Remediation

*The Collapse of Constitutional Remedies*

BY AZIZ Z. HUQ

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**ABSTRACT.** In *The Collapse of Constitutional Remedies*, Aziz Huq challenges the idealistic view of federal courts as faithful exponents of the Constitution's protections for liberty. He insists that the Framers' design of Article III is fundamentally flawed, resulting in a judiciary that is ill-disposed to furnishing individual remedies for unconstitutional violence yet overly solicitous of constitutional challenges to government regulation—especially challenges founded upon the Constitution's structural principles of federalism or separation of powers. According to Huq, this judicial double standard exacerbates societal inequities to the detriment of marginalized groups. He contends that constitutional provisions that limit government's regulatory authority have largely malign effects, whereas individual rights against corporeal coercion protect the most vulnerable at little cost to society at large. To address the perceived failings of the judiciary—and to achieve what Huq calls “redistributive goals”—he proposes various reforms, including legislation that would strip federal courts of jurisdiction to enforce constitutional protections that Huq considers harmful.

In this Book Review, we set forth our own account of individual rights, governmental structure, and judicial remediation of constitutional wrongs—an account that differs from Huq's in many respects. Huq is undoubtedly right that federal courts have sometimes come up short in dispensing remedies for official misconduct. He is also justified in his criticisms of certain doctrines, particularly qualified immunity, that stand in the way of those seeking legal redress for constitutional wrongs. But Huq's claims of remedial “collapse” are largely overstated, and his allegations of judicial partiality for certain litigants and constitutional provisions do not withstand scrutiny. We further argue that Huq's normative case for exalting some constitutional rules while disregarding others is unsound and misguided. In so arguing, we highlight the benefits of constitutional principles that Huq disparages—such as structural provisions and so-called “rights against regulation”—as well as the costs of those he celebrates. Finally, given our concern that measures such as Huq's proposed jurisdiction-stripping legislation are inimical to the rule of law, we conclude with alternative proposals that we believe would advance his professed aims without imperiling our system of constitutional governance.



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## INTRODUCTION

Ever quotable, Justice Scalia shared a characteristically colorful insight in 2011 while testifying before the Senate Judiciary Committee:

[I]f you think that the Bill of Rights is what sets us apart, you are crazy. Every banana republic has a bill of rights. . . . [J]ust words on paper. What our Framers would have called a “parchment guarantee.” . . . [T]he real key to the distinctiveness of America is the structure of our Government. One part of it . . . is the independence of the judiciary . . . .<sup>1</sup>

A decade later, at Scalia’s former academic home, University of Chicago Law Professor Aziz Z. Huq has set forth his own account of the relationship between constitutional structure, the judiciary, and individual liberty. In his latest work, *The Collapse of Constitutional Remedies (Collapse)* – which he describes as “a book about how and when we have remedies for constitutional wrongs,” and “when and why we don’t”<sup>2</sup> – Huq espouses the Scalia-esque notion that the Bill of Rights, without an institutional mechanism for effectuating its guarantees, is nothing more than ink on parchment. But Huq parts ways with the late Justice when it comes to the role of governmental structure in securing individual freedom.

Huq asserts that America’s constitutional architecture has faltered, leaving courts unreliable guardians of “We the People’s” rights. Indeed, he begins his case before the book is even opened, with the cover depicting a building in shambles. This construction/destruction theme is reinforced in the pithy titles of the book’s five chapters: Blueprint, Building, Remedies, Collapse, and Remains. At 160 pages, *Collapse* itself is slim. But don’t let its concision fool you. Huq undertakes an ambitious historical inquiry into “why federal courts behave as they do”<sup>3</sup> and, based on this analysis, calls for reforms intended to address the modern judiciary’s perceived failings.

Huq’s starting point is uncontroversial enough: “The Constitution contains many . . . rights. None enforces itself. Without a remedy, a right has no practical value.”<sup>4</sup> The consensus melts away, however, as Huq unveils his principal thesis: when it comes to righting constitutional wrongs, “[r]emedies are not doled out

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1. *The Role of Judges Under the Constitution of the United States: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 6-7 (2011) (statement of Antonin Scalia, Associate J., United States Supreme Court), <https://www.c-span.org/video/?301909-1/constitutional-role-judges> [<https://perma.cc/7J29-DN82>].
  2. AZIZ Z. HUQ, *THE COLLAPSE OF CONSTITUTIONAL REMEDIES* 3 (2021).
  3. *Id.* at 4.
  4. *Id.* at 3.

in an even-handed way.”<sup>5</sup> To illustrate his point, Huq juxtaposes the treatment of two Supreme Court litigants in 2020. Victorious was *Seila Law LLC*, a small California-based law firm, which persuaded the Court that restrictions on the President’s authority to remove the Director of the Consumer Financial Protection Bureau (CFPB) violated the separation of powers.<sup>6</sup> Defeated was *Alexander Baxter*, a homeless arrestee whose case the Court declined to review, leaving intact a Sixth Circuit ruling that police officers who released a dog on the nonresisting *Baxter* were protected by qualified immunity.<sup>7</sup> That controversial doctrine—arguably “the main source of the right-remedy gap” in public law today<sup>8</sup>—shields police, among other officials, from damages liability unless they violate “clearly established” constitutional rights.<sup>9</sup> This is an exacting standard in practice. Qualified immunity, in its most robust iteration, has been described as protecting “all but the plainly incompetent or those who knowingly violate the law.”<sup>10</sup>

According to Huq, the disparate outcomes in the *Seila Law* and *Baxter* cases evince a pattern: litigants who “bridle against government regulation tend to have an easy glide path into federal court,” particularly when their complaints relate to the Constitution’s “structural limits on the power of government,” such as “separation of powers and federalism . . . . But when an individual challenges illegal violence . . . as a violation of constitutional rights,” federal courts are “less hospitable.”<sup>11</sup> Huq cites a variety of legal rules, including qualified immunity, that purportedly exemplify this double standard.<sup>12</sup> Their combined effect, Huq argues, is that today, “most individual constitutional wrongs that reach a federal

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5. *Id.*

6. *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183 (2020). The Court held that the statute establishing the Consumer Financial Protection Bureau (CFPB) was unconstitutional insofar as it forbade the President from removing the CFPB Director except “for inefficiency, neglect of duty, or malfeasance in office.” *Id.* at 2193 (quoting 12 U.S.C. § 5491(c)(3) (2018)). “The executive Power” constitutionally vested in the President includes the power to oversee (and often to remove) heads of executive departments, the Justices reasoned. *Id.* at 2197 (quoting U.S. CONST. art. II, § 1, cl. 1). The Court thus concluded that the CFPB Director’s protection against removal, especially given the CFPB’s unusual status as an independent agency headed by a single director, was an undue intrusion upon presidential authority. *Id.*

7. *Baxter v. Bracey*, 751 F. App’x 869 (2018), *cert. denied*, 140 S. Ct. 1862 (2020).

8. John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 90 (1999).

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

10. *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

11. HUQ, *supra* note 2, at 3-4.

12. *See id.* at 109-35.

court yield no remedy” – and that “judicial action on constitutional questions deepens economic, social, and racial hierarchies.”<sup>13</sup>

Aziz Huq has written a rabble-rousing book. With evocative prose, *Collapse* makes its case insistently – albeit, in our view, incompletely and ideologically – and asks questions worth asking, even if its answers sometimes spur more head-scratching than head-nodding. Respectfully, however, while there are trenchant insights to be found within its pages, *Collapse* ultimately falls short of its intended objective of explaining “how and when we have remedies for constitutional wrongs.”<sup>14</sup> This is so, we believe, for two principal reasons. First, Huq’s project is undercut by his lack of a principled basis for identifying which wrongs are constitutional in nature and which are not, and his resulting failure to appreciate the range of forms that unconstitutional coercion may take. Second, many of Huq’s descriptive claims about courts’ jurisprudence and behavior, as well as about the real-world impacts of legal doctrine, lack empirical support or are simply mistaken. Worse, and partly based on such missteps, Huq goes on to propose “reforms” that threaten the very principles of judicial independence and the rule of law that he professes to champion. The audacity of his proposals regrettably obscures some good points that might otherwise resonate with readers having different ideological priors.

The aims of this Book Review are twofold. First, we evaluate the main descriptive claims Huq makes in explaining how and when remedies for constitutional wrongs are available. It is of course true that federal courts have at times come up short in dispensing remedies for constitutional violations. But the problem is neither as calamitous nor as uniformly “regressive” in orientation (in the sense in which Huq uses that term) as *Collapse* leads readers to believe. Second, relying on our argument to that effect, we set forth an alternate perspective to Huq’s suite of normative prescriptions – which are neatly summed up by his proposal that “[i]nstead of thinking about federal courts as primarily bastions of the rule of law,” we should regard them as “instruments for the redistribution of the valuable quasi-public goods of constitutionality and legality.”<sup>15</sup>

We advocate doing precisely the opposite. Even if Huq were right about the extent to which the judiciary has failed to uphold the rule of law, it would not follow that we should burn it all down and cynically refashion federal courts into political playthings. Better solutions to any troubling trends in judicial decision making may be devised by invoking the very principles of constitutional structure that Huq waves off. His dystopian call for courts to “redistribut[e]” legality rests on the false premise that there is a finite supply of conformity with law –

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13. *Id.* at 4, 7.

14. *Id.* at 3.

15. *Id.* at 157.

and reflects an apparent conviction that some constitutional rules are good and therefore worthy of judicial protection, while others are bad and therefore unworthy of the same. We disagree. In explaining why, we hope to show both the virtues of the constitutional principles that Huq derides and the vices of those he romanticizes. More generally, we highlight the danger to the rule of law posed by the notion that courts may broaden or contract constitutional provisions' scope based on judges' own balancing of policy considerations.

This Book Review proceeds as follows. In Part I, we discuss two recurring topics that feature prominently in Huq's analysis: the role of judicial independence and the proper criteria for identifying what qualifies as a "constitutional wrong" or a "constitutional remedy."<sup>16</sup> In Part II, we identify some fundamental dichotomies on which many of Huq's arguments, descriptive and normative, are founded—such as the Constitution's structural provisions versus its guarantees of individual rights, and its protections against "violence" versus its protections against "regulation." We object to the arguments Huq constructs around these binaries. In our view, his claims of judicial partiality for certain litigants or doctrines are largely wrong, and his arguments for favoring some constitutional provisions over others are unconvincing. In Part III, we examine Huq's criticisms of two specific doctrines—qualified immunity and *Bivens*—about which he raises valid concerns, but perhaps gives other competing concerns less attention than they deserve. Finally, in Part IV, we evaluate Huq's proposed solutions to the problems he perceives in federal courts' decision making. We counter with alternative proposals that we believe are less inimical to the rule of law and more conducive to achieving Huq's professed aims.

## I. HUQ'S ARGUMENT: RECURRING THEMES

This Part discusses two recurring topics that figure significantly in Huq's analysis and likewise figure significantly in our critique: the role of judicial independence and the proper criteria for identifying "constitutional wrongs" and "constitutional remedies."

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16. An important point regarding the right-remedy relationship: Huq's focus is not, as *Collapse's* title would seem to suggest, limited to the issue of remedies. The "hurdle[s]" to remedies have "seep[ed] into the very marrow of constitutional rights themselves," he complains, *id.* at 6, resulting in "shifts in the substantive law," *id.* at 110; *see also id.* at 115, 119-20 (citing examples). In dedicating large portions of *Collapse* to validating this claim, Huq elides the distinction between limitations on remedies and limitations on rights themselves. We therefore elide that same distinction in evaluating his argument.

### A. *The Role of Judicial Independence*

At the heart of *Collapse* is Huq's descriptive claim that over the last half-century, federal courts have largely foreclosed avenues for remediation of unconstitutional violence while at the same time facilitating powerful, well-heeled litigants' constitutional challenges to regulation — especially when those challenges are founded upon principles of federalism or the separation of powers. We first focus on Huq's theorized cause of this trend, as we remain perplexed by his explanation.

Huq lays the blame for courts' remedial stinginess principally at the feet of “the Article III blueprint” itself<sup>17</sup>: “[t]he present remedial vacuum for individual rights . . . is bred in the constitutional bone,” he writes, a consequence of “the Framers' vision for judicial independence.”<sup>18</sup> “The Constitution created a judiciary that lacked effectual means for exercising power against other branches” or for “self-protection.”<sup>19</sup> It is federal courts' “incomplete separation from politics,”<sup>20</sup> Huq says, that makes them “inclined against the vindication of all constitutional rights against state coercion,” yet “solicitous of . . . challenges to regulatory measures.”<sup>21</sup>

Huq attempts to substantiate this causal theory through historical narrative. Beginning with Article III's Framing Era origins, Huq criticizes the provision's safeguards for judicial independence as inadequate. Those safeguards, Huq argues, were designed to work in tandem with certain natural forces that the Framers assumed would reinforce the protections of Article III — namely, “the balancing and offsetting role of the Senate in relation to the presidency, the professionalism of the bar, and the disciplining effect of legislative drafting . . . upon the bench's discretion” — none of which, in Huq's view, “survived the 1790s.”<sup>22</sup> Huq then recounts how Article III's blueprint was transmuted into real-world institutions over the course of the next century. As an exemplar of the Constitution's inadequate protections for judicial independence, Huq points to the Supreme Court's 1803 decision in *Stuart v. Laird* — which held that Congress could, by mere statute, eliminate inferior federal courts, along with the positions of judges who sat on them.<sup>23</sup>

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17. *Id.* at 46.

18. *Id.* at 4.

19. *Id.* at 46-47.

20. *Id.* at 156.

21. *Id.* at 12-13.

22. *Id.* at 38.

23. *Id.* at 48-52 (citing *Stuart v. Laird*, 5 U.S. (1 Cranch) 299 (1803)).



Nowhere in Huq's historical account, however, does he explain how it was deficiencies in Article III's safeguards of judicial independence that *caused* the alleged remedial collapse. He laments that federal courts in the Republic's early days proved to be "institutionally dependent upon the caprices of the political branches,"<sup>24</sup> citing instances of nineteenth-century legislative meddling with courts' structure, resources, and jurisdiction.<sup>25</sup> But despite his initial assertions that modern remedial "poverty" is a consequence of such meddling, Huq's narration of post-Warren Court history is simply a laundry list of complaints, none of which bolster the causal claim set forth in the Introduction. How have weaknesses in the Article III framework led to remedial "collapse"? Have there been any successful efforts by Congress during the relevant period to eliminate lower courts, curtail federal jurisdiction, or add seats to the federal bench so as to manipulate its composition? None leap to mind, and Huq cites no examples (except for some unspecified legislation enacted in the 1990s, which he admits "tended to work *with* the grain of judicial preferences").<sup>26</sup> What, then, are we to make of his claim elsewhere that it is federal courts' "incomplete separation from politics"<sup>27</sup> that has made them "inclined against the vindication of all constitutional rights"?<sup>28</sup>

Even more puzzlingly, Huq appears to revise that claim roughly halfway through the book, though without acknowledging his apparent pivot. In Chapter 4, Huq bemoans a "move away from the robust judicial commitment to individual remedies that manifested in the 1950s onward,"<sup>29</sup> but he ultimately, and surprisingly, concludes that this change in direction was not due to insufficient constitutional protections for judicial independence, after all. Rather, "judicial independence" was "realiz[ed]" during the "late twentieth and early twenty-first centuries," but its realization "may well have done more to harm than help the cause of individual rights."<sup>30</sup> This unexpected concession seems hard to reconcile with Huq's earlier claims that the "contemporary poverty of individual judicial remedies for unlawful state coercion emerges" in large part due to federal courts' "politicized dynamic of construction," susceptibility "to pressure from partisan forces," and lack of "effectual means for exercising power against other branches

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24. *Id.* at 37.

25. *Id.* at 53-60.

26. *Id.* at 133 (emphasis added). Huq writes that Congress passed "laws that stripped or narrowed jurisdiction to hear prisoner cases, immigration, and postconviction challenges to state criminal sentences," *id.*, though he does not cite these laws or elaborate further.

27. *Id.* at 156.

28. *Id.* at 12.

29. *Id.* at 107.

30. *Id.* at 135.

or . . . self-protection.”<sup>31</sup> As best we can discern, Huq’s message shifts halfway through the book from, essentially, “the problem with federal courts is that they’re not independent from the political branches,” to “actually, courts *are* independent from the political branches—and that’s a bad thing.” Perhaps the change of heart is for the best, since Huq ultimately sets forth no evidence that it was Article III’s deficient safeguards for judicial independence that caused the remedial “collapse” of which he complains. But Huq’s apparent revision of one of his key claims midway through *Collapse* nonetheless induces a bit of whiplash.

For our part, we are admittedly ambivalent as to the relationship between the independence of the court system and the availability of judicial remedies for constitutional wrongs (as is Huq, it seems). On one hand, the traditional view is that the “independence of the judges is . . . requisite to guard the Constitution and the rights of individuals from . . . dangerous innovations in the government, and serious oppressions.”<sup>32</sup> This theory certainly has much to commend it: the Constitution’s prescriptions, except possibly the Thirteenth Amendment,<sup>33</sup> all establish rules of *public* law, which govern the rulers rather than the People. It follows that courts effectuating these constitutional guarantees are bound to clash with other branches of government, state and federal alike. To carry out this responsibility, judges need healthy bulwarks against manipulation by the officials whose excesses the Constitution is meant to restrain. Hence, when those guarantors of judicial independence are wanting, constitutional restraints on government power are imperiled across the board.<sup>34</sup>

At the same time, as Huq has elsewhere noted, experience suggests that “[t]he institutionalization of judicial independence does not lead inexorably to the vindication of individual constitutional rights.”<sup>35</sup> Judges may take advantage of unrestrained discretion to further institutional or ideological interests adverse to those of rights holders. Conversely, political checks on judicial decision-making do not inexorably lead to marginalization of constitutional rights. Sometimes a judicial ruling in favor of a constitutional claimant will be more popular with

31. *Id.* at 11, 47.

32. THE FEDERALIST NO. 78, at 469 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

33. U.S. CONST. amend. XIII.

34. We certainly see no basis for believing, as Huq suggests, that an insufficiently independent court system jeopardizes only individual rights against violence, but not the Constitution’s structural principles or limits on governmental regulatory power. See HUQ, *supra* note 2, at 3–4, 15. If Huq were right that successful separation-of-powers or federalism challenges “gum[med] up [the] legal regime” governing regulated entities’ behavior, *id.* at 8, then one would expect *those* constitutional rules to be the first casualties of a regime in which courts were at the mercy of the political branches, who would presumably have no patience for such judicial obstruction of their policy objectives.

35. Aziz Z. Huq, *Judicial Independence and the Rationing of Constitutional Remedies*, 65 DUKE L.J. 1, 76 (2015).

the public than a ruling the other way.<sup>36</sup> Indeed, state courts of last resort, nearly all of which are more politically accountable than federal courts, have often interpreted rights guarantees in state constitutions more expansively than federal courts have interpreted those of the U.S. Constitution.<sup>37</sup>

To us, however, the paramount issue is not the relationship between judicial independence and remedial generosity, but rather the relationship between judicial independence and conformity with law. An independent judiciary, after all, is only a means of achieving a higher goal – not of handing out as many remedies as possible, but of “inflexible and uniform adherence to . . . the Constitution and the laws.”<sup>38</sup> We think the Constitution’s judicial-selection mechanism, designed to ensure *ex ante* that appointees have the requisite skills and character, combined with the document’s safeguards against *ex post* manipulation of judges, generally promote this objective of adjudication in conformity with law. But of course the decisional leeway judges enjoy can also be abused to subvert that goal. The Framers must have understood this, because just as they equipped courts with qualified powers to check the political branches’ excesses, so too did they equip the political branches with qualified powers to check courts’ excesses. These include Congress’s control over federal courts’ jurisdiction and funding, the process of impeaching and removing judges, the number and structure of inferior courts, and the size of the Supreme Court – not to mention the Senate’s role in confirming judicial nominees.<sup>39</sup>

Fortunately, an ingrained norm has emerged over centuries that these *ex post* political checks on the courts are to be reserved for extraordinary circumstances – at least if they are being exercised with the intention of influencing judicial behavior.<sup>40</sup> The prevailing consensus, as we perceive it, is that the aforementioned congressional powers are properly used only as a last resort, when no

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36. See, e.g., Joseph Carroll, *Race and Education 50 Years After Brown v. Board of Education*, GALLUP (May 14, 2004), <https://news.gallup.com/poll/11686/race-education-years-after-brown-board-education.aspx> [<https://perma.cc/U8UU-4LSA>] (citing a 1954 poll finding that “55% of Americans approved” of *Brown v. Board of Education*’s holding).

37. See Jeffrey S. Sutton, *What Does – and Does Not – Ail State Constitutional Law*, 59 U. KAN. L. REV. 687, 703–07 (2011).

38. THE FEDERALIST NO. 78, at 470–71 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

39. See Charles G. Geyh, *Judicial Independence, Judicial Accountability, and the Role of Constitutional Norms in Congressional Regulation of the Courts*, 78 IND. L.J. 153, 156 (2003) (discussing these powers). In contrast to Huq’s unsupported claim that federal jurisdiction “turn[s] entirely on the caprice” of Congress, HUQ, *supra* note 2, at 28, we are of the view that Congress cannot altogether deny litigants a federal judicial forum for otherwise-justiciable controversies that raise federal questions, see Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741, 748–53 (1984); THE FEDERALIST NO. 82 (Alexander Hamilton).

40. See generally Geyh, *supra* note 39 (discussing this norm).

other avenues remain for correcting a flagrant and manifest pattern of usurpation by the judiciary. In general, the stronger our adherence to that norm, the more fearless courts will be in vindicating the Constitution's prescriptions. Because we believe Huq fails to show any such pattern in courts' decision-making, we find the proposed "reforms" he sets forth in *Collapse's* final chapter—which calls on Congress to invoke every means at its disposal to manipulate the courts—quite alarming, as we explain in Part IV.

## B. Identifying "Constitutional Wrongs" & "Constitutional Remedies"

### 1. Methodology

Any account of "how and when we have remedies for constitutional wrongs"<sup>41</sup> must have criteria for identifying what amounts to a constitutional wrong. So far as we can tell, Huq has none (or none to which he unswervingly adheres). But before delving into our evaluation of Huq's analysis along these lines, we wish to set forth our own such criteria.

The following are the basic principles of legal reasoning from which we operate in this context.<sup>42</sup> First, we believe that "there are right and wrong answers to legal questions."<sup>43</sup> Sometimes the right answers are hard to find, yet still "we must strive to operate, even in those areas of ambiguity or unclarity, with principles and with rules."<sup>44</sup> Second, we believe that, in discovering the answers to legal questions, text matters. A written "instrument . . . is to have a reasonable construction, according to the import of its terms."<sup>45</sup> A "[c]ourt would transgress the limits of judicial power" if it adopted "a construction at variance with the manifest meaning" of a legal text as "expressed in plain and unambiguous language."<sup>46</sup> Finally, as originalists, we believe that, in discerning a text's meaning, history matters. "A cardinal rule in dealing with written instruments is that" they are "not to be made to mean one thing at one time, and another at some

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41. HUQ, *supra* note 2, at 3.

42. Your judicial coauthor, of course, will always dutifully apply the decisions of the Supreme Court.

43. Clarence Thomas, *Judging*, 45 U. KAN. L. REV. 1, 5 (1996).

44. *Id.* at 6.

45. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 326 (1816).

46. *Evans v. Jordan*, 13 U.S. (9 Cranch) 199, 203 (1815).

subsequent time.”<sup>47</sup> Thus, “[i]n the construction of the constitution,” or of a statute adopted long ago, “we must look to the history of the times” to ascertain its meaning “when it was framed and adopted.”<sup>48</sup> We also believe, on that score, that understanding the period immediately following the Civil War is as crucial to historically informed constitutional interpretation as understanding the Founding Era. Three pivotal amendments to the Constitution were adopted during Reconstruction, and it is important not only to interpret these provisions according to their public meaning at that time, but also to appreciate how their adoption may have affected the meaning of existing constitutional language.<sup>49</sup>

We do not understand the foregoing principles to be inconsistent with Huq’s professed views. For one, far from embracing the agnosticism of a legal realist, Huq often employs rhetoric presupposing that at least *some* legal questions have manifestly correct and incorrect answers.<sup>50</sup> Moreover, as we shall see, Huq cares enough about constitutional and statutory text to chide courts when he thinks they disregard it.<sup>51</sup> And although he derides originalism à la Justice Scalia as a mere “ideological project[],”<sup>52</sup> Huq does not disparage the use of history as an interpretive tool. If anything, he seems to exalt it, even castigating jurists with whom he disagrees for failing to practice historically informed interpretation.<sup>53</sup> Huq is also in our corner when it comes to Reconstruction’s importance. He rebukes his *bête noire*, the Roberts Court, for emphasizing the “Constitution of 1789 over that of 1865,” which he derides as “fidelity . . . to a certain strand of history” and “derogation of another.”<sup>54</sup>

These comments aside, Huq is otherwise coy about his interpretive philosophy. He makes clear at the outset that dividing lines do indeed exist between lawful and unlawful official acts. He highlights as one of his key concerns that

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47. THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 54 (Boston, Little, Brown & Co. 1868).

48. *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 723 (1838); *see also* *Preston v. Browder*, 14 U.S. (1 Wheat.) 115, 121 (1816) (applying this principle to statutes).

49. In particular, the Bill of Rights should be interpreted with an eye towards how its guarantees were understood at the time the Fourteenth Amendment incorporated them against subnational governments. *See generally* Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193 (1992) (discussing the relationship between the Bill of Rights and the Fourteenth Amendment).

50. He refers variously to “almost certainly unconstitutional violence,” HUQ, *supra* note 2, at 107-08, and “blatantly unconstitutional actions,” *id.* at 120, in discussing specific cases.

51. *See infra* notes 58, 71 and accompanying text.

52. HUQ, *supra* note 2, at 11.

53. *See infra* notes 71, 98 and accompanying text.

54. HUQ, *supra* note 2, at 150-51.

“[l]egality and compliance with federal law are . . . becoming increasingly unevenly distributed goods under our Constitution.”<sup>55</sup> And he condemns much of the federal jurisprudence paring back the availability of remedies for its supposed lack of “conformity with law.”<sup>56</sup> Remarks like these naturally raise the question of how Huq determines whether government is in fact “compl[ying]” with the Constitution.

Readers hoping to find an answer within the pages of *Collapse* will be disappointed. Huq’s book offers little in the way of legal argumentation. Instead, he leans heavily on consequentialist reasoning: judicial decisions that inure to the benefit of social groups with which Huq sympathizes – and thereby serve the “larger goal of a transformative egalitarian order”<sup>57</sup> – merit cheers; decisions that Huq perceives as favorable to the interests of the privileged and powerful merit jeers. This sort of reasoning is a far cry from the arguments based on “clear statutory or constitutional text” that he levels against the Roberts Court in the opening pages.<sup>58</sup> Are there clear bases in constitutional or statutory text, or perhaps in American jurisprudential history, for the doctrines championed by Huq – including the exclusionary rule or *Miranda* rights? Huq assumes throughout that the answer is always “yes,” all without entertaining the notion that he might be wrong or citing any evidence that he is right. So is he?

We start with the Fourth Amendment exclusionary rule.<sup>59</sup> Huq declares, sans support, that among the remedies “federal courts [can] offer against unconstitutional state violence” is ordering “that evidence obtained in violation of the Constitution” – such as through “unconstitutional police searches” – “can’t be used in a criminal trial.”<sup>60</sup> That is undoubtedly true within the federal judicial system, where the Supreme Court may rely on its inherent supervisory power to formulate evidentiary rules for inferior federal courts (at least insofar as those rules are consistent with federal legislation).<sup>61</sup> But Huq’s contention that federal courts may foist such a rule upon *state* judiciaries is on weaker footing. “The exclusionary rule appears nowhere in the Constitution,” explicitly or implicitly; and the historical evidence suggests that federal courts thus have no authority to

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55. *Id.* at 157–58.

56. *Id.* at 108.

57. *Id.* at 154.

58. *Id.* at 6.

59. This rule generally “bars the prosecution from introducing evidence obtained by way of a Fourth Amendment violation” during a criminal trial as part of the government’s case-in-chief. *Davis v. United States*, 564 U.S. 229, 232 (2011).

60. HUQ, *supra* note 2, at 5, 7.

61. *See United States v. Hasting*, 461 U.S. 499, 505 (1983).

impose such a rule on the states.<sup>62</sup> As Huq admits, the Warren Court's decision to do so "had no Reconstruction-era foundation."<sup>63</sup> The Framers of the Fourth and Fourteenth Amendments contemplated suits for damages, not exclusion, as the remedy for unconstitutional searches, and "[s]upporters of the exclusionary rule cannot point to a single major statement" from the Founding or Reconstruction Eras that supports constitutionalizing that rule.<sup>64</sup> Indeed, many such historical authorities emphatically reject the notion.<sup>65</sup> It seems to us that Huq cannot ignore these sources, lest he be guilty of the same selective fidelity to "certain strand[s] of history"<sup>66</sup> of which he accuses the Roberts Court.

Relatedly, Huq condemns as an example of remedial collapse the Court's partial retreat from its 1966 holding in *Miranda v. Arizona*:

[T]he Court has made it easier for police to bypass the . . . *Miranda* warnings . . . where a defendant cannot show that the officer acted intentionally in circumventing the Constitution. . . . The result [is that] . . . the criminal trial itself becomes an opportunity for the state to take away life or liberty using its own unlawful conduct.<sup>67</sup>

These criticisms rest on the unproven assumption that law enforcement's failure to comply with *Miranda*'s requirements for custodial interrogation is "unlawful," or a violation of the Constitution. In reality, it is neither. What the Constitution prohibits is use of an *involuntary* statement as evidence against the person who made it.<sup>68</sup> But the *Miranda* Court's holding that a statement is involuntary simply because a suspect was not reminded of the right against self-incrimina-

62. *Collins v. Virginia*, 138 S. Ct. 1663, 1677, 1680 (2018) (Thomas, J., concurring).

63. HUQ, *supra* note 2, at 97 (discussing *Mapp v. Ohio*, 367 U.S. 643 (1961)).

64. AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* 21 (1997).

65. *See, e.g.*, *United States v. La Jeune Eugenie*, 26 F. Cas. 832, 843-44 (C.C.D. Mass. 1822); *Commonwealth v. Dana*, 43 Mass. 329, 337 (1841); *State v. Flynn*, 36 N.H. 64, 72 (1858); *State v. Plunkett*, 64 Me. 534, 537-38 (1874); 1 SIMON GREENLEAF, *A TREATISE ON THE LAW OF EVIDENCE* § 254a (Boston, Press of Thurston, Torrey & Co., 3d ed. 1846) (noting that the fact that "evidence may have been . . . unlawfully obtained . . . is no valid objection to [its] admissibility, if [it is] pertinent to the issue").

66. HUQ, *supra* note 2, at 150-51.

67. *Id.* at 118. *Miranda v. Arizona* established that police must inform a suspect before subjecting him to custodial interrogation "that he has a right to remain silent, that any statement he does make may be used as evidence," and that he has a right to an attorney, "either retained or appointed." 384 U.S. 436, 444 (1966). Police must cease all questioning as soon as a suspect invokes the right to remain silent or requests counsel. *Id.* at 473-74. A statement obtained in violation of these rules, the Court said, was inadmissible at trial. *Id.* at 476.

68. *See, e.g.*, U.S. CONST. amend. V; *Bram v. United States*, 168 U.S. 532, 542-43 (1897).

tion beforehand—or because the statement was made in response to the questioning of a suspect who previously expressed a desire to remain silent—has no basis in the original meaning of the relevant constitutional provisions.<sup>69</sup> As Justice Scalia put it, the Constitution, “unlike the *Miranda* majority,” is not “offended by a criminal’s commendable qualm of conscience or fortunate fit of stupidity.”<sup>70</sup> In this way, the Court’s partial retreat from *Miranda* has in fact brought the case law closer to—not further from—conformity with the Constitution.

Huq’s drive-by statements of constitutional principle seem especially off-key given how he chastises the modern Supreme Court for “[i]gnoring the Constitution’s text” and “evidence from the early Republic” in developing its constitutional jurisprudence.<sup>71</sup> If that is a legitimate ground for criticizing judicial reasoning, as we agree that it is, it seems only fair that Huq should confront the historical evidence against—and the lack of textual basis for—the exclusionary rule or the holding in *Miranda*.

## 2. Identifying Constitutional Wrongs

Related to (or perhaps because of) Huq’s lack of a principled method for identifying constitutional wrongs, his attempt to explore “how and when we have remedies for constitutional wrongs” falters, too, because his conception of constitutional wrongs is itself unduly constricted. At the outset, Huq promises readers an account of the dearth of remedies for “unconstitutional coercion.”<sup>72</sup> It becomes clear in short order, however, that Huq is only concerned with rights that lie “precisely at the seam at which state violence sparks brightly against human flesh.”<sup>73</sup> But constitutional wrongs come in many flavors. Individual rights encompass more than the right not to be killed or brutalized. And one of *Collapse*’s most glaring shortcomings is its neglect of—and at times seeming contempt for—these other freedoms, many of which ranked among the most important to the Reconstruction Framers with whom Huq aligns himself.

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69. See *Miranda*, 384 U.S. at 526–31 (White, J., dissenting); *Hopt v. Utah*, 110 U.S. 574, 584 (1884); *Commonwealth v. Morey*, 67 Mass. (1 Gray) 461 (1854); *State v. Staley*, 14 Minn. 105, 119–21 (1869); *State v. Reddick*, 7 Kan. 143, 148 (1871); *Commonwealth v. Cuffee*, 108 Mass. 285 (1871); FRANCIS WHARTON, *A TREATISE ON THE LAW OF EVIDENCE IN CRIMINAL ISSUES* §§ 647, 661–62 (Philadelphia, Kay & Brother, 8th ed. 1880); Steven Penney, *Theories of Confession Admissibility: A Historical View*, 25 AM. J. CRIM. L. 309, 324 (1998); Stephen J. Markman, *Miranda v. Arizona: A Historical Perspective*, 24 AM. CRIM. L. REV. 193, 204–05, 218 (1986).

70. *Dickerson v. United States*, 530 U.S. 428, 450 (2000) (Scalia, J., dissenting).

71. HUQ, *supra* note 2, at 94.

72. *Id.* at 3, 8.

73. *Id.* at 17.



To be sure, the Reconstruction Amendments were born of blood and horror. Their primary purpose was to eradicate slavery, America's foundational failing, and all its badges and incidents. And although physical violence was a notorious incident of slavery, it was not the only one. Lives were threatened, of course—but so were livelihoods.<sup>74</sup> The Reconstruction Framers understood this and sought to enshrine constitutional protections for a wide array of individual rights. “Every citizen,” William Lawrence told his House colleagues in 1866, has not only “the absolute right to live,” but also “the right of . . . personal liberty, and the right to acquire and enjoy property.”<sup>75</sup> “It is idle to say that a citizen shall have the right to life, yet to deny him the right to labor, whereby alone he can live,” or the right to “make a contract to secure . . . the rewards of labor.”<sup>76</sup> Huq's confessed “redistributive goals”<sup>77</sup> were *not* shared by many of the Reconstruction Era's leading lights—including a certain lanky statesman from Illinois, who stridently opposed the calls of some for “a war upon property”: “[p]roperty is the fruit of labor . . . [and] is a positive good,” he once said.<sup>78</sup> “That some should be rich, shows that others may become rich, and hence is just encouragement to industry and enterprize.”<sup>79</sup>

Contrast this attitude with that of Huq, who insists that constitutional “constraints on government ‘takings’ [of property] under the Fifth Amendment . . . increase the vulnerability of the socially marginal to . . . violence and discrimination.”<sup>80</sup> He cites as an example a 2019 Roberts Court decision holding that “[a] property owner has an actionable . . . takings claim” at the moment “the government takes his property without paying for it.”<sup>81</sup> In so holding, the Court overruled a 1985 case that had required takings claimants to exhaust state-law procedures for requesting compensation before bringing federal takings claims, on the theory that property was not taken “without just compensation” until

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74. See, e.g., Thomas M. Cooley, *Limits to State Control of Private Business*, 1 PRINCETON REV. 233, 267 (1878) (“[T]he statutes enacted in the Southern States in 1865-6, which required freedmen to take out licenses for ordinary occupations . . . were set aside, as . . . regulations which in effect compelled . . . involuntary servitude.”).

75. CONG. GLOBE, 39th Cong., 1st Sess. 1833 (1866) (statement of Rep. William Lawrence).

76. *Id.*; accord CONG. GLOBE, 42d Cong., 1st Sess. app. 86 (1871) (statement of Rep. John Bingham) (arguing that “American constitutional liberty” includes “the liberty . . . to work in an honest calling . . . and to be secure in the enjoyment of the fruits of your toil”).

77. HUQ, *supra* note 2, at 15.

78. ABRAHAM LINCOLN, *Reply to New York Workingmen's Democratic Republican Association* (1864), in 7 COLLECTED WORKS OF ABRAHAM LINCOLN 260 (Roy P. Basler ed., 1953).

79. *Id.*

80. HUQ, *supra* note 2, at 139.

81. *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2167 (2019).

such procedures had been unsuccessfully invoked.<sup>82</sup> This requirement, which contravened the “settled rule” that “exhaustion of state remedies is *not* a prerequisite” to a federal action for the violation of constitutional rights,<sup>83</sup> had relegated the Takings Clause to inferior status. The Court’s 2019 decision merely restored that guarantee to parity with other rights (and in the process brought takings jurisprudence into step with how the right was understood by the time of Reconstruction<sup>84</sup>). The notion that this holding “increase[d] the vulnerability of the socially marginal” to “violence and discrimination” is puzzling, and Huq’s unfounded contention to that effect would surely have astounded the Reconstructionists he claims as allies.

Equally well-documented is the enthusiasm of Reconstruction Era civil-rights advocates for “[g]un rights under the Second Amendment,” another freedom Huq trivializes as a mere “shield[] against regulation” rather than against “physical coercion.”<sup>85</sup> Try telling that to Thaddeus Stevens, who declared to his House colleagues in 1868 that to “[d]isarm a community” is to “rob them of the means of defending life” and “take away [their] inalienable right of defending liberty.”<sup>86</sup> One senator made the point even more vividly in an 1866 address:

Every man . . . ha[s] the right to bear arms for the defense of himself and family . . . . [I]f the cabin door of the freedman is broken open and the intruder enters for purposes as vile as were known to slavery, then should

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82. *Williamson Cnty. Reg’l Plan. Comm’n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985).

83. *Knick*, 139 S. Ct. at 2167 (internal quotations omitted) (quoting *Heck v. Humphrey*, 512 U.S. 477, 480 (1994)).

84. See, e.g., *Gardner v. Vill. of Newburgh*, 2 Johns. Ch. 162, 167 (N.Y. Ch. 1816); *Thompson v. Grand Gulf R.R. & Banking Co.*, 4 Miss. (3 Howard) 240, 249 (1839); THEODORE SEDGWICK, *A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND APPLICATION OF STATUTORY AND CONSTITUTIONAL LAW* 526 (New York, John S. Voorhies 1857) (“[B]efore any definitive act be done . . . in the nature of the assertion of ownership, payment must be made . . . , or a certain and adequate remedy be provided; and, unless this is done . . . the statute is wholly unconstitutional . . . .”); 2 JAMES KENT, *COMMENTARIES ON AMERICAN LAW* 339 n.b (3d ed. 1836) (“[T]he compensation, or offer of it, must precede or be concurrent with the seizure and entry upon private property under the authority of the state.”).

85. HUQ, *supra* note 2, at 139. Huq’s flippant characterization of this bedrock freedom would likely surprise, among others, the “groups of citizens” who “us[ed] firearms in self-defense” amidst the mass unrest of summer 2020 “when effective law enforcement was absent,” David E. Bernstein, *The Right to Armed Self-Defense in Light of Law Enforcement Abdication*, 19 GEO. J.L. & PUB. POL’Y 177, 180 (2021), and the victims (or near-victims) of the approximately 60,000 crimes every year during which a gun is used defensively, see *Firearm Justifiable Homicides and Non-Fatal Self-Defense Gun Use*, VIOLENCE POL’Y CTR. 6 (July 2019), <https://vpc.org/studies/justifiable19.pdf> [<https://perma.cc/S9YZ-QNAB>].

86. CONG. GLOBE, 40th Cong., 2d Sess. 1967 (1868) (statement of Rep. Thaddeus Stevens).

a well-loaded musket be in the hand of the occupant to send the polluted wretch to another world . . . .<sup>87</sup>

The Fourteenth Amendment's framers intended the provision's clause forbidding states from "abridg[ing] the privileges or immunities of citizens"<sup>88</sup> to secure these and other constitutional rights (including those enumerated in the Bill of Rights) against infringement by state and local officials.<sup>89</sup> But the drafters' hopes were dashed in 1873 when the Supreme Court held in the infamous *Slaughter-House Cases* that this clause protected only an insignificant subset of federally created rights, like the "right to use the navigable waters of the United States."<sup>90</sup> Huq, to his credit, seems to share our view that *Slaughter-House's* now widely scorned holding impoverished U.S. constitutional law. He laments that "[f]ederal judges initially . . . held that the Bill of Rights . . . did not extend to the several states," and that the "[n]ew constitutional rights created by the 1868 Fourteenth Amendment were hence stingily doled out."<sup>91</sup> But he also speaks disapprovingly of litigants during this period who "use[d] the federal courts to slough off state regulation,"<sup>92</sup> and criticizes modern courts' amenability to "legal challenges to regulatory measures."<sup>93</sup>

Leading Reconstructionists, we suspect, would not endorse such complaints. They believed, as we do, that the Constitution does not countenance "[a]n unlimited power in the state to control and regulate private property and private business."<sup>94</sup> True, "[j]udicial duty does not include second-guessing everyday policy choices," but the question is, "[d]oes state 'police power'—the inherent authority to enact general-welfare legislation—*ever* go too far?"<sup>95</sup> We think in some cases it may: "[a] law which unnecessarily and oppressively restrains a citizen from engaging in any traffic, or disposing of his property as he may see fit, although passed under the specious pretext" of protecting public welfare, would violate "the rights guaranteed . . . by the organic law."<sup>96</sup> The Constitution,

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87. CONG. GLOBE, 39th Cong., 1st Sess. 1182 (1866) (statement of Sen. Samuel Pomeroy).

88. U.S. CONST. amend. XIV, § 1.

89. See, e.g., *Adamson v. California*, 332 U.S. 46, 71-72 (1947) (Black, J., dissenting).

90. 83 U.S. (16 Wall.) 36, 79 (1873).

91. HUQ, *supra* note 2, at 90.

92. *Id.* at 71.

93. *Id.* at 13.

94. *Cooley*, *supra* note 74, at 239.

95. *Patel v. Tex. Dep't of Licensing & Regul.*, 469 S.W.3d 69, 102 (Tex. 2015) (Willett, J., concurring).

96. *State v. Fisher*, 52 Mo. 174, 177 (1873); accord *Herman v. State*, 8 Ind. 545, 557 (1855).

properly read, protects against such arbitrary regulation.<sup>97</sup> In papering over the strain of Reconstruction Era thought recognizing as much, Huq is ultimately no more faithful to the interests at “the fore in the Civil War’s aftermath,” nor any less guilty of selective “fidelity . . . to a certain strand of history,”<sup>98</sup> than the contemporary jurists he reproaches.

### 3. Identifying Constitutional Remedies

Just as Huq takes too narrow a view of “unconstitutional coercion,” so too does he take too narrow a view of remediation. Readers are told in the Introduction that “by and large the state wields its hobnailed boot and billy club with no fear at all of reprisal or reproach.”<sup>99</sup> But a proper defense of this sweeping claim cannot be confined – as Huq’s analysis is – to consideration of *federal* courts. Any constitutionally minded readers who make it through *Collapse* will be left wondering, “what about the states?” How might the laboratories of democracy fill remedial gaps? One will not find an answer in *Collapse*, which makes hardly a mention of states.

The omission is regrettable because justice in America is dispensed overwhelmingly in state courts – an impressive 96 percent of all cases, to be exact.<sup>100</sup> Bombshell federal cases dominate the headlines, but, as Justice Scalia remarked, “If you ask which court is of the greatest importance to an American citizen, it is not my court.”<sup>101</sup> Indeed, state tribunals have been fundamental since the Founding, when Hamilton lauded them as “the immediate and visible guardian[s] of life and property.”<sup>102</sup> And when it comes to remedying constitutional wrongs, it seems Hamilton may have had a point. Across the country, states and localities, while powerless to amend Section 1983<sup>103</sup> or defy federal courts’ interpretation of it, are enacting state- or municipal-law analogues that allow individuals whose rights are violated to seek damages in state court. Colorado blazed the trail in June 2020 with a new “civil action for deprivation of rights.”<sup>104</sup> The

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97. See, e.g., Aaron Gordon, A Cure for *Lochner*-Phobia 12-49 (June 18, 2019) (unpublished manuscript), <https://ssrn.com/abstract=3406809> [<https://perma.cc/B792-SK5P>].

98. HUQ, *supra* note 2, at 150-51.

99. *Id.* at 8.

100. See *Doe v. Mckesson*, 945 F.3d 818, 838 (5th Cir. 2019) (Willett, J., concurring in part and dissenting in part).

101. See *id.* (quoting *Thompson v. Dall. City Att’y’s Off.*, 913 F.3d 464, 471 (5th Cir. 2019)).

102. THE FEDERALIST No. 17, at 120 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

103. Section 1983 refers to 42 U.S.C. § 1983 (2018), a federal statute establishing a right of action against state and local officials and municipalities for violations of federal rights.

104. See COLO. REV. STAT. ANN. § 13-21-131 (West 2021).

City Council of New York followed suit in April 2021, authorizing Fourth Amendment claims against police.<sup>105</sup> Next was New Mexico in July of the same year.<sup>106</sup> Importantly, all three enactments disallowed the qualified-immunity defense in suits brought under the new laws.

Granted, these nonfederal remedies, while robust, are limited in scope. Measures enacted by a few jurisdictions are obviously of little value to the vast majority of Americans who live in other parts of the country. But these are merely a subset of the many instances in which states have taken the lead in remediation of legal wrongs. For example, innumerable “state court decisions over the last several decades” have “granted individual-rights protections” under state constitutions that federal judges expounding the U.S. Constitution would not.<sup>107</sup> State-law remedies, then, while by no means a *substitute* for federal ones, are an important *supplement*. For that reason, Huq’s analysis of “how and when we have remedies for constitutional wrongs” is incomplete. So eager is he to malign the constitutional division of power between state and federal governments that he overlooks a key means by which that division “secures to citizens the liberties that derive from the diffusion of sovereign power.”<sup>108</sup>

Huq’s conception of remediation, while too narrow in some respects, is too broad in others. One premise in particular undergirds much of Huq’s thinking on the subject of remedies—a premise that we think is generally valid, though ultimately carried too far. In the Introduction, Huq approvingly quotes Chief Justice Marshall’s statement in *Marbury v. Madison* that an individual whose legal rights are violated “has a right to resort to the laws of his country for a remedy.”<sup>109</sup> Huq seems to infer from this remark that the rule of law is subverted every time a court fails to provide a remedy for an unlawful act (though, as we shall see, his concerns extend to only *some* unlawful acts).<sup>110</sup>

The notion, deeply embedded in our jurisprudence, that “where there is a legal right, there is also a legal remedy,”<sup>111</sup> establishes a strong presumption in favor of the availability of judicial relief. But it does not follow that courts should adhere inflexibly to that maxim at all costs. Certainly, no court may withhold a

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**105.** See N.Y.C., N.Y., ADMIN. CODE § 8-803 (2021).

**106.** See N.M. STAT. ANN. § 41-4-4 (West 2021).

**107.** Sutton, *supra* note 37, at 703. For instance, “twenty state courts have declined to apply the . . . good-faith exception [to the exclusionary rule] under their own constitutions,” *id.* at 706, a trend that Huq should surely applaud, given his criticism of the U.S. Supreme Court for establishing that exception at the federal level, see HUQ *supra* note 2, at 117.

**108.** *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting).

**109.** HUQ, *supra* note 2, at 14 (quoting 5 U.S. (1 Cranch) 137, 166 (1803)).

**110.** See *infra* Section IV.A (citing HUQ, *supra* note 2, at 159).

**111.** 3 WILLIAM BLACKSTONE, COMMENTARIES \*23.

remedy for an acknowledged legal wrong without a firm basis in law for doing so. It is simply not true, however, that remediation is a goal to which our Constitution invariably subordinates all others. *Marbury*'s aspiration of "effective redress for all constitutional violations reflects a principle, not an ironclad rule," and must be understood "within a tradition that has, as a matter of fact, frequently limited remedies" in service of other important interests.<sup>112</sup>

Our constitutional system exalts personal freedom, to be sure, but it also reflects concern for other values, such as federalism and effective public administration. In some cases, doctrines founded upon such other values will preclude individual remedies (at least judicial ones, anyway), and no judge may defy controlling law because he or she believes the balance between these competing concerns should have been struck differently. What the Constitution demands is simply "an overall structure of remedies adequate to preserve . . . a regime of government under law."<sup>113</sup> Huq would likely respond that we do not even have *that*—but as we explain in Parts II and III, we are unpersuaded.

## II. DICHOTOMIES: RIGHTS V. STRUCTURE, VIOLENCE V. REGULATION

A uniting feature of many of Huq's arguments in *Collapse*, both descriptive and normative, is that they are built upon dichotomies—individual rights versus structural constitutional provisions, the Constitution's protections against violence versus its protections against regulation, and the Founding versus the Reconstruction, among others. We object to the arguments Huq constructs around these binaries. As we argue in this Part, his claims of judicial partiality for certain litigants or doctrines are largely wrong, and his normative arguments for favoring some constitutional provisions over others are logically unanchored.

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**112.** Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1778 (1991); see *Wheeler v. Patterson*, 1 N.H. 88, 90 (1817) (holding that the for-every-right-a-remedy maxim is not absolute); *Cozens v. Dickinson*, 3 N.J.L. 507, 510 (1809) (same); *Wilkes v. Dinsman*, 48 U.S. (7 How.) 89, 131 (1849) (same); *Williams v. Reg. of W. Tenn.*, 3 Tenn. 214, 217-19 (1812) (same); 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1671 (1833) ("Cases . . . may occur, in which [a citizen] may not always have an adequate redress, without some legislation by congress."). Indeed, Chief Justice Marshall proceeded in that same opinion to deny William *Marbury* a remedy on jurisdictional grounds, which probably left him with no judicial avenue for relief. See Richard H. Fallon, Jr., *Bidding Farewell to Constitutional Torts*, 107 CALIF. L. REV. 933, 971 & n.182 (2019).

**113.** Fallon & Meltzer, *supra* note 112, at 1790.

### A. *Judicial Double Standards?*

No explanation of “why federal courts behave as they do”<sup>114</sup> can succeed unless it is founded upon an accurate understanding of how federal courts behave. *Collapse* comes up short in this regard. One of Huq’s central descriptive claims is that the modern “Supreme Court modulates the intensity of threshold screening rules so as to disable individual rights bearers while empowering litigants with structural constitutional claims.”<sup>115</sup> Yet nearly all of his examples of this purported bias are founded upon misreadings of the Court’s holdings or generalizations about judicial behavior that the data do not support. So when Huq admits that “[n]one of the[] differences” he identifies “between the political economy of rights and structural litigants are prominent on the surface of opinions,”<sup>116</sup> the reason for this, we submit, is that those differences do not exist. While the following jot-for-jot rebuttal to Huq’s suite of claims may make for tedious reading at times, we believe it is warranted, as those claims form the basis for his proposed assault on judicial independence. Bear with us.

#### 1. *Double Standards in Remediation?*

The theorized structure/rights double standard makes its first appearance in the Introduction, which Huq kicks off by comparing the experiences of Alexander Baxter and Seila Law. “Seila Law had its case heard on the merits – and won,” Huq explains; “[t]he decision . . . didn’t turn on whether the constitutional violation at issue was egregious.”<sup>117</sup> In Baxter’s case, by contrast, the Sixth Circuit held that the police who allegedly used excessive force in arresting him were protected by qualified immunity. The disparate results in these cases, we are told, illustrate one “commonalit[y] that distinguish[es]” structural “challenges by regulatory entities” from cases in which “remed[ies] [for] discrete instances of state violence” are sought: the former are not hampered by anything like “the fault demand of qualified immunity.”<sup>118</sup> According to Huq, this difference embodies “a rising use of the Constitution for regressive deregulation.”<sup>119</sup>

Huq’s comparison of these cases, however, is simply inapt. The contrasting outcomes have nothing to do with the constitutional provisions at issue or the identity of the litigants, but rather are a consequence of the different procedural

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**114.** HUQ, *supra* note 2, at 4.

**115.** *Id.* at 146.

**116.** *Id.* at 148.

**117.** *Id.* at 2.

**118.** *Id.* at 145.

**119.** *Id.* at 1.

contexts in which the constitutional issues arose. *Seila Law* was raising a constitutional argument as a *defense* in proceedings initiated against it by the CFPB,<sup>120</sup> whereas *Baxter* was a plaintiff invoking the Constitution offensively in a damages action against individual officers. The fact that he had to overcome qualified immunity while *Seila Law* did not in no way evinces the Court's affinity for "regressive deregulation" or preference for corporate litigants. The Court affords the same treatment to any party invoking the Constitution in a defensive posture – regardless of that party's identity or the provision relied upon.<sup>121</sup> For example, had *Baxter* been arrested and prosecuted for violating an unconstitutional law, he could have challenged that law – and the courts would have considered his challenge – without regard to whether the law's unconstitutionality was "clearly established."<sup>122</sup>

Huq also faults the Court for siding with *Seila Law* without asking "whether [it] would have been treated differently if the president had greater control over the [CFPB]."<sup>123</sup> In foregoing this inquiry in *Seila* and other structural decisions, the Roberts Court has, Huq insists, afforded litigants raising separation-of-powers arguments special treatment by relieving them of a procedural requirement that other constitutional claimants must satisfy. But Huq's claim of partiality is baseless. In reality, the Roberts Court case law that Huq denounces merely applies to the Constitution's structural provisions a well-settled proposition reflected in federal jurisprudence on a wide array of issues: when an improperly constituted authority takes adverse action against someone, or when official action is conducted within a flawed procedural framework, courts generally will not demand that the injured party prove "prejudice" – that is, that the government actor would have behaved differently but for the error – but instead will

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**120.** See *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183 (2020).

**121.** See *Ryder v. United States*, 515 U.S. 177, 185 (1995). Huq also introduces the clearly-established-law requirement of qualified immunity as a "hurdle [that] applies across the spectrum of potential remedies." HUQ, *supra* note 2, at 6. In fact, this "hurdle" applies only in damages actions against public officials in their individual capacities (and, in a modified form, when state criminal convictions are collaterally attacked in federal court). See 28 U.S.C. § 2254(d)(1) (2018). Qualified immunity does *not* apply to suits against counties or municipalities, to suits seeking injunctive or declaratory relief, or when constitutional arguments are raised by litigants in a defensive posture. See *Pearson v. Callahan*, 555 U.S. 223, 242 (2009) (describing the limits of qualified immunity).

**122.** This also explains why, to Huq's chagrin, criminal defendants who challenge their convictions on federalism grounds do not "need to point to a right to action." HUQ, *supra* note 2, at 138. Obviously, someone brought into court *by the government* need not have a "right of action" to raise a defense.

**123.** *Id.* at 2; see also *id.* at 145.



simply declare such action void.<sup>124</sup> The reasons for this eminently reasonable principle are obvious: “it will often be difficult or impossible for someone subject to a wrongly designed scheme to show that the design . . . played a causal role in his loss.”<sup>125</sup> Hence, in declining to require proof that the CFPB would have acted differently if the President could remove its director at will, the Supreme Court showed not partiality towards Seila Law, but rather fidelity to this settled doctrinal principle.

Relatedly, Huq accuses the Roberts Court of relieving litigants asserting structural claims from the normal procedural requirement of “pointing to a constitutional violation on the facts of [their] case[s]”; specifically, “[i]n the removal cases,” the Court has “granted relief by reasoning that the president’s constitutional authority might be hindered in some hypothetical case not before the Court.”<sup>126</sup> Once again, Huq’s cries of a double standard are unwarranted. A “constitutional violation” of the separation of powers occurs at the moment an improperly constituted decisionmaker takes adverse action against someone.<sup>127</sup> The “hypothetical case[s]” that inform the Court’s reasoning in its removal decisions are merely illustrations of the kind of ills that the executive branch’s constitutional structure was designed to prevent. Whether or not those ills materialize in a particular case involving an unconstitutionally insulated officer, a

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**124.** See, e.g., *United States v. Gonzalez-Lopez*, 548 U.S. 140, 148-49 (2006); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 211-12 (1995); *Clinton v. City of N.Y.*, 524 U.S. 417, 433 n.22 (1998); *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007); *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952). Admittedly, the Court’s most recent pronouncement on this issue seemed to tilt away from this line of decisions—but the shift only further undercuts Huq’s assertion that the Justices accord structural claims preferential treatment. In *Collins v. Yellen*, the Court held that the Federal Housing Finance Agency (FHFA) Director’s protection from presidential removal violated the separation of powers. 141 S. Ct. 1761, 1783-84 (2021). But rather than invalidate the FHFA action challenged on direct appeal, the Court remanded, suggesting that the stockholders challenging the removal restriction could only prevail if they showed that the agency would have acted differently had its Director been subject to at-will removal. See *id.* at 1788-89. This disposition “defie[d] [the Court’s own] precedents,” *id.* at 1795 (Gorsuch, J., concurring in part), which counseled that when an affected party “challenges the action of an unconstitutionally-insulated officer, that action must be set aside,” *Collins v. Mnuchin*, 938 F.3d 553, 626 (5th Cir. 2019) (en banc) (Willett, J., dissenting in part) (collecting cases), *rev’d in part sub nom.* *Collins v. Yellen*, 141 S. Ct. 1761 (2021). The new rule thus consigns structural constitutional provisions to an inferior rank; the Court would not, for instance, require someone convicted by a materially interested adjudicator to prove, in order to obtain reversal, that an impartial adjudicator would have acquitted him or her. See *Tumey v. Ohio*, 273 U.S. 510, 535 (1927).

**125.** *Landry v. Fed. Deposit Ins. Corp.*, 204 F.3d 1125, 1131 (D.C. Cir. 2000).

**126.** HUQ, *supra* note 2, at 145.

**127.** See *Bowsher v. Synar*, 478 U.S. 714, 727 n.5 (1986); *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2196 (2020).

constitutional violation has occurred all the same,<sup>128</sup> and the Court has shown no partiality toward structural claims by correctly recognizing as much.

For some reason, Huq invites readers to “contrast the treatment of . . . Seila Law” in this regard with that of Adolph Lyons, a Black man whose suit seeking to enjoin prospectively the Los Angeles Police Department’s (LAPD) racially discriminatory chokehold policy (of which he had been a victim) was thrown out by the Supreme Court for lack of standing.<sup>129</sup> According to Huq, Lyons was “not entitled to an injunction” or even “to get into court . . . unless he could show with certainty that the [LAPD] would place him in a chokehold once again,” and because he could not, the Court prevented his “litigation [from] moving forward.”<sup>130</sup> That is inaccurate. In fact, although Lyons lacked standing to seek an injunction, his “claim that he was illegally strangled remain[ed] to be litigated in his suit for *damages*” and “in no sense . . . ‘evade[d]’ review.”<sup>131</sup> While a strong argument can be made that the Court was wrong and that Lyons’s suit for injunctive relief should have been allowed to proceed as well, no argument to that effect warrants a mischaracterization of the Court’s holding.

In any event, Huq’s comparison of *Lyons* with *Seila* is bewildering. The reason *Seila Law*, unlike Adolph Lyons, was not required to prove future injury “with certainty” was that the firm was raising its constitutional argument as a defense against *ongoing* proceedings initiated against it by the CFPB. Had *Seila Law* sought pre-enforcement judicial review of the constitutionality of the CFPB’s structure, it—like any plaintiff “claiming standing” “[i]n the absence of contemporary enforcement”—would have to “show that the likelihood of future enforcement is ‘substantial.’”<sup>132</sup>

Another “way in which the rules for individual rights and structural constitutional principles diverge,” says Huq, is “the scope of the remedy”<sup>133</sup>:

Remedies for rights . . . tend to be narrow and granular. Only the specific person asserting a right gets . . . damages, the exclusion of evidence, or a conviction thrown out. In contrast, in the structural context, remedies

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**128.** See *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 (1995); COOLEY, *supra* note 47, at 70-71 (“A power . . . may be exercised . . . in violation of [a] constitutional prohibition, without the mischief which the Constitution was designed to guard against appearing . . . but th[is] circumstance[] cannot be allowed to sanction a clear infraction of the Constitution.”).

**129.** HUQ, *supra* note 2, at 146 (citing *City of L.A. v. Lyons*, 461 U.S. 95 (1983)).

**130.** *Id.* at 146.

**131.** *Lyons*, 461 U.S. at 109 (emphasis added).

**132.** *California v. Texas*, 141 S. Ct. 2104, 2114 (2021); see *Seila L.*, 140 S. Ct. at 2196.

**133.** HUQ, *supra* note 2, at 148.

are wholesale. For example, in ruling on the CFPB[’s] . . . removal provision, the Court . . . invalidated [a] portion[] of the agenc[y’s] founding statute[].<sup>134</sup>

This argument confuses the immediate effect of a court’s *judgment* with the precedential implications of its *reasoning*. Although one often hears that a court has “invalidated” or “struck down” a statute, the court’s action is more accurately described as a refusal to give effect to the statute in the course of deciding the case before it. No court, after all, has “jurisdiction to pronounce any statute . . . irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies.”<sup>135</sup> Still, a court may “in deciding a particular point destroy[] a general principle, by passing a judgement which tends to reject all the inferences from that principle.”<sup>136</sup> When legislation is judicially “struck down,” then, it merely means that a court, in deciding that a statute may not constitutionally be applied in a particular case, adopts reasoning broad enough to imply the statute’s invalidity under all other circumstances. Per the doctrine of *stare decisis*, that court’s reasoning will effectively control outcomes in later cases that raise similar legal questions. But a judgment’s preclusive effect is limited “to parties . . . to the controversy” – who “are bound only so far as regards the subject matter then involved.”<sup>137</sup>

Judicial invalidation of a statute, then, is really no different from the “granular” remedies of “damages, the exclusion of evidence[,]” or the reversal of a conviction to which Huq alludes; all are binding only on parties to the litigation, yet often a court’s reasoning in making its decision will logically suggest the invalidity of similar government actions in future cases.<sup>138</sup> And the difference Huq identifies between remedies for rights and remedies for structural constitutional violations in this regard is illusory.

While on the subject of remedial breadth, another of Huq’s proffered examples of the structure/rights double standard is that “the Court invalidates statutes on structural constitutional grounds even though a substantial fraction of the statute’s applications are plainly constitutional,” thereby deviating from the usual rules governing facial challenges.<sup>139</sup> His Exhibit A is *National Federation of Independent Business v. Sebelius*, in which the Court held that the Affordable Care Act’s (ACA) individual mandate exceeded Congress’s Commerce and Necessary

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134. *Id.*

135. *Liverpool v. Comm’rs of Emigration*, 113 U.S. 33, 39 (1885).

136. 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 137 (1835).

137. COOLEY, *supra* note 47, at 49.

138. HUQ, *supra* note 2, at 148; *see* COOLEY, *supra* note 47, at 49–50.

139. HUQ, *supra* note 2, at 147.

and Proper Clause powers by regulating inactivity rather than activity.<sup>140</sup> According to Huq, because the Court was presented with, but “breezed past[,]” evidence that a majority of those subject to the . . . mandate regularly used . . . healthcare” — which was “activity,” and thus within Congress’s authority to regulate — the Court should have declared the mandate constitutional at least as applied to such persons but instead “f[ound] the whole law unconstitutional.”<sup>141</sup>

This logic simply does not hold up. For one, *Sebelius* does nothing for Huq’s contention that the Court too often facially “invalidates statutes on structural . . . grounds,” since the Court in that case (far from “finding the whole law unconstitutional”) ultimately *upheld* the mandate as an exercise of federal taxing power.<sup>142</sup> But Huq’s misstatement of the holding in *Sebelius* is less disconcerting than his misapprehension of the rules governing “facial” and “as-applied” challenges to the constitutionality of statutes.

The rule for facial challenges is indeed that a “challenger must establish that no set of circumstances exists under which [an enactment] would be valid.”<sup>143</sup> But this deceptively simple formulation only glosses over the harder question of how one substantively defines the constitutional protection at issue. Some of the Constitution’s prescriptions, for instance, limit the *purposes* for which government may act, whereas others forbid government from taking actions that produce certain *results*. In general, where “[i]t is not the terms of [a] law, but its effect, that is inhibited by the constitution,” a law “may, when applied to a given case, produce an effect . . . prohibited by the constitution, but it may not, when applied to a case differently circumstanced.”<sup>144</sup> Legislation that violates a constitutional restriction on the putative purposes of government action, however, will often be unconstitutional in all its applications, even in situations where essentially the same rule of conduct could have validly been applied had it been enacted for a constitutionally legitimate purpose.<sup>145</sup>

In delineating the limits of Congress’s commerce power, the case law has established a kind of “objective-purpose” test: legislation is valid if it regulates either interstate commerce, or those intrastate activities that “so affect interstate

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**140.** 567 U.S. 519 (2012).

**141.** HUQ, *supra* note 2, at 147.

**142.** *Id.* (emphasis added); see also *Sebelius*, 567 U.S. at 574.

**143.** *United States v. Salerno*, 481 U.S. 739, 745 (1987).

**144.** *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 316 (1827) (Trimble, J.).

**145.** See David L. Franklin, *Facial Challenges, Legislative Purpose, and the Commerce Clause*, 92 IOWA L. REV. 41, 80-81 (2006); *Hunter v. Underwood*, 471 U.S. 222, 233 (1985).

commerce . . . as to make regulation of them appropriate” for “effective execution of the . . . power to regulate interstate commerce.”<sup>146</sup> And because “it [i]s the class of activities regulated that [i]s the measure, . . . the courts have no power ‘to excise, as trivial, individual instances’ of the class” if “that class is within the reach of federal power.”<sup>147</sup> The converse of this class-of-activities test is that, where legislation is aimed at objects *beyond* federal power, those subject to the enactment may attack its constitutionality even if their conduct could have been regulated by a hypothetical statute passed in service of valid regulatory objectives.<sup>148</sup>

Now back to *Sebelius*. Is it true, as Huq maintains, that the “constitutional overreach was plainly limited to a subset of the [individual mandate’s] applications”?<sup>149</sup> No. Granted, most of those subject to the mandate regularly use healthcare—activity within Congress’s authority to regulate. But the fact that Congress could have written a different statute that regulated the action, rather than the inaction, of essentially the same class of citizens does *not* mean that “a substantial fraction of the [ACA’s] applications” were constitutional.<sup>150</sup> To understand why not, imagine a statute requiring police to pull over all Black motorists on sight. Are a “substantial fraction” of the statute’s applications constitutional so long as *some* Black motorists stopped pursuant to the law also could have been pulled over under a different imaginary law setting forth legitimate, nondiscriminatory reasons for a traffic stop? Of course not. That the statute provides for traffic stops on an invalid basis in every case is enough to make it facially invalid.<sup>151</sup> So, too, with the ACA provision in question.

Perhaps Huq meant to argue that the set of remedial rules discussed thus far, while purportedly neutral, have an incidental (if not intentional) disparate impact on litigants who belong to marginalized groups—who may, for instance, be more likely to seek damages than equitable relief, or to invoke the Constitution

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**146.** *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942); *see also* *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 203-04 (1824) (“If the legislative power of the Union can reach [certain intrastate activities], it must be for national purposes . . .”); Franklin, *supra* note 145, at 93 & n.283 (describing the case law as setting forth an objective-purpose test).

**147.** *Perez v. United States*, 402 U.S. 146, 154 (1971) (emphasis omitted) (quoting *Maryland v. Wirtz*, 392 U.S. 183, 193 (1968)); *accord* *Gonzales v. Raich*, 545 U.S. 1, 23 (2005).

**148.** *See, e.g.*, *United States v. Reese*, 92 U.S. 214, 220-21 (1875).

**149.** HUQ, *supra* note 2, at 147-48.

**150.** *Id.* at 147.

**151.** *See, e.g.*, *Shelby Cnty. v. Holder*, 570 U.S. 529, 554-55 (2013); *Sec’y of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 965-68 (1984); *Aptheker v. Sec’y of State*, 378 U.S. 500, 515-16 (1964); *Fisher v. McGirr*, 67 Mass. (1 Gray) 1, 49 (1854) (“[I]f [a statute] fail[s] in those qualities and characteristics required by the constitution . . . it is so far void, and cannot be made good in any particular case, by attempts to supply its defects.”).

offensively rather than defensively. We frankly do not know whether any of that is so, but in any event, it is not the argument Huq makes. Instead, he goes for broke, accusing the Justices of “modulat[ing] the intensity of threshold screening rules” — “silently plac[ing] their thumb on the scales” and “favoring some litigants over others.”<sup>152</sup> These claims, as we have explained, are inaccurate. Whether the black-letter rules governing remedies have insidious regressive effects despite evenhanded administration is a topic we leave for another day.

Much of Huq’s indignation at the contemporary Supreme Court for even halfheartedly enforcing the Constitution’s structural provisions apparently stems from his misconceptions about the remedies awarded for violations of these provisions. He believes that “structural constitutional challenges” bless the challengers with “immunity to regulation” and “gum up . . . legal regime[s] that would otherwise channel their behavior.”<sup>153</sup> But Huq’s claims to this effect are incorrect — so obviously so that they are undercut even by the examples he hand-picked in support of his position.

Start with *Seila Law*. What did *Seila Law* get after it prevailed before the Court, other than a moral victory and a declaration that the CFPB Director’s insulation from presidential control violated the Constitution’s separation of powers? Certainly not an “immunity to regulation.” The Court remanded the case to the Ninth Circuit, which concluded that the Director had ratified the Bureau’s earlier civil investigative demand (CID) against *Seila* following the invalidation of the Director’s for-cause removal protection.<sup>154</sup> Enforcement of the CID thus proceeded exactly as it would have had that protection been upheld (a fact Huq omits from his account of the case). A similar result obtained in *Lucia v. SEC*,<sup>155</sup> another recent separation-of-powers decision of which Huq complains. After the Court held that the SEC’s administrative law judges (ALJs) were constitutional “Officers” that had to be appointed by “Heads of Departments,”<sup>156</sup> the SEC’s Commissioners ratified the appointments of existing ALJs without issue,<sup>157</sup> *Lucia* received a new hearing before a different ALJ,<sup>158</sup> and the agency reimposed

**152.** HUQ, *supra* note 2, at 146, 148.

**153.** *Id.* at 8.

**154.** *Consumer Fin. Prot. Bureau v. Seila L. LLC*, 984 F.3d 715, 718 (9th Cir. 2020).

**155.** 138 S. Ct. 2044 (2018).

**156.** U.S. CONST. art II, § 2, cl. 2.

**157.** *See Caselaw Developments 2018*, 74 BUS. LAW. 895, 901 (2019).

**158.** *Lucia* surely welcomed this development, since the first ALJ assigned to the case (Judge Elliot), *see Lucia*, 138 S. Ct. at 2050, once boasted that he “had never ruled against the agency’s enforcement division,” *see* Jean Eaglesham, *Fairness of SEC Judges Is in Spotlight*, WALL ST. J. (Nov. 22, 2015, 9:25 PM ET), <https://www.wsj.com/articles/fairness-of-sec-judges-is-in-spotlight-1448236970> [<https://perma.cc/P9AQ-EHFL>].

sanctions on Lucia just as it had initially, except this time via consent decree.<sup>159</sup> In no way did Lucia or anyone else “gum up a legal regime” for “channel[ing] their behavior.”

The same goes for *Free Enterprise Fund v. Public Company Accounting Oversight Board*, another Roberts Court removal-power case that draws Huq’s ire for allegedly “hindering, although not entirely derailing, efforts to regulate Beckwirth [sic] & Watts.”<sup>160</sup> In fact, the Court held that Beckstead & Watts was “not entitled to [the] broad injunctive relief against the [Public Company Accounting Oversight Board’s (PCAOB)] continued operations” that it had sought, but instead only to declaratory relief severing the invalid removal protections for PCAOB members from the statute.<sup>161</sup> The Court remanded for further proceedings, the PCAOB refused to withdraw its inspection report, and the case settled eight months later.<sup>162</sup> We see no evidence of “hind[erance]” here.

The hollow victories won by structural claimants in these cases are not outliers. Recent scholarship has raised concerns about the remedial poverty in this area, noting that “[i]n almost every separation of powers case” decided by the Supreme Court or D.C. Circuit “in the past two decades” in which such a constitutional challenge succeeded, the court “ha[s] not afforded . . . a remedy,” or at least not one that meaningfully “constrained regulators.”<sup>163</sup> By breezing past these findings while bending the facts of specific cases, Huq leaves readers with an impression of federal courts’ behavior that is in tension with reality.

## 2. *Double Standards in Substantive Law?*

Any alert student of constitutional law will be confounded by Huq’s repeated assertions that the federal judiciary subjects “the regulatory state” to “unerring

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**159.** See *In re Raymond J. Lucia Cos.*, Exchange Act Release No. 5523, 2020 WL 3264213 (June 16, 2020).

**160.** HUQ, *supra* note 2, at 144 (citing *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477 (2010)).

**161.** *Free Enter. Fund*, 561 U.S. at 513. The Court held that department heads may not be insulated from presidential control by multiple layers of “for-cause” removal protection, as it would intrude on the “executive power” that Article II vests in the President. See *id.* at 492.

**162.** See *Beckstead and Watts Settles Inspection Case with PCAOB*, ACCT. TODAY (Feb. 23, 2011, 2:32 PM EST), <https://www.accountingtoday.com/news/beckstead-and-watts-settles-inspection-case-with-pcaob> [<https://perma.cc/64CL-K7FR>].

**163.** David Zaring, *Toward Separation of Powers Realism*, 37 YALE J. ON REGUL. 708, 728, 743 (2020); accord Kent Barnett, *To the Victor Goes the Toil—Remedies for Regulated Parties in Separation-of-Powers Litigation*, 92 N.C. L. REV. 481 (2014).

scrutiny”<sup>164</sup> and that courts are “less hospitable” to individuals asserting “violation[s] of constitutional rights” than to litigants whose “complaints . . . relate to structural limits on the power of government.”<sup>165</sup> Although “federal courts have . . . played a minor role” in “providing remedies for the violation of negative rights against state violence,” Huq writes, they have played a comparatively “more important role in drawing bounds on what the regulatory state can do.”<sup>166</sup>

The doctrinal reality is precisely the reverse of Huq’s description: it is *noneconomic* liberties that enjoy courts’ most vigilant protection, while judicial scrutiny of economic and other regulatory measures is almost limitlessly deferential.<sup>167</sup> Since the 1940s, the prevailing rule has been that policymakers “have broad scope to experiment with economic problems.”<sup>168</sup> Federal courts now routinely sustain “regulat[ions] of business and industrial conditions” even “in many cases” where such laws concededly impose “needless, wasteful requirement[s].”<sup>169</sup> As the Supreme Court noted in 1994, “exacting review of economic legislation . . . ‘has long since been discarded.’”<sup>170</sup> How strange that judicial abandonment of protection for commercial liberty—cherished by the Reconstruction Framers with whom Huq aligns himself—earns no eulogy in his tale of remedial collapse.

The same hyperdeferential review, despite Huq’s contrary claims, has even crept into modern jurisprudence on constitutional structure. The Court, by its own admission, has “taken long steps down [the] road” of “convert[ing] congressional authority under the Commerce Clause to a general police power of the sort retained by the States[,] . . . giving great deference to congressional action.”<sup>171</sup> Even the Court’s 1995 decision in *United States v. Lopez* and the handful of cases that followed it have, in practical terms, limited congressional power only at the margins. Other than the Fourth Circuit in 1999, no federal court of appeals invalidated a federal law on Commerce Clause grounds between 1995 and 2011, when the Eleventh Circuit partly invalidated the ACA—and of course

**164.** HUQ, *supra* note 2, at 152.

**165.** *Id.* at 3-4.

**166.** *Id.* at 14.

**167.** At times, Huq also portrays federal case law as less favorable to civil-liberties claimants than it really is. For instance, he derides the Court for holding that “[o]utside the policing context, the Fourth Amendment does not apply.” *Id.* at 115. In reality, “th[e] Court has never limited th[at] Amendment[] . . . to operations conducted by the police,” and indeed has held the provision “applicable to the activities of civil as well as criminal authorities” in a variety of contexts. *New Jersey v. T.L.O.*, 469 U.S. 325, 335 (1985).

**168.** *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963).

**169.** *Williamson v. Lee Optical, Inc.*, 348 U.S. 483, 487-88 (1955).

**170.** *United States v. Carlton*, 512 U.S. 26, 34 (1994) (quoting *Ferguson*, 372 U.S. at 730).

**171.** *United States v. Lopez*, 514 U.S. 549, 567 (1995).



that holding was ultimately reversed.<sup>172</sup> And while today's Court acknowledges the separation of powers "as [a] core principle[] of our constitutional design," it has adopted a more "'flexible approach' to that design when it has seemed more convenient to permit the powers to be mixed."<sup>173</sup>

Huq further paints a misleading picture when he complains that, "from schools to prisons to police stations to the border, the Supreme Court has cultivated a thicket of 'deference doctrines'" requiring "judges to give the benefit of the doubt" to officials' "minimally plausible justification[s] founded on public safety, national security, or foreign affairs."<sup>174</sup> Notably absent from Huq's list, however, is perhaps the most consequential form of deference (and the one that most obviously cuts against his position by evincing entrenched judicial bias in favor of regulatory power): *Chevron*, a doctrine that requires a reviewing court to "defer to an agency's reasonable interpretation of a statute it is charged with administering,"<sup>175</sup> "whether or not it is . . . the [interpretation] a court might think best."<sup>176</sup> The Supreme Court has often applied "*Chevron* where concerns about agency self-aggrandizement are at their apogee," including "where an agency's expansive construction of the extent of its own power" works "a fundamental change in the regulatory scheme."<sup>177</sup> Empirical data, too, confirm that *Chevron* loads the interpretive dice in favor of agencies when their acts are challenged in court.<sup>178</sup>

But enough doctrine for now. Huq is all about the data—or at least one would assume so, given how he lambasts his ideological adversaries for resting their views "on hollow empirical premises"<sup>179</sup> and "rely[ing] on . . . bare intuition[s]."<sup>180</sup> Alas, a recurring feature of *Collapse* is Huq's tendency to do just that, particularly in discussing judicial behavior. For example, what do the data say about his claims that litigants whose "complaints . . . relate to structural limits on the power of government" supposedly "have an easy glide path into federal

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172. Jonathan H. Adler, *The Conflict of Visions in NFIB v. Sebelius*, 62 DRAKE L. REV. 937, 958–59 (2014).

173. *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1215 (2015) (Thomas, J., concurring in the judgment) (quoting *Nixon v. Adm'r Gen. Servs.*, 433 U.S. 425, 442 (1977)).

174. HUQ, *supra* note 2, at 7.

175. *Cuomo v. Clearing House Ass'n*, 557 U.S. 519, 525 (2009) (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984)).

176. *Holder v. Martinez Gutierrez*, 566 U.S. 583, 591 (2012).

177. *City of Arlington v. FCC*, 569 U.S. 290, 303 (2013).

178. See Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 116 MICH. L. REV. 1, 5, 6 (2017) (concluding that "agency interpretations were significantly more likely to prevail under *Chevron* deference (77.4%) than . . . de novo review (38.5%)").

179. HUQ, *supra* note 2, at 8.

180. *Id.* at 125.

court,” that “[j]udges[] . . . today” (especially Supreme Court justices, as the context of Huq’s discussion makes abundantly clear) have a “taste for enforcing structure over rights,” or that the modern Supreme Court has “facilitate[d] the litigation of structural constitutional claims” while “severely ration[ing] rights against immediate state coercion”?<sup>181</sup>

Reliable data is hard to come by, and the vagueness of Huq’s claims makes precise empirical measurement challenging. But we tried. We first consulted the Judicial Review of Congress Database (JRCD), which aims to compile all Supreme Court cases considering the constitutionality of federal statutes, and determined based on the results that the Roberts Court declared laws unconstitutional in 38.9% of cases where such laws were assailed on structural grounds, compared to in 67.9% of cases where they were assailed on individual-rights grounds.<sup>182</sup> Still, the JRCD does not include cases decided after the 2017 Term, or those involving constitutional challenges to anything but federal statutes. For more complete data, we consulted the Supreme Court database (SCDB).<sup>183</sup> After

**181.** *Id.* at 3, 138, 150.

**182.** See Keith E. Whittington, *Judicial Review of Congress Database*, PRINCETON UNIV., <https://scholar.princeton.edu/kewhitt/judicial-review-congress-database> [<https://perma.cc/9BCA-WGKM>]. The corresponding figures for the combined Rehnquist Court and Roberts Court eras were 37.5% and 42.9%, respectively. Our coding methods for all statistics in this Section of the Review are described in the Appendix.

**183.** See *The Supreme Court Database*, WASH. UNIV. L., <http://scdb.wustl.edu> [<https://perma.cc/ZL2W-UXDF>]. This database, which is current as of the end of the Court’s most recent full term, is “[t]he most famous and widely used source of Outcome Coding for Supreme Court cases.” Carolyn Shapiro, *The Context of Ideology: Law, Politics, and Empirical Legal Scholarship*, 75 MO. L. REV. 79, 91 (2010). Yet despite the “significant” “reliance on the [SCDB] for empirical projects on the Court . . . , a handful of recent studies have criticized . . . the database’s coding.” Christina L. Boyd, *In Defense of Empirical Legal Studies*, 63 BUFF. L. REV. 363, 375 (2015). We accounted for coding issues by cross-checking our results against other sources and sorting through our SCDB data to weed out miscoded cases.

Some readers may wonder, given that the Supreme Court’s constitutional decisions are not representative of constitutional litigation writ large, whether our methodology is undermined by potential selection effects. Although we cannot be certain, we think not. We rely on success rates of arguments before the Court not to draw inferences about constitutional litigation in general, but rather to compare how the Court treats different types of constitutional arguments when it decides them on the merits. It is irrelevant that the Court’s decisions are not a random sample of cases in which constitutional issues are litigated. To be sure, selection effects could still undermine our comparison if, among constitutional arguments that reached the Court for a decision on the merits, there were systematic qualitative differences between the structural or “rights-against-regulation” arguments and the rights-against-violence arguments. But we see no reason to suspect that such differences exist. One possibility suggested to us during the editing process was that Supreme-Court litigants’ behavior may differ depending on the type of constitutional argument they are advancing, thus confounding our

a cross-check of the results, our refined Roberts Court data show a success rate of 36.5% for structural-constitutional claimants (19 out of 52 cases) and 52.6% for constitutional-rights claimants (163 of 310 cases). For comparison, criminal defendants and habeas petitioners prevailed before the Roberts Court in 43.8% of the 182 cases in which they were parties. These data, while not unassailable, nonetheless call into doubt Huq's claim of partiality on the Court's part for structural arguments, as well as his assertion that "[t]he Court's disdain for prisoner-litigants reached its peak" during Chief Justice Roberts's tenure.<sup>184</sup>

But wait, Huq might say, the analytical "categories of structural constitutional principles" and "negative rights . . . leave out a class" of what he "call[s] individual rights against regulation" – which, like structural principles, "increase the vulnerability of the socially marginal to . . . violence and discrimination": "the Second Amendment, free speech and religious liberty . . . under the First," and "constraints on government 'takings' under the Fifth."<sup>185</sup> While we reject this analytical category of "bad" rights as incoherent, we nonetheless put Huq's claim of judicial bias towards this seemingly random assortment of liberties to the test. We combined all Roberts Court cases that concerned either "rights against regulation" (73, by our count) or constitutional structure into a single category. The win rate for constitutional claimants in such cases was 53.6% (67 of 125 cases), compared to 48.1% (115 of 239 cases) for litigants invoking rights that Huq likes. The former group fared slightly better, but the difference (which is not statistically significant at even the 15% level) is hardly dramatic enough to

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comparison of the success rates of each such type. We doubt it. Constitutional claimants presumably always present the strongest arguments they can, regardless of the constitutional provision being relied upon. If Huq were right that the Court favored some provisions over others, litigants may well react by invoking certain provisions more or less often, as doctrinal shifts broadened the grounds for a constitutional challenge in some areas and narrowed them in others. But we doubt that the *quality* of constitutional arguments that litigants did make would vary depending on whether they concerned structure, "rights against regulation," or other rights.

A harder question is the selection effects arising from the Court's control over its docket. Our tentative view is that such effects do not undercut our reliance on decided cases, either. If the Court had the biases Huq claims it does and acted upon them in choosing cases, review would likely tend to be granted in those that presented (1) rights-against-violence arguments that the Court planned on rejecting and (2) structural or rights-against-regulation arguments that it planned on accepting, so that the justices could narrow doctrine in the former area and broaden it in the latter. But this kind of bias at the grant stage would still manifest itself in the success rates of each type of argument when the Court decided them on their merits.

At any rate, we do not purport to definitively resolve questions about selection effects here, though we flag the issue as one of potential interest for future scholarship.

**184.** HUQ, *supra* note 2, at 117.

**185.** *Id.* at 138-39.

warrant cries of systemic judicial bias.<sup>186</sup> The JRCD data cut even harder against Huq, showing that structural or rights-against-regulation challenges to federal statutes succeeded before the Roberts Court in 16 of 31 (53.6%) cases, compared to 10 of 17 (58.8%) cases in which litigants invoked other rights.

Still, perhaps our analysis would be underinclusive if it were confined to the Court's merits decisions, since Huq argues that the Court's preference for certain constitutional principles also manifests itself in the application of screening rules (mainly standing) that *precede* consideration of the merits. To test this theory, we compiled all Roberts Court cases that decided a point of law regarding a litigant's Article III standing to press a constitutional argument. The Court found standing in 10 of 19 (52.6%) cases in which the underlying constitutional argument was rights-based, compared with in 5 of 9 (55.6%) in which it was structural. This negligible, statistically insignificant difference is not evidence of a double standard. On the other hand, the Roberts Court found standing in 10 of 16 (62.5%) cases where the underlying constitutional issue was either structural or a so-called "right against regulation," and in 5 of 12 (41.7%) where that issue was another right. True, the former figure is higher, though the difference still is not significant at even the 10% level—and thus hardly probative of the kind of bias Huq posits.<sup>187</sup> For good measure, we broadened our inquiry to include Rehnquist-Court cases, but the results tell a similar story. The Court, during the two Chief Justices' combined tenures, found standing in 66.7% (40 of 60) of cases in which the underlying constitutional claim related to individual rights

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**186.** Equally dubious is Huq's vague, unsupported claim that "[p]roperty owners . . . almost always prevail in the Roberts Court." *Id.* at 139. We searched the SCDB for Roberts Court cases where an "owner, landlord, or claimant to ownership, fee interest, or possession of land as well as chattels" was a party, or that applied the Takings Clause. Property owners or takings claimants prevailed in just 17 (51.5%) of 33 cases. Still, given doubts about the validity of the SCDB's coding of parties, we also considered takings cases alone, of which the Roberts Court has decided eight. Takings claimants prevailed in six, but this is weak support for the view that such litigants "almost always" win, especially given that the difference here between 50% and 75% is not statistically significant at even the 10% level.

**187.** To be clear, ours is not an affirmative claim that the Court evenhandedly applies standing rules; our small datasets lack the statistical power to support such an assertion. Rather, our claim is simply that the data fail to support Huq's charges of bias.

Still, some might ask, might the Court instead be manipulating the threshold screening rules by *ignoring* a patent lack of standing so as to reach the merits? That issue is beyond our research capabilities, though another writer studied cases from the Roberts Court's first eight terms "where the Court failed to discuss standing, yet the court or courts below discussed standing extensively, suggesting that standing was at issue"—and, out of 538 decisions, she identified "only one . . . in which the Court" overlooked a probable lack of standing in order "to issue its merits opinion." Heather Elliott, *Does the Supreme Court Ignore Standing Problems to Reach the Merits? Evidence (or Lack Thereof) from the Roberts Court*, 23 WM. & MARY BILL RTS. J. 189, 190, 207 (2014). This finding undercuts claims that the Court regularly "ignor[es] . . . standing doctrine when it wishes to reach the merits of a case." *Id.* at 207.

and 70.6% (12 of 17) in which it related to structural provisions—another statistically insignificant difference. Likewise, the corresponding figures for the Rehnquist Court and Roberts Court combined were 62.5% (25 of 40) for claims based on “Huq-approved” rights and 73% (27 of 37) for structural or “rights-against-regulation” claims—again, a difference not significant at even the 15% level.

To be sure, we would caution others against reading too much into our results, given our imperfect methodology (though even an inexact methodology seems preferable to a nonexistent one). We recognize, too, that these statistics tell us little about the practical importance of various cases’ holdings or about how those holdings affect anyone other than the named litigants. Nor do statistics about the Supreme Court tell us about the behavior of lower courts, which are the last stop for all but a tiny fraction of federal-question cases. We chose the parameters we did only in order to test Huq’s descriptive claims. And even if the Justices *had* agreed with structural arguments slightly more often than individual-rights arguments, so what? Absent a showing that the Court is contorting the law to achieve this result (a showing Huq has failed to make), we see no inherent problem with such a pattern. Huq’s contrary view is founded upon policy arguments about the comparative effects of different classes of constitutional rules that, as we explain in the next Section, are unsound.

### B. Constitutional Costs & Benefits

Consequentialist argument is a recurring feature of Huq’s analysis. He relentlessly presses his contention that modern constitutional case law “deepens economic, social, and racial hierarchies.”<sup>188</sup> But, as with his claims about courts’ behavior, Huq rarely offers more than a scintilla of evidence to affirmatively bolster—or to contend with evidence that undercuts—his assertions about the real-world impacts of judicial decisions (with one exception, which will be discussed in Section III.A). And Huq’s approach to assessing empirical consequences seems just as standardless as his ad hoc approach to identifying constitutional wrongs. Huq attacks a wide variety of core constitutional principles (often in passing), and we have done our best to rehabilitate many of these in the pages that follow—though we regret that, given our time and length constraints, our treatment of some important topics is a bit perfunctory.

At bottom, most of Huq’s empirical claims—as well as his views on the law—are informed by his belief in a fundamental dichotomy: rights against “violent, unconstitutional coercion” deserve judicial protection because their primary

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188. HUQ, *supra* note 2, at 4.

beneficiaries are “economically vulnerable and socially marginal” populations,<sup>189</sup> whereas constitutional “bounds on what the regulatory state can do” are unworthy of such protection because they “raise the cost of government interventions to fix market failures”<sup>190</sup> and thereby inure to the benefit of “the powerful and [the] harmful.”<sup>191</sup>

Even if all that were true, Huq’s perception that some constitutional principles primarily benefit litigants he finds unsympathetic would be infirm grounds for abandoning those principles. Such free-floating “[a]rguments . . . from impolicy or inconvenience ought . . . to be of no weight” in construing the Constitution.<sup>192</sup> In any event, even interpreters who attach great weight to policy arguments would surely agree that, at the very least, the burden should be on those who advocate defiance of the Constitution to show convincingly that compliance with its prescriptions will precipitate disaster. Huq comes nowhere close to clearing this bar.

### 1. *Evaluating “Rights Against Regulation”*

Huq’s manifold claims about the horrors wrought by judicially enforced “bounds on what the regulatory state can do”<sup>193</sup> range from the unfounded to the outlandish. What is it about government action that comes couched as “regulation” that makes it inherently good policy (or at least good enough to place it above judicial reproach)? “Governments at every level . . . wield regulatory power, but not always with regulatory prudence,” and when misused, this power “stymies innovation, raises consumer prices, and impedes economic opportunity with little or no concomitant public benefit.”<sup>194</sup> Are the marginalized better able than the powerful to absorb the costs of such onerous regulatory impositions?

If anything, the opposite seems to be true.<sup>195</sup> For instance, occupational licensing, a pervasive form of economic regulation today, increasingly faces bipartisan criticism for the excessive burdens it imposes (especially on consumers and

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**189.** *Id.* at 8.

**190.** *Id.* at 9.

**191.** *Id.* at 156.

**192.** STORY, *supra* note 112, § 426.

**193.** HUQ, *supra* note 2, at 14.

**194.** Patel v. Tex. Dep’t Licensing & Regul., 469 S.W.3d 69, 101 (Tex. 2015) (Willett, J., concurring) (footnotes omitted).

**195.** See, e.g., *The Growth Potential of Deregulation*, COUNCIL ECON. ADVISORS 7 (Oct. 2, 2017), <https://www.eifr.eu/document/file/download/1936/the-growth-potential-of-deregulation-1-pdf>

job-seekers of color, or from disadvantaged backgrounds) compared with its dubious public benefits.<sup>196</sup> Some worry licensing's focus "has morphed from protecting the public from unqualified providers to protecting practitioners from unwanted competition."<sup>197</sup> Why not enlist courts in smoking out such invidious measures by reinvigorating the commonsense constitutional principle that, if "the qualifications required" by law for a "profession . . . have no relation" thereto, "or are unattainable by . . . reasonable study and application," they unconstitutionally "deprive one of his right to pursue a lawful vocation?"<sup>198</sup>

Huq takes for granted that the effect of policy measures styled as "regulations" is invariably to "fix market failures." But just as surely as regulation may fix market failures, it can inflict them as well. A common manifestation of this "government failure," so to speak, are policies that benefit small groups of industry insiders at the expense of factions too large "to organize an effective 'cartel' in support of or in opposition to . . . legislation" (e.g., consumers).<sup>199</sup> Ironically, antidemocratic measures of this kind are traceable to pathologies that inhere to representative democracy: small, well-organized factions with an intense interest in some issue are better able to convince each of their members that his or her participation in efforts to lobby for favorable policy is critical, whereas in a larger group, the incentive to free ride off of such efforts by others is stronger and each member's sense of obligation to participate weaker.

Thus, in our view, instead of uncritically accepting government's proffered rationales for economic or occupational regulation, judges (particularly state judges unshackled by federal rational-basis review) should "probe more deeply to ensure . . . the laws actually . . . serve the public rather than a narrow faction."<sup>200</sup> A court is no less capable of reviewing for reasonableness regulation deemed "economic" or "occupational" in nature than it is of reviewing, say, a

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[<https://perma.cc/LEX6-SC3A>] (citing studies finding that the economic "burden of government regulation falls most heavily on low-income Americans," who spend more of "their income on heavily regulated goods," and that "[i]ncreasing regulation, particularly entry regulations, can also increase income inequality").

**196.** See Alexander C. Lemke & Alexander Macdonald, *Getting a Second Wind: Reviving Natural Rights Clauses as a Means to Challenge Unjustified Occupational Licensing Regulations*, 41 PACE L. REV. 56, 61-63 (2021) (citing studies showing disparate impact).

**197.** *Patel*, 469 S.W.3d at 105 (Willett, J., concurring).

**198.** *Dent v. West Virginia*, 129 U.S. 114, 122 (1889); see also THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS 277-78 (1879) ("[T]he constitution . . . makes an important provision . . . [to] the right to follow all lawful employments[,] . . . which cannot be made to depend upon the State's permission . . . except . . . that if the business offers temptations to exceptional abuses, it may be subjected to special and exceptional regulations [including] . . . the requirement of a license.").

**199.** RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 497 (3d ed. 1986).

**200.** *Patel*, 469 S.W.3d at 99 n.46 (Willett, J., concurring).

police officer’s search of a suspect’s property under the same rubric. Perhaps the threat of litigation would marginally “raise the cost of government interventions”<sup>201</sup> in the economic realm. But so, too, could the threat of Fourth Amendment litigation raise the cost of police interventions in the law-enforcement realm. All “constitutional protections have costs.”<sup>202</sup> This is no less true of non-economic than of economic liberties, and the costs associated with the former have never been thought to justify their abandonment.

## 2. *Evaluating Structural Principles*

Given, however, that economic rights have been “relegate[d] . . . to a . . . junior-varsity echelon of . . . protection,”<sup>203</sup> the Constitution’s structural provisions have taken on heightened importance as bulwarks against government overreach—and not just for “the powerful and harmful,” as Huq contends.<sup>204</sup> Our federalist system, for its part, has many advantages: “[i]t assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society; . . . it allows for . . . experimentation in government; . . . it makes government more responsive by putting the States in competition for a mobile citizenry”;<sup>205</sup> and it “protects liberty . . . by ensuring that

**201.** HUQ, *supra* note 2, at 9.

**202.** *Coy v. Iowa*, 487 U.S. 1012, 1020 (1988).

**203.** *Patel*, 469 S.W.3d at 113 (Willett, J., concurring). Our general conception of economic liberty is “the right of the citizen” —subject, of course, to reasonable limits— “to live and work where he will; . . . pursue any livelihood or avocation; and . . . enter into all contracts which may be proper” for these purposes. *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897).

**204.** Among the litigants invoking these provisions in the last century have been many whom Huq would likely find sympathetic: criminal defendants, *United States v. Lopez*, 514 U.S. 549 (1995); immigrants, *Immigr. & Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983); public-sector unions, *Bowsher v. Synar*, 478 U.S. 714 (1986); small farmers’ cooperatives, *Clinton v. City of N.Y.*, 524 U.S. 417 (1998); cancer patients, *Gonzales v. Raich*, 545 U.S. 1 (2005); individual shareholders in publicly traded companies, *Collins v. Yellen*, 141 S. Ct. 1761 (2021); and family-owned kosher-poultry merchants, *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935)—all of whom were challenging regulatory codes drafted with the input of their larger, better-connected competitors, *see* Christopher DeMuth, *Can the Administrative State Be Tamed?*, 8 J. LEGAL ANALYSIS 121, 129 (2016).

**205.** *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (citation omitted); *see also* Robert Inman, *Federalism’s Values and the Value of Federalism*, 53 CESIFO ECON. STUD. 522, 522 (2007) (examining “11 measures of economic, democratic, and rights performance” in 73 countries classified as unitary or federal, and finding that “decentralized policy-making” has “a unique contribution to make to a society’s ability to enforce property rights, to protect political and civil rights,” and “to enhance private sector economic performance”).



laws enacted in excess of delegated governmental power cannot direct . . . [citizens'] actions.”<sup>206</sup>

Huq disagrees. Although he is adamant that judicial enforcement of the Constitution’s structural principles is a bad thing, he cannot seem to make up his mind about why. At times, we are told that “federalism and the separation of powers restrict the scope or subject matter of government regulation. They tend to concern *what* the state can regulate, not *how* it acts against individuals.”<sup>207</sup> Elsewhere, however, Huq remarks that these “[s]tructural principles offer an etiquette for the exercise of government power, not necessarily a flat limit on its reach.”<sup>208</sup> So which is it? These contradictory characterizations seem to have been formulated ad hoc, depending on which one better bolsters Huq’s position at a given moment.

Huq’s reasons for spurning the notion that our federal system “promote[s] individual liberty” are no more consistent: federal criminal defendants whose convictions are reversed on federalism grounds “remain[] vulnerable to state prosecution after[wards]” – and it is in many cases “relatively straightforward to write a new federal statute that covers their cases.”<sup>209</sup> Thus, “[g]iven the ease of their circumvention,” Huq writes, the Court’s “federalism decisions . . . are likely to . . . increas[e] vulnerability to violence and discrimination.”<sup>210</sup> But why would those cases have such catastrophic effects if indeed they are so easily circumvented?

Huq’s primary response is to point to *United States v. Morrison*, where the Supreme Court held that the federal civil suit of Christy Brzonkala, a former student at Virginia Tech, against the two classmates who had allegedly raped her could not proceed because Congress lacked the enumerated power to establish a cause of action for sexual violence.<sup>211</sup> As a result, Huq says, she “and others were left tragically exposed to sexual violence that state authorities have neither the will nor the wherewithal to address.”<sup>212</sup> But *Morrison* lends no support to Huq’s claims of state ineptitude. On the contrary, “[a]fter [Brzonkala’s] suit was publicized in 1996, Virginia’s attorney general asked state police to investigate” her allegations.<sup>213</sup> Prosecutors presented the results of the “two-month state police

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**206.** *Bond v. United States*, 564 U.S. 211, 222 (2011).

**207.** HUQ, *supra* note 2, at 138.

**208.** *Id.* at 149–50.

**209.** *Id.* at 142.

**210.** *Id.*

**211.** *Id.* (discussing *United States v. Morrison*, 529 U.S. 598 (2000)).

**212.** *Id.*

**213.** LISA KLOPPENBERG, *PLAYING IT SAFE: HOW THE SUPREME COURT SIDESTEPS HARD CASES AND STUNTS THE DEVELOPMENT OF THE LAW* 250 (2001).

investigation” to a grand jury, before which Brzonkala “declined [an] offer[] to testify” and which found “insufficient evidence to indict” either alleged assailant.<sup>214</sup> Brzonkala later “said in hindsight” that “she would have reported her alleged rape immediately, while there was evidence to collect,” but her attorney nonetheless opined to the press that the state had conducted “a very serious investigation.”<sup>215</sup> While hesitancy to report or testify about a traumatic experience is understandable, the underlying facts undercut Huq’s claim that state authorities’ lack of “will” or “wherewithal to address . . . sexual violence” was the core of the problem.

Indeed, Congress itself, during investigations that precipitated the 1994 passage of the statute struck down in *Morrison*, found that states “[we]re not purposefully discriminating . . . against gender-motivated . . . violence, but rather . . . ha[d] undertaken the ‘most fervent,’ and ‘sincere efforts . . . to assist . . . victims’” of such crimes.<sup>216</sup> A Senate report on the legislation, while lamenting that “legal barriers” faced those who sought redress under state law, ultimately admitted that “[e]ven if we could eradicate these legal rules and practices tomorrow, it is unlikely that prosecution and reporting rates for rape would increase.”<sup>217</sup> The underprosecution of sex crimes had little to do with state courts as such but instead “reflect[ed] more general societal attitudes” that had made

**214.** *Grand Jury Declines to Indict VA. Tech Players but the Athletes Still Face a Civil Suit*, VIRGINIAN-PILOT (Blacksburg), Apr. 11, 1996, at A1.

**215.** *WDBJ 7 News at 6* (television broadcast Apr. 10, 1996) (internal quotation marks omitted) (transcript available Virginia Tech University library), [https://scholar.lib.vt.edu/VA-news/WDBJ-7/script\\_archives/96/0496/041096/041096.6.htm](https://scholar.lib.vt.edu/VA-news/WDBJ-7/script_archives/96/0496/041096/041096.6.htm) [<https://perma.cc/JHA3-3F38>].

**216.** *Brzonkala v. Va. Polytechnic Inst. & State Univ.*, 169 F.3d 820, 885 (4th Cir. 1999) (en banc) (first quoting S. REP. NO. 102-197, at 39 (1991); and then quoting S. REP. NO. 101-545, at 33 (1990)).

**217.** S. REP. NO. 102-197, at 48, 46 (1991). The report focuses on the now largely abandoned common-law rules of parental and spousal immunity. *See id.* at 48, 45. But by 1995, every state but two had abolished or pared back parental immunity enough to allow actions by children against parents for abuse, *see* R. KEITH PERKINS, *DOMESTIC TORTS: CIVIL LAWSUITS ARISING FROM CRIMINAL CONDUCT WITHIN FAMILY RELATIONSHIPS* app. G (2d ed. 2022); and in any event, it is unclear how the 1994 act, which required a plaintiff suing thereunder to prove that an assailant was “motivated by gender,” 42 U.S.C. § 13981(d)(1) (2012), would address child abuse, except in the event such abuse was provably gender-motivated. Similarly, by 1993, all states but four had limited spousal immunity at least enough to permit interspousal assault actions for acts of violence, *see* PERKINS, *supra* app. B; and even in states that retained it, the immunity did not bar suits between former spouses, Douglas D. Scherer, *Tort Remedies for Victims of Domestic Abuse*, 43 S.C. L. REV. 543, 563 (1992). More generally, “[b]y 1988, all fifty states had enacted laws to provide civil and criminal remedies for victims of family violence.” William G. Bassler, *The Federalization of Domestic Violence: An Exercise in Cooperative Federalism or a Misallocation of Federal Judicial Resources?*, 48 RUTGERS L. REV. 1139, 1162 (1996). At any rate, the 1994 federal act was overbroad as a remedial measure; it applied in *all* states, not just in the small minority that retained either of these immunities. *See Brzonkala*, 169 F.3d at 887.

state and federal courts alike inhospitable to victims of sexual violence.<sup>218</sup> All told, then, Huq's unsupported claims notwithstanding, *Morrison* had little effect on those victims' access to legal redress. Only a handful ever invoked the federal right of action before the Court held it invalid in 2000, with the overwhelming majority of such plaintiffs even then opting to pursue state-law remedies.<sup>219</sup> And in the years since *Morrison*, "the number of lawsuits seeking damages for sexual assault" has "gr[own] 'exponentially,'" and "recoveries by plaintiffs have skyrocketed," as well.<sup>220</sup>

On a related note, it seems to us rather odd that Huq is not more skeptical of the overfederalization of criminal law, a key symptom of contemporary courts' halfhearted adherence to federalism principles. He justifiably expresses concern that "the twentieth century has been marked by a tremendous growth in the American state's coercive capacity."<sup>221</sup> That being so, shouldn't he cheer federalism decisions like *Lopez* for their potential to slow the growth of the federal coercive state? After all, defendants in federal court are subject to far harsher penalties than their counterparts in state court charged with substantially identical crimes.<sup>222</sup> Even worse, because "[m]any federal criminal statutes overlap with or merely duplicate state law prohibitions unrelated to any substantial federal interest,"<sup>223</sup> prosecutorial power is enhanced at the expense of defendants (particularly politically unpopular ones) in that prosecutors can take a second bite at the apple pursuant to the separate-sovereigns exception to the Constitution's double-jeopardy prohibition.<sup>224</sup>

The Constitution's scheme of separation of powers, no less than its provisions for federalism, "protects the liberty of the individual from arbitrary power. . . . [T]he claims of individuals – not of Government departments – have

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**218.** S. REP. NO. 101-545, at 34. There is ample research finding "that the federal court systems are prone to the identical types of gender-bias that exist in state court systems." *Brzonkala*, 169 F.3d at 886 n.33 (citing studies). Even some *Morrison* critics have thus noted that it is unclear why victims' right of action "needs to be a federal one," since "state courts are generally open to hear . . . assault and other tort cases." Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 103-04 (2000).

**219.** Krista M. Anderson, *Twelve Years Post Morrison: State Civil Remedies and a Proposed Government Subsidy to Incentivize Claims by Rape Survivors*, 36 HARV. J.L. & GENDER 223, 239 (2013).

**220.** Tom Lininger, *Is It Wrong to Sue for Rape?*, 57 DUKE L.J. 1557, 1568-69 (2008).

**221.** HUQ, *supra* note 2, at 79.

**222.** Gerald G. Ashdown, *Federalism, Federalization, and the Politics of Crime*, 98 W. VA. L. REV. 789, 811 (1996).

**223.** Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135, 1162 (1995).

**224.** See *Gamble v. United States*, 139 S. Ct. 1960 (2019).

been the principal source of judicial decisions concerning separation of powers.”<sup>225</sup> There are many doctrinal manifestations of this separation, but for now we will focus on the one that Huq rails against most ferociously: the unitary executive—the notion that the Constitution, by vesting “[t]he executive Power” in the President, gives him ultimate “control over all exercises of the executive power,”<sup>226</sup> including “the power of removing” principal officers “at his discretion.”<sup>227</sup>

It was agreed upon by the First Congress that “officers in the executive department should hold at the pleasure of the [President], because he is invested . . . with the executive authority”; and this interpretation was soon accepted “as firmly and definitively settled.”<sup>228</sup> But in 1935, the Supreme Court upheld so-called “independent” agencies—those headed by officers whom the President may remove only for specified causes, rather than at will or for policy reasons.<sup>229</sup> A plausible case can be made that, as a matter of first principles, independent agencies violate Article II.<sup>230</sup> Moreover, given their “enormous power over . . . economic and social life” and “the absence of Presidential supervision” of their activities, “independent agencies pose a significant threat to individual liberty.”<sup>231</sup> While the Court has not yet come around to this view and jettisoned its precedents upholding agency independence, it has reined in Congress’s power to structure agencies in cases such as *Free Enterprise Fund* and *Seila Law*. Both holdings strike us as steps in the right direction.

For Huq, however, even these modest limits on agency independence are intolerable. He attacks this line of cases for “undermining the autonomy of the

**225.** *Bond v. United States*, 564 U.S. 211, 222 (2011).

**226.** *Morrison v. Olson*, 487 U.S. 654, 724 n.4 (1988) (Scalia, J., dissenting). Huq misdescribes the unitary executive as the theory that the president has the “absolute[] authority to remove any official within the executive.” HUQ, *supra* note 2, at 137. Actually, the theory, or at least the prevailing version, is that the President has “plenary power to remove principal officers,” but not necessarily “inferior officers.” *Morrison*, 487 U.S. at 724 n.4 (Scalia, J., dissenting). Since the latter are “subject to the supervision of principal officers . . . removable at will” by the President, “it is enough” to preserve presidential control over the executive branch “that [inferior officers] be removable *for cause*, which would include, of course, the failure to accept supervision.” *Id.*

**227.** NATHANIEL CHIPMAN, *PRINCIPLES OF GOVERNMENT: A TREATISE ON FREE INSTITUTIONS INCLUDING THE CONSTITUTION OF THE UNITED STATES* 187 (1833).

**228.** 1 JAMES KENT, *COMMENTARIES ON AMERICAN LAW* 310 (Philadelphia, Grigg & Elliot 2d ed. 1832).

**229.** *See Humphrey’s Ex’r v. United States*, 295 U.S. 602 (1935).

**230.** *See Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2211–19 (2020) (Thomas, J., concurring in part and dissenting in part).

**231.** *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75, 165 (D.C. Cir. 2018) (en banc) (Kavanaugh, J., dissenting).

federal civil service”; the resulting “inability to durably insulate policy projects[],” he says, “undermines efforts to address long-term national challenges.”<sup>232</sup> But how? (And “insulate” policy projects from what? Democracy?) Huq breezes past the substantial literature suggesting that independent agencies are far from the bastions of technocratic expertise or saviors of the marginalized that he portrays them to be.

The prevailing scholarly view is that independent agencies are more prone than their presidentially supervised counterparts to regulatory capture, tunnel vision, and other undemocratic afflictions.<sup>233</sup> A typical independent agency faces acute pressures from whichever congressional committee is responsible for the agency’s budget and oversight.<sup>234</sup> These committees are often dominated by lawmakers beholden primarily to “the policy preferences of . . . small and often atypical” constituencies intensely interested in certain issues.<sup>235</sup> Independent agencies, without the supervision of the President (whose constituency is the entire nation) to counterbalance these congressional influences, tend to fall under the sway of committees and special interests they represent. Considerable evidence bears out these hypotheses.<sup>236</sup> All told, there are more effective means of pursuing the objective of independent, apolitical execution of the laws than

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**232.** HUQ, *supra* note 2, at 143-44.

**233.** See, e.g., Cass Sunstein, *Paradoxes of the Regulatory State*, 57 U. CHI. L. REV. 407, 427 (1990); MARVER BERNSTEIN, *REGULATING BUSINESS BY INDEPENDENT COMMISSION* (1955); Geoffrey Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41, 83; Richard E. Wiley, *Political Influence at the FCC*, 1988 DUKE L.J. 280 (1988); Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 83-86 (1995).

**234.** See, e.g., Calabresi, *supra* note 233, at 62; MIROSLAVA SCHOLTEN, *THE POLITICAL ACCOUNTABILITY OF EU AND US INDEPENDENT REGULATORY AGENCIES* 223, 266-72 (2014).

**235.** Calabresi, *supra* note 233, at 62.

**236.** See sources cited *supra* note 233. Several studies, for example, compare the FTC’s and DOJ’s concurrent powers to enforce antitrust law (an independent agency and an ordinary executive agency, respectively), finding that “[d]espite changes in administrations,” when “the FTC challenges a merger, stock prices of firms in the industry rise . . . as one would expect [of] challenge[s]” likely to “aid producers; when the [DOJ] challenges a merger, stock prices fall,” as “one would expect [of] action . . . designed to assist consumers.” Frank Easterbrook, *The State of Madison’s Vision of the State: A Public Choice Perspective*, 107 HARV. L. REV. 1328, 1342 (1994) (citing studies). True, other research finds that, increasingly, “independent-agency heads are especially likely to support the priorities of the political party they represent.” Neal Devins & David E. Lewis, *Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 B.U. L. REV. 459, 492 (2008). But even if such findings signal waning congressional influence over agencies, they still undercut the idea of independent agencies as bastions of nonpartisan expertise.

the creation of independent agencies, which is “unlikely” in practice to achieve that technocratic ideal and indeed is “usually self-defeating.”<sup>237</sup>

Take the CFPB, which Huq flatteringly describes as “an agency that protects ordinary borrowers and consumers from the sophisticated depredations of banks and payday lenders.”<sup>238</sup> Although it is not funded through the usual congressional budgetary process (and hence not subject to the congressional influences discussed earlier),<sup>239</sup> the CFPB has been the target of thoughtful criticism alleging that its policies are detrimental to the very consumers it purports to protect.<sup>240</sup> One need not agree with this criticism to recognize that there is at least room for well-founded differences of opinion as to how the CFPB ought to exercise its awesome discretion. It seems perfectly reasonable that an agency head

**237.** Sunstein, *supra* note 233, at 428. For instance, Congress could create causes of action through which private plaintiffs may effectuate federal policy, set statutory criteria constraining agencies’ enforcement discretion, *see* *Heckler v. Chaney*, 470 U.S. 821, 833 (1985), establish a norm of presidential noninterference with enforcement decisions such that the norm’s violation would be grounds for impeachment, *see* 1 ANNALS OF CONG. 517 (1789) (Joseph Gales ed., 1834) (“[T]he wanton removal of meritorious officers would subject [the President] to impeachment and removal.” (statement of Rep. Madison)), or transfer any independent agencies’ adjudicatory powers seen as too delicate for an executive agency to Article III courts, *see also* Aaron L. Nielson & Christopher J. Walker, *Congress’s Anti-Removal Power* (C. Boyden Gray Ctr. for the Study of the Admin. State, Working Paper No. 21-46, 2021) (arguing that Congress has other means, besides statutory limits on presidential removal authority, of holding agencies accountable, including its powers of confirming principal officers and of deciding which of the offices it creates will require Senate confirmation).

**238.** HUQ, *supra* note 2, at 13.

**239.** The CFPB is authorized to draw funds from the Federal Reserve up to twelve percent of the Fed’s total operating expenses for that fiscal year. *See* 12 U.S.C. § 5497(a) (2018).

**240.** *See, e.g.*, Todd Zywicki, *Assessing the Effects of Consumer Finance Regulations*, George Mason University School of Law (Apr. 5, 2016) (statement of Prof. Todd Zywicki, former Director of FTC’s Office of Policy Planning, before the S. Comm. on Banking, Hous. & Urb. Affs.) (testifying that “[g]iven [its] extreme lack of democratic accountability, the CFPB . . . has constantly expanded its power . . . at the expense of the public and American families, and trampled under foot other public policies, such as consumer choice and financial innovation”); Todd Zywicki, *The Consumer Financial Protection Bureau: Savior or Menace?*, 81 GEO. WASH. L. REV. 856 (2013) (arguing that the CFPB’s policies have reduced access to credit and generally harmed consumers); Rick Manning, Opinion, *Warren’s Consumer ‘Protection’ Agency Sets Dangerous Precedent*, HILL (July 19, 2017, 5:20 PM EDT), <https://thehill.com/blogs/pundits-blog/finance/342800-warrens-consumer-financial-protection-bureau-setting-dangerous> [<https://perma.cc/WBR6-PDUW>] (criticizing a proposed CFPB regulation of arbitration); Ronald L. Rubin, *The Tragic Downfall of the Consumer Financial Protection Bureau*, NAT’L REV. (Dec. 21, 2016, 9:00 AM), <https://www.nationalreview.com/2016/12/consumer-financial-protection-bureau-tragic-failures> [<https://perma.cc/HR45-FL5K>] (arguing that the CFPB is politicized and mismanaged); Thaya Brook Knight, *This Government Agency Is Seriously Overstepping Its Bounds*, FORTUNE (Oct. 5, 2017, 10:21 AM EDT), <https://fortune.com/2017/10/05/payday-loans-lending-cfpb-rule> [<https://perma.cc/JA9Z-VSQL>] (criticizing CFPB payday-loan regulation for reducing consumers’ access to credit).

entrusted with such pivotal decisions should be answerable to an elected official—namely, the President. After all, the CFPB is one of many “agencies [that] often must make important judgments of policy and principle” that arguably “belong in the political rather than the regulatory sphere.”<sup>241</sup>

But, some may ask, couldn’t subjecting the CFPB and other powerful agencies to the control of one person (the President) threaten liberty as well? Yes, perhaps—which is why, should the Court ever restore the unitary executive, it should also at least partly revive the nondelegation doctrine, another long-dormant structural rule, which holds that “Congress violates the separation of powers when it delegates” to the executive “authority so open-ended as to be essentially ‘legislative’ in nature.”<sup>242</sup> Thus, while accountability for the exercise of executive power would be consolidated in the President, the extent of that power would itself be circumscribed so as to comport with the Constitution.

Indeed, renewed commitment to nondelegation would do a good deal to address Huq’s concern about the “tremendous growth in the American state’s coercive capacity” during the last century.<sup>243</sup> Modern legislators’ penchant for ceding vast policymaking authority to agencies subverts the Constitution’s bicameralism and presentment requirements<sup>244</sup>—which were crafted, as *The Federalist* explained, so as to guard against “the faculty and excess of law-making . . . by requiring the concurrence of two distinct bodies” in matters of national policy.<sup>245</sup> Predictably, “the removal of limits on Congress’s . . . ability to delegate [legislative] powers” to agencies has “produce[d] too much law.”<sup>246</sup> Agency regulation is also “more dynamic” and “unpredictable” than ordinary legislation,<sup>247</sup> and as such is in some tension with Huq’s conception of the rule of law—the idea that those in “power [are] subject to standing legal constraints, enabling citizens . . . to anticipate and plan their lives without fear of arbitrary state coercion.”<sup>248</sup> The Constitution’s ponderous lawmaking process was designed as a bulwark against such “unstable government,” which “damps every

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241. Sunstein, *supra* note 233, at 426.

242. Aaron Gordon, *Nondelegation*, 12 N.Y.U. J.L. & LIBERTY 718, 722 (2019) [hereinafter Gordon, *Nondelegation*]; see also Aaron Gordon, *Nondelegation Misinformation: A Rebuttal to “Delegation at the Founding” and Its Progeny 1-12* (Apr. 23, 2020) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3561062](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3561062) [<https://perma.cc/TR7K-583N>] (arguing for at least partial revival of the nondelegation doctrine).

243. HUQ, *supra* note 2, at 79.

244. See U.S. CONST. art. I, § 7.

245. THE FEDERALIST NO. 62 (James Madison or Alexander Hamilton).

246. DeMuth, *supra* note 204, at 173.

247. *Id.* at 173-74.

248. HUQ, *supra* note 2, at 15.

useful undertaking, the success and profit of which may depend on a continuance of existing arrangements.”<sup>249</sup> That bulwark, of course, cannot function as intended if legislators hand off their core duties to agencies.<sup>250</sup>

According to Huq, however, modern constitutional jurisprudence has led to precisely the opposite evil – a *shortage* of regulation. So what do the numbers say about his claims, made throughout *Collapse* in various forms, that existing case law interpreting the Constitution has “extend[ed] and entrench[ed] a deregulatory agenda” and “durably calcif[ied] the institutional channels through which regulation emerges?”<sup>251</sup> Is the United States today an underregulated society, compared to either the America of the past or to other nations? The answer, no matter how one measures such phenomena, is so obviously “no” that it should hardly require substantiation. But in case it does, the data on the extent of the regulatory burden in this country all contradict Huq quite emphatically.

The U.S. Code consists of over 22 million words of statutory law, while the Code of Federal Regulations has grown from less than 75,000 pages in 1975 to over 175,000 today, and its word count now exceeds 103 million.<sup>252</sup> Recent estimates of the number of federal statutory crimes range from 3,600 to about 4,500, and the number of federal crimes created by administrative regulation is often thought to be between 10,000 and 300,000,<sup>253</sup> to say nothing of the immense body of state and local law that also governs citizens’ lives. Is it any wonder that, according to one recent estimate, the average American professional unwittingly commits three felonies per day?<sup>254</sup> Indeed, it has been said that excessive regulation is “the American illness,”<sup>255</sup> a diagnosis supported by substantial scholarship. A 2013 study of product-market regulation in thirty-five developed countries found that the United States was the ninth most regulated.<sup>256</sup> Many such countries also outrank the United States in the ease-of-doing-business index and other measures of economic freedom.<sup>257</sup>

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**249.** THE FEDERALIST NO. 62 (James Madison or Alexander Hamilton).

**250.** See *In re Borough of W. Phila.*, 5 Watts & Serg. 281, 283 (Pa. 1843) (arguing that “as [the] legislative branch abandons its own functions,” citizens are increasingly subject, “not to prescribed rules of action, to which [they] may safely square [their] conduct before-hand, but to the unsettled will of the ruling power”).

**251.** HUQ, *supra* note 2, at 151.

**252.** See Gordon, *Nondelegation*, *supra* note 242, at 813-14.

**253.** See *id.* at 813.

**254.** See *id.*

**255.** DeMuth, *supra* note 204, at 173 (internal quotation marks omitted).

**256.** COUNCIL ECON. ADVISORS, *supra* note 195, at 2.

**257.** See *Doing Business 2017*, WORLD BANK 7, <https://www.doingbusiness.org/content/dam/doingBusiness/media/Annual-Reports/English/DB17-Report.pdf> [<https://perma.cc/VM8N->



The upshot of all this is that *The Federalist's* insights about the value of constitutional structure were prophetic – and that, if federal courts are trying to “entrench[] a deregulatory agenda”<sup>258</sup> through constitutional adjudication, as Huq alleges, they are doing a remarkably poor job of it.

### 3. *Evaluating Other Rights*

At the same time Huq bewails the effects of the Court's structural cases, he brushes aside concerns about the effects of jurisprudence he likes (which, he assures us, “has no kindred effect on marginalized groups”<sup>259</sup>):

Provision of individual remedies against state coercion . . . may lead to . . . defendants being released from custody . . . . But this is highly unlikely to yield meaningful increases in criminal violence. Rare indeed will be the case in which a defendant is freed due to a constitutional ruling, and then goes on to commit another violent crime.<sup>260</sup>

Says who? No citation or support – empirical or theoretical – is provided for *any* of these claims. We are unwilling to accept Huq's *ipse dixit* that challenging official action on federalism or separation-of-powers grounds undercuts important public-policy goals, while doing so on individual-rights grounds poses no similar difficulties.

Huq disparages the Constitution's structural principles on the purported ground that they “bite hardest when the state is regulating with the aim of *preventing* harms to vulnerable populations. So they are likely to be of greatest use to those who . . . are already inflicting harms to others.”<sup>261</sup> But could the same not be said of those constitutional rules that Huq considers worthy of judicial protection, insofar as they “gum up” the justice system's efforts to protect innocent victims from criminal violence? Note, for instance, that Huq liberally references Christy Brzonkala's tragic story, but makes no mention of the eighteen-year-old girl kidnapped and raped by Ernesto Miranda, whom the Warren Court set free in the decision that bears his name.<sup>262</sup> Could it be that, as Justice White

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SGP4]; Gordon, *Nondelegation*, *supra* note 242, at 814 n.323 (citing studies ranking the United States 11th and 17th).

**258.** HUQ, *supra* note 2, at 151.

**259.** *Id.* at 142.

**260.** *Id.* at 142-43.

**261.** *Id.* at 150.

**262.** *Miranda v. Arizona*, 384 U.S. 436 (1966).

wrote in dissent, “[i]n some unknown number of cases the Court’s rule will return a killer, a rapist or other criminal to the streets”<sup>263</sup>

Certainly, many scholars have criticized *Miranda* “from a crime control perspective” for “fail[ing] to create strong incentives for suspects to talk and to tell the truth.”<sup>264</sup> It seems doubtful that *Miranda*’s warning requirement deters many guilty suspects who would otherwise incriminate themselves from doing so, since the information the warnings convey is by now so ingrained in popular culture as to be common knowledge. But the right of suspects to cut off custodial questioning, another invention of the *Miranda* majority, may be less benign. Most research on the issue finds that *Miranda* reduced confession rates by “between 4 and 16 percent.”<sup>265</sup> Likewise, many “empirical studies . . . about the impact of *Miranda* on crime detection” in general “indicate that [the decision] took a toll,”<sup>266</sup> though of course there has been debate surrounding these findings.<sup>267</sup>

Meanwhile, research on *Miranda*’s benefits to the innocent is bearish; most concludes that innocent suspects are no more likely than guilty ones to invoke *Miranda* rights.<sup>268</sup> In fact, some studies have found that “innocent people *in particular* are at risk to waive [*Miranda*] rights.”<sup>269</sup> And if the *Miranda* Court hoped to civilize interrogations by empowering suspects to cut off questioning if police turned the heat up too high (thereby steering officers toward less coercive tactics), then *Miranda* has failed; all but a handful of suspects either invoke *Miranda* before questioning has begun or not at all.<sup>270</sup> Police, who surely know this, are

**263.** *Id.* at 542 (White, J., dissenting).

**264.** Akhil Reed Amar & Renée B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 908 (1995).

**265.** NAT’L RSCH. COUNCIL OF THE NAT’L ACAD. OF SCI., FAIRNESS AND EFFECTIVENESS IN POLICING: THE EVIDENCE 256-57 (Wesley Skogan & Kathleen Frydl eds., 2004). Fewer confessions means not only that (in all likelihood) more wrongdoers evade punishment, but also that the innocent may lose chances for exoneration by way of true perpetrators’ confessions—a common way in which the falsely accused have cleared their names. See Paul G. Cassell, *Tradeoffs Between Wrongful Convictions and Wrongful Acquittals: Understanding and Avoiding the Risks*, 48 SETON HALL L. REV. 1435, 1474 (2018).

**266.** Gerald M. Caplan, *Questioning Miranda*, 38 VAND. L. REV. 1417, 1464 (1985); see, e.g., Paul G. Cassell, *Miranda’s Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387, 440 (1996) (“[I]n 1993 *Miranda* produced roughly 28,000 lost cases against suspects for index violent crimes and 79,000 . . . for index property crimes.”).

**267.** See generally Paul G. Cassell & Richard Fowles, *Still Handcuffing the Cops? A Review of Fifty Years of Empirical Evidence of Miranda’s Harmful Effects on Law Enforcement*, 97 B.U. L. REV. 685 (2017) (reviewing literature but defending Cassell’s earlier findings).

**268.** See Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051, 1092 (2010).

**269.** Saul M. Kassin, Steven A. Drizin, Thomas Grisso, Gisli H. Gudjonsson, Richard A. Leo & Allison D. Redlich, *Police-Induced Confessions: Risk Factors and Recommendations*, 34 LAW & HUM. BEHAV. 3, 23 (2010) (emphasis added).

**270.** See William J. Stuntz, *Miranda’s Mistake*, 99 MICH. L. REV. 975, 988-91 (2001).

thus unlikely to be deterred from using heavy-handed interrogation methods by fear of *Miranda* invocations. So *Miranda* has likely done little good and has quite possibly done much harm. Of course, findings in social science are rarely unassailable, and perhaps Huq *could* make a contrary empirical case for *Miranda*. But instead, he “rel[ies] on bare intuition” — just as he accuses his adversaries of doing.<sup>271</sup>

Much of the same can be said about Huq’s account of *Mapp v. Ohio*, the Warren Court’s 1961 decision imposing the exclusionary rule on the states.<sup>272</sup> Before *Mapp*, Huq says, the Fourth Amendment had been held applicable to state officials, but it “had very little effect because the Court declined to mandate the exclusion of unconstitutionally gained evidence.”<sup>273</sup> Only after *Mapp* did police, for the first time, “ha[ve] a professional incentive to follow constitutional rules.”<sup>274</sup> But in so arguing, Huq ignores altogether — one might even say “breeze[s] past”<sup>275</sup> — the substantial body of research reaching the opposite conclusion. It is widely acknowledged that, to this day, “[t]he most comprehensive study on the exclusionary rule is probably that done by Dallin Oaks . . . in 1970.”<sup>276</sup> And among his key findings was that “[a]s a device for directly deterring illegal searches and seizures by the police, the exclusionary rule is a failure.”<sup>277</sup>

Nor does Huq stop to consider the *costs* of the exclusionary rule. Couldn’t the justice system’s integrity or fairness be undercut by excluding relevant evidence of criminal wrongdoing based on collateral concerns about how the evidence was obtained? And “[w]hen rapists, burglars, and murderers are convicted, are not the people often *more* ‘secure in their persons, houses, papers, and effects?’”<sup>278</sup> Conversely, are the people not less secure when such offenders are acquitted or never tried thanks to a constitutionally dubious exclusionary rule, as happens not infrequently?<sup>279</sup>

**271.** HUQ, *supra* note 2, at 125.

**272.** 367 U.S. 643 (1961).

**273.** HUQ, *supra* note 2, at 97.

**274.** *Id.* at 98.

**275.** *Id.* at 147.

**276.** Albert W. Alschuler, *Studying the Exclusionary Rule: An Empirical Classic*, 75 U. CHI. L. REV. 1365, 1365 (2008) (quoting *California v. Minjares*, 443 U.S. 916, 926 (1979) (Rehnquist, J., dissenting from denial of a stay)).

**277.** Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 755 (1970).

**278.** AMAR, *supra* note 64, at 26 (quoting U.S. CONST. amend. IV).

**279.** See Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363, 443 (noting that “[a] conservative estimate is that approximately 10,000 felons and 55,000 misdemeanants evade punishment” annually due to the exclusionary rule).

According to Huq, no. Yet he believes that the Court’s handful of state-friendly federalism decisions “increas[e] vulnerability to violence and discrimination.”<sup>280</sup> One cannot help but notice that Christy Brzonkala is front and center in Huq’s argument to this effect, yet his denunciation of the pair of cases establishing the good-faith exception to the exclusionary rule omits any corresponding mention of the twenty-nine-year-old woman beaten to death by the man whose conviction would have been reversed had the Court decided those cases to Huq’s liking.<sup>281</sup> The point, of course, is not that Huq is indifferent to such heinous acts, but rather that his mode of argument is emotionally charged and logically unmoored.

Huq’s discussion of the post-Warren Court’s habeas jurisprudence is equally one-dimensional. He is indignant at Congress and the Court for tightening the rules governing collateral attacks on criminal convictions, arguing that the Court should return to the more permissive standards adopted in 1953’s *Brown v. Allen*.<sup>282</sup> *Brown* “recast habeas as another way for federal courts to redress practically any error of federal law they might find in state court proceedings.”<sup>283</sup> That was contrary to the time-honored rule that “[m]ere error in the judgment or proceedings . . . constitutes no ground for the issue of the writ [of habeas corpus].”<sup>284</sup> There are good reasons for this traditional limitation. A defendant petitioning for habeas relief has already had a chance to raise almost any objection to his conviction on direct appeal. To upend that conviction years after the fact would undercut the penal system by freeing wrongdoers unless prosecutors are able to convict them anew—a tall order, since witnesses may well have died or disappeared and tangible evidence may have deteriorated.<sup>285</sup>

So why must convicted defendants (other than those raising issues that could not have been raised on direct appeal, such as ineffective assistance of counsel or *Brady* claims) have as broad of access to habeas relief as Huq urges? He never

**280.** HUQ, *supra* note 2, at 142.

**281.** See *id.* at 117-18 (criticizing *United States v. Leon*, 468 U.S. 897 (1984)); *Massachusetts v. Sheppard*, 468 U.S. 981 (1984) (delineating the bounds of the good-faith exception).

**282.** 344 U.S. 443 (1953); see HUQ, *supra* note 2, at 95-97, 116-17.

**283.** *Edwards v. Vannoy*, 141 S. Ct. 1547, 1568 (2021) (Gorsuch, J., concurring).

**284.** *Ex parte Siebold*, 100 U.S. 371, 375 (1879).

**285.** It is true that the current federal habeas statute imposes various procedural “tripwires and trapdoors” on prisoners collaterally challenging convictions (particularly state convictions) that, one could argue (as Huq does), are “needlessly intricate.” HUQ, *supra* note 2, at 116, 171 n.14 (citing 28 U.S.C. § 2254(d)(1) (2018)). We are open to arguments for reforming the statute so as to mitigate some of these burdens, but Huq does not suggest any such reform other than returning to the regime established by *Brown v. Allen*—which, for reasons already explained, is a proposal liable to weighty objections.

explains.<sup>286</sup> We can only assume that his position on this issue is informed by his belief that nothing – not even settled rules of procedural default or the systemic interest in the finality of convictions – can *ever* stand in the way of a litigant demanding a judicial remedy. The law, of course, has never reflected that quixotic view.

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Instead of engaging with any of the foregoing ideas, Huq slights those whose views differ from his on constitutional questions as harboring “malign neglect for the . . . marginalized.”<sup>287</sup> “[T]he structural constitution,” according to Huq, is primarily “wielded today by” those “eager to prey on the financially weak.”<sup>288</sup> How, one wonders, does it show “malign neglect” for the “marginalized” or “the financially weak” to demand that ALJs be appointed by agency heads rather than by less accountable subordinate bureaucrats, that powerful regulators be insulated from the control of elected officials by no more than one layer of “for-cause” removal protection, or that agency heads who wield significant regulatory power over the national economy without presidential supervision be multimember commissions rather than individual administrators? We find these insinuations deeply troubling. We do not believe, for instance, that Huq, in praising the holding in *Miranda*, displays “malign neglect” for the young woman raped by the man whom that holding set free. We wish Huq would extend the same courtesy to those with whom he disagrees on constitutional issues or at least better substantiate his offhanded claims that his ideological adversaries are in league with slave owners.<sup>289</sup>

### III. REMEDIAL RATIONING: QUALIFIED IMMUNITY & *BIVENS*

All that said, some of Huq’s concerns about remedial rescission are well-founded. We agree in large part with his criticism of two doctrines in particular: qualified immunity and implied rights of action (or, more accurately, the lack thereof) for constitutional violations. Given the practical significance of these

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**286.** It is not as if the rules for criminal defendants collaterally attacking their convictions are stricter than those for litigants invoking the Constitution’s structural provisions on collateral attack. In particular, under the *de facto* officer doctrine, the unconstitutionality of a decisionmaker’s composition or appointment cannot be raised on collateral attack or to challenge the decisionmaker’s past acts. See *Ryder v. United States*, 515 U.S. 177, 180–82 (1995).

**287.** HUQ, *supra* note 2, at 151.

**288.** *Id.* at 150.

**289.** See *id.* at 150 (stating that “the Constitution of 1787 accommodated slavery and white supremacy” such that “[t]he elevation of [the structural] . . . Constitution reflects a decision to prioritize th[ose] interests” over those at “the fore in the Civil War’s aftermath”).

topics, we dedicate this Part to echoing, supplementing, and critiquing Huq’s analysis of both, as appropriate.

### A. *Qualified Immunity*

Start with qualified immunity—a lead villain in Huq’s story of remedial collapse. That controversial doctrine limits the availability of remedies out of a purported “need to shield officials from . . . liability when they perform their duties reasonably.”<sup>290</sup> Unfortunately, qualified immunity is often stretched beyond this objective to the point of unduly thwarting the righting of constitutional wrongs. We therefore agree with Huq that modern immunity practice is susceptible to serious objections.

To begin with, we share Huq’s consternation that the Supreme Court, in formulating its qualified-immunity doctrine, has “appeal[ed] in the main not to . . . nineteenth-century common law, but to ‘considerations of public policy.’”<sup>291</sup> This is a dubious approach to construing the broad language of Section 1983, a landmark civil-rights law enacted to combat abuses against former slaves that makes no explicit mention of immunity.<sup>292</sup> In our view, courts may afford defendants sued under Section 1983 no broader immunity than that established in common law when the provision was enacted in 1871. This is because presumed congressional intent not to eliminate traditional immunities is the only potentially sound justification for limiting Section 1983’s sweeping text.

In its current form, however, qualified immunity is a mere invention of twentieth-century judges. In 1967, the Warren Court, even while issuing momentous decisions expanding civil rights, held that government officials exercising discretionary functions are not liable “if they acted in good faith.”<sup>293</sup> That idea laid the foundation for qualified immunity by drawing upon a principle of common law that predated Section 1983 by decades: that officials have limited immunity for certain acts taken in “good faith.” To be sure, serious scholars differ over the state of eighteenth-century immunity jurisprudence and the degree to which

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**290.** *Pearson v. Callahan*, 555 U.S. 223, 231 (2009).

**291.** HUQ, *supra* note 2, at 123 (quoting *Butz v. Economou*, 438 U.S. 478, 506 (1978)). In fairness to the Court, we note that *Butz* concerned immunity from *Bivens* claims. In contrast, the Court has properly disclaimed a power to shape immunities in Section 1983 actions based on its own policy judgment. See *Burns v. Reed*, 500 U.S. 478, 493 (1991).

**292.** See 42 U.S.C. § 1983 (2018) (“Every person who, under color of [state law], subjects, or causes to be subjected [any person] to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .”).

**293.** *Pierson v. Ray*, 386 U.S. 547, 555 (1967).

Section 1983 incorporated then-prevailing common law.<sup>294</sup> But they do agree on the one critical thing that, in practical terms, matters most: today's contrived "clearly established law" test has no historical basis. Nowadays, "an allegation of malice is not sufficient to defeat [qualified] immunity if the defendant acted in

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294. See Scott A. Keller, *Qualified and Absolute Immunity at Common Law*, 73 STAN. L. REV. 1337 (2021). Keller's contention that a good-faith defense covered "quasi-judicial" duties, which referred to the kind of "discretionary policy decisions" for which modern courts afford qualified immunity, *id.* at 1346, has been contested by William Baude, who argues that "quasi-judicial" duties involved "mak[ing] binding legal determinations," William Baude, *Is Quasi-Judicial Immunity Qualified Immunity?*, 73 STAN. L. REV. ONLINE (forthcoming 2022) (manuscript at 3), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3746068](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3746068) [<https://perma.cc/2AWY-QXKP>], whereas the duties covered by qualified immunity today were considered merely "ministerial" and thus unprotected by any immunity, *see id.* at 4.

Baude is right that, according to some nineteenth-century writers, "an act is not necessarily" nonministerial just "because the officer . . . is required to judge, whether [a] contingency has occurred, in which he is empowered or bound to act." MONTGOMERY H. THROOP, A TREATISE ON THE LAW RELATING TO PUBLIC OFFICERS AND SURETIES IN OFFICIAL BONDS § 538, at 512 (New York, The J.Y. Johnson Co. 1892). The "ministerial" label was sometimes used even "where [a] duty [was] plainly pointed out, but [an officer] [was] nevertheless vested with a discretion" as to "the method of performing it." *Id.* Still, the prevailing view when Section 1983 was enacted seems to have been that "any officer, sworn to act faithfully, according to the best of his ability, . . . is a judicial officer within the rule." THOMAS G. SHEARMAN & AMASA A. REDFIELD, A TREATISE ON THE LAW OF NEGLIGENCE § 163, at 192-93 (New York, Baker, Voorhis & Co. 1869). "[S]o far as he exercises his judgment" as "to the manner . . . in which he will do a certain thing," "[t]he law confides a discretion to him, which, if exercised in good faith, cannot be questioned." *Id.* § 165, at 195-96. Other sources also described this good-faith immunity as broadly covering discretionary functions, without any indication that it was limited to binding legal determinations. See 2 FRANCIS HILLIARD, THE LAW OF TORTS OR PRIVATE WRONGS 330-32 (Boston, Little, Brown, & Co. 1859); *cf.* COOLEY, *supra* note 47, at 411-13; Gould v. Hammond, 10 F. Cas. 874 (C.C.N.D. Cal. 1857) (explaining that where the law vests an officer with discretion, he acts quasi-judicially and is not liable unless he acts maliciously). Indeed, some authorities expressly rejected such a limitation. See SHEARMAN & REDFIELD, *supra*, § 164, at 194-95 (election officers act quasi-judicially even though they cannot adjudicate rights with finality). Courts, too, often extended quasi-judicial-grade immunity to officials' discretionary law-enforcement decisions (apparently independently of the leeway afforded by constitutional provisions governing searches and seizures, which tolerate some reasonable mistakes by public officers). See, e.g., *Druecker v. Salomon*, 21 Wis. 621, 630 (1867); *Furr v. Moss*, 52 N.C. 525, 527 (1860); *McCarthy v. De Armit*, 99 Pa. 63, 71-74 (1881); *Firestone v. Rice*, 38 N.W. 885, 888-89 (Mich. 1888); *Goodwin v. Guild*, 29 S.W. 721, 722-23 (Tenn. 1895). And while Baude suggests that good-faith immunity never covered unconstitutional (as opposed to merely illegal) conduct, *see* Baude, *supra*, at 7-8, some courts did hold officials immune for allegedly unconstitutional quasi-judicial acts, *see, e.g.,* *Jenkins v. Waldron*, 11 Johns. 114, 120-21 (N.Y. Sup. Ct. 1814); *Wheeler v. Patterson*, 1 N.H. 88, 89-91 (1817); *Pike v. Megoun*, 44 Mo. 491, 499-500 (1869); *Wilkes v. Dinsman*, 48 U.S. (7 How.) 89, 114-15, 130-32 (1849). With that said, Baude rightly stresses that even traditional good-faith immunity was unavailable for acts wholly outside the scope of officials' jurisdiction, a limitation perhaps not adequately observed in today's qualified-immunity case law. See Baude, *supra*, at 7.

an objectively reasonable manner” — a clear departure from the traditional common-law good-faith standard, under which a plaintiff could overcome immunity by showing a defendant’s ill intent.<sup>295</sup>

Unfortunately, Huq misses an opportunity to engage with this debate over whether some form of official immunity can be justified based on a historically informed reading of Section 1983.<sup>296</sup> We presume he believes the answer to be “no,” but without any discussion of history, his critique seems incomplete. For if it were the case that such immunity *was* implicit in Section 1983 as originally understood, then we doubt courts would be any freer to abolish immunity based on Huq’s policy arguments than they would be to fabricate it based on the policy arguments on the other side.

Huq is likewise correct that courts have often set too-stringent a standard for what qualifies as a “clearly established” constitutional right. Courts, he observes, have at times held official defendants immune, even apparently for bad-faith conduct, simply because “there [was] no earlier decision with identical facts” that established “beyond debate” that such conduct was wrong.<sup>297</sup> The Federal Reports are replete with head-scratching grants of immunity for abuses that, while conscience-shocking, were apparently novel enough that their unlawfulness was not “clearly established.”<sup>298</sup> By frequently letting public servants off the hook for one-off acts of palpable misconduct, qualified immunity in its current form “smacks of unqualified impunity, letting . . . officials duck consequences for bad behavior . . . as long as they were the *first* to behave badly.”<sup>299</sup>

That said, Huq slightly oversimplifies the doctrinal landscape with his categorical assertion that a plaintiff must identify a prior decision with “identical” facts. True, the facts of the prior case must map onto the facts of the plaintiff’s

**295.** *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

**296.** Compare *Burns*, 500 U.S. at 498 n.1, 500 (Scalia, J., concurring in part and dissenting in part) (arguing that something similar to qualified immunity is historically justified), Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 NOTRE DAME L. REV. 1853, 1864-68 (2018) (same), and Keller, *supra* note 294 (same), with Jay Schweikert, *Qualified Immunity: A Legal, Practical, and Moral Failure*, CATO INST. 3-5 (2020), <https://www.cato.org/sites/cato.org/files/2020-09/pa-901-update.pdf> [<https://perma.cc/Q4Z8-R88B>] (arguing that qualified immunity lacks historical basis), and *Baxter v. Bracey*, 751 F. App’x 869 (2018), *cert. denied*, 140 S. Ct. 1862, 1862-64 (2020) (Thomas, J., dissenting from denial of certiorari) (same).

**297.** HUQ, *supra* note 2, at 113; see *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011).

**298.** See, e.g., *Jessop v. City of Fresno*, 936 F.3d 937 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 2793 (2020) (describing the police stealing \$225,000 while executing a search warrant); *Corbitt v. Vickers*, 929 F.3d 1304 (11th Cir. 2019), *cert. denied*, 141 S. Ct. 110 (2020) (describing the police shooting a ten-year-old boy in the leg while trying to shoot the nonthreatening family dog).

**299.** *Zadeh v. Robinson*, 928 F.3d 457, 479 (5th Cir. 2019) (Willett, J., concurring in part and dissenting in part).



case. But in reality, the lower courts are “divided . . . over precisely what degree of factual similarity must exist.”<sup>300</sup> The Supreme Court has unfortunately done little to clear things up. On the one hand, the Court says the law “does not require a case directly on point” for a right to be clearly established.<sup>301</sup> Yet the Court also says at times that the relevant precedent must be “particularized” to the facts of the case.<sup>302</sup> The “clearly established” standard, then, is neither clear nor established.

We likewise share Huq’s concern that courts often grant qualified immunity without first determining whether the Constitution was violated. Today, courts may duck deciding the legality of a defendant’s conduct by disposing of a case based on a lack of factually analogous precedent.<sup>303</sup> Yet skipping the legality question in this way stunts the doctrinal development needed to “clearly establish” rights in future cases: “[p]laintiffs must produce precedent” in order to overcome immunity, but thanks to courts leapfrogging the threshold question of whether the challenged conduct was unlawful, “fewer courts are producing precedent.”<sup>304</sup>

Huq also repeats the widespread (and understandable) critique that qualified immunity “disallow[s] private actors from even getting into court to challenge government action.”<sup>305</sup> But how often are courthouse doors *actually* slammed shut? Huq never undertakes to answer. Some studies, however, have attempted such data-driven analyses, and they suggest that qualified immunity is rarely dispositive in constitutional litigation – at least not in the way the Court may have intended.<sup>306</sup> To be sure, studies that analyze dispositions in federal

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**300.** *Id.* Even the Supreme Court has not invariably required a near-identical precedent. Twenty years ago, the Court explained that “officials can still be on notice that their conduct violates established law even in novel factual circumstances”; all that is required is that the prior decisions be clear enough to give officials the same “fair warning” of their conduct’s unlawfulness to which ordinary citizens are entitled under the Due Process Clauses. *Hope v. Pelzer*, 536 U.S. 730, 740 n.10, 741 (2002). To the extent Huq faults courts for going beyond that to the point of demanding a carbon-copy precedent, we are with him. And perhaps the Supreme Court is, too. Two recent summary dispositions vacated grants of immunity for clear constitutional abuses, holding that courts below had set too high a bar for what constituted a “clearly established” right. *See Taylor v. Riojas*, 141 S. Ct. 52, 53–54 (2020) (per curiam); *McCoy v. Alamu*, 141 S. Ct. 1364 (2021) (mem.).

**301.** *Mullenix v. Luna*, 577 U.S. 7, 12 (2015).

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

**303.** *Pearson v. Callahan*, 555 U.S. 223, 227 (2009).

**304.** *Zadeh*, 928 F.3d at 479 (Willett, J., concurring in part and dissenting in part).

**305.** HUQ, *supra* note 2, at 6.

**306.** For instance, “the largest and most comprehensive study to date” on this topic, undertaken by a leading academic *critic* of qualified immunity, examined “1,183 lawsuits filed against state

cases cannot tell us how often qualified immunity influences plaintiffs' decisions to settle or deters would-be plaintiffs from suing in the first place.<sup>307</sup> Nor, as we explain shortly, do they assuage the main public-policy concerns surrounding the doctrine. But they certainly can tell us how often "constitutional wrongs *that reach a federal court* yield no remedy."<sup>308</sup> On that score, a more salient question is how often plaintiffs with *meritorious* constitutional claims are denied recovery by qualified immunity. The answer seems to be "not all too often" – at least according to a study that examined the period from 2001 to 2009 (during which courts were required in every qualified-immunity case to decide whether a right had been violated *and* whether the right was "clearly established") and concluded that it was relatively rare for courts to find a constitutional violation but side with the defendant on immunity grounds.<sup>309</sup> So anecdotally, while there are countless cases of wrongs not righted, empirically, qualified immunity (flawed as it may be) is not the reason that most plaintiffs are unsuccessful. To clarify, our point thus far has not been that qualified immunity is good policy. Rather, we simply contend that Huq's unqualified assertion that "most individual constitutional wrongs that reach a federal court yield no remedy" is belied by the data.<sup>310</sup>

This brings us to the most compelling part of *Collapse*: Huq's thoughtful analysis of whether the Supreme Court "[w]as . . . right," *as a matter of policy*, "to constrict individual remedies" via qualified immunity.<sup>311</sup> Huq begins this discussion by articulating some of the Court's key policy justifications for its decisions in this area, the first of which is that "[d]amages . . . work against [a public

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and local law enforcement defendants over a two-year period in five federal district courts" and found that qualified immunity "was the basis for dismissal in 3.9% of the 979 cases" in which the defense even *could* have been raised. Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 9, 45 (2017). (Moreover, to reiterate, suits against police officers are themselves but a small fraction of the many proceedings in which constitutional claims may be litigated.) Another study likewise found that qualified immunity was dispositive in only two percent of *Bivens* actions. Alexander A. Reinert, *Measuring the Success of Bivens Litigation and Its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809, 843 (2010).

**307.** See Schwartz, *supra* note 306, at 61-62. For example, because no attorney fees are awarded when a case is dismissed on qualified-immunity grounds, would-be plaintiffs may find it difficult to retain counsel. See Nielson & Walker, *supra* note 296, at 1881-82.

**308.** HUQ, *supra* note 2, at 7 (emphasis added).

**309.** See *Saucier v. Katz*, 533 U.S. 194, 201 (2001), *overruled by* *Pearson v. Callahan*, 555 U.S. 223 (2009). According to that study, during the period in question, only 8.8% of federal appellate cases and 4.5% of district court cases in which qualified immunity was discussed found a constitutional violation but then held defendants immune. Colin Rolfs, *Qualified Immunity After Pearson v. Callahan*, 59 UCLA L. REV. 468, 491-94 (2011). And of course these percentages fall further if one adds to the denominator cases where a constitutional claim was litigated but qualified immunity played no role.

**310.** HUQ, *supra* note 2, at 7.

**311.** *Id.* at 123.

official] individually. They force him . . . to bear the downside risk, and . . . costs, of his action”; without qualified immunity, “[t]he asymmetry . . . between personally felt costs and benefits would result in officers shying away from legally risky actions that . . . are in fact justified.”<sup>312</sup> A related defense of immunity, Huq further observes, “sounds in fairness terms”<sup>313</sup>: public officials, particularly those with no legal training or who must make split-second decisions, can hardly be expected to anticipate the novel constraints on their actions that a court might derive from vague constitutional provisions, except to the extent that existing case law has made those constraints clear.

But Huq ultimately rejects both of “th[ese] justification[s]” as “at odds with the facts.”<sup>314</sup> He points to studies finding that, thanks to widespread indemnification and insurance, state and local police “officers almost never pay judgments out of pocket.”<sup>315</sup> That being so, fears about overdeterrence of laudable law-enforcement activity would seem infirm grounds on which to deny compensation for constitutional violations, as would “fairness concern[s]” about the lack of notice to defendants that their conduct is unlawful, since “liability will never hit home.”<sup>316</sup>

There is great force to Huq’s position. If individual defendants entitled to qualified immunity under current law are, in practice, unlikely to shoulder the costs personally if they are found liable, the balance of policy considerations shifts. Suddenly, it no longer seems as fair to deny the injured party recovery out of concern for the impact of liability on a defendant. To Huq’s analysis of these public-policy issues, we add some (though not necessarily contrasting) observations of our own.

First, even assuming the data Huq cites on police can be generalized to the class of *all* officials entitled to qualified immunity, it is worth remembering that just because an official contributes little to a settlement or judgment does not mean he or she faces no personal consequences. It is hard to believe that states

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**312.** *Id.* at 125–26.

**313.** *Id.* at 127.

**314.** *Id.* at 126.

**315.** *Id.* (citing Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885 (2014)).

**316.** *Id.* at 128. Similarly, to the extent qualified immunity is intended to ensure that officials have actual—as opposed to constructive—notice of constitutional limits on their conduct, one commentator has seriously called into question the assumption behind this justification for immunity (at least in the policing context), arguing that officers do not in fact stay abreast of developments in the caselaw on excessive force—and that, in any event, it is fanciful to expect officers to recall and apply judicial holdings while making split-second decisions. *See generally* Joanna C. Schwartz, *Qualified Immunity’s Boldest Lie*, 88 U. CHI. L. REV. 605 (2021) (describing the findings of a study of law enforcement policies and training materials).

and localities would do nothing to dissuade their employees from incurring liabilities for which those governments are ultimately on the hook.<sup>317</sup> Some empirical and anecdotal evidence tends to confirm the commonsense notion that officials are indeed deterred, at least to some degree, by the threat of liability.<sup>318</sup> Surely employer discipline is part of the explanation—especially given that a practice of “inadequate supervision and discipline of officers who have committed constitutional violations in the past” exposes a government entity itself (which is generally not liable for such violations by its employees) to Section 1983 liability.<sup>319</sup> It is possible, too, that qualified immunity’s role in deterring litigation of constitutional claims is part of the reason why officials personally shoulder little of the liability in civil-rights cases. Hence, if that immunity

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**317.** Huq casts doubt on government entities’ aversion to liability, worrying that if such an entity were insured or satisfied its liabilities “from a central fund common to the [jurisdiction] as a whole,” it would have “no financial reason to change its ways.” HUQ, *supra* note 2, at 128. Huq’s concern seems overstated. If “policy makers were indifferent to damages liability, they would presumably not bother to seek state laws that confer immunity” therefrom, but “such state-law immunities are ubiquitous.” Lawrence Rosenthal, *Defending Qualified Immunity*, 72 S.C. L. REV. 547, 575-76 (2020); *see also* John Rappaport, *How Private Insurers Regulate Public Police*, 130 HARV. L. REV. 1539 (2017) (detailing how insurers use incentives and penalties to deter constitutional violations by insured municipalities).

**318.** *See, e.g.*, Arthur H. Garrison, *Law Enforcement Civil Liability Under Federal Law and Attitudes on Civil Liability: A Survey of University, Municipal and State Police Officers*, 18 POLICE STUD.: INT’L REV. POLICE DEV. 19, 26 (1995) (finding sixty-two percent of Pennsylvania law-enforcement officers believed liability deters police abuses); John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 51 n.17 (1998) (observing that “officers at the National Academy” had a strong “aversion to being sued, even when they were confident” that they would not personally bear liability).

We also wonder, given how heavily Huq’s argument against qualified immunity relies on the expectation that official defendants will be indemnified, whether he would hew to the same position if it came to light in a particular case that the defendant *would* personally bear all liability. This prospect raises another concern highlighted by some defenders of qualified immunity: imposing personal liability for unconstitutional acts whose unlawfulness is not “clearly established” presents a risk of rendering Section 1983 unconstitutionally vague. *See* Nielson & Walker, *supra* note 296, at 1873; *cf.* *Screws v. United States*, 325 U.S. 91, 104-05 (1945) (plurality opinion) (holding that the criminal counterpart to Section 1983 risks being unconstitutionally vague without the clearly-established-law requirement). A policy is unconstitutionally vague if it “fails to provide a person of ordinary intelligence fair notice of what is prohibited.” *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). This principle applies to both criminal and civil prohibitions, *see id.*, including when the issue arises in a private civil lawsuit (or so some case law suggests), *see* *A.B. Small Co. v. Am. Sugar Refin. Co.*, 267 U.S. 233, 239 (1925); *Drake v. Drake*, 15 N.C. 110, 115 (1833). Because the Constitution does not “partake of the prolixity of a legal code,” *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819), turning the Constitution into such a code would arguably arouse fair-warning concerns.

**319.** MICHAEL AVERY, DAVID RUDOVSKY, KAREN M. BLUM & JENNIFER LAURIN, *POLICE MISCONDUCT: LAW AND LITIGATION* § 4:20 (2021).

were abolished, the frequency and extent to which officials are indemnified or otherwise reimbursed could decrease as the frequency and size of judgments and settlements in Section 1983 suits increased.

More fundamentally, there may be more at stake in this debate than just the consequences personally suffered by officials sued under Section 1983. It is in the sovereign interests of governmental entities to maximize their officers' discretion in carrying out duties that call for flexible and prompt decision making. To what extent should the entity – and, by extension, the taxpayers – bear the costs if officers exercising that discretion make a legal misstep in an area where the jurisprudence is unsettled? Immunity defenders forcefully argue that liability under such circumstances would divert public resources away from optimal uses and towards litigation-imposed costs. As one commentator explains:

If liability were imposed merely because public employees and their supervisors failed to anticipate future legal developments . . . governments could minimize liability only by directing their employees to resolve every debatable judgment in favor of avoiding liability-creating conduct . . . . [T]imidity of this type might deter public employees from providing important public services.<sup>320</sup>

We draw attention to the foregoing policy considerations not because we believe they prove Huq wrong, but rather because we hope to call attention to nuances in the qualified-immunity debate that Huq's analysis, well-reasoned as it is, does not fully confront. All things considered, our position is simply that, "[g]iven the uncertain state of empirical evidence," one should be slow to embrace immunity proponents' claims that the doctrine is necessary to afford officials adequate leeway in the performance of their duties – but at the same time, one should also "be slow to embrace the counterintuitive" contrary view "that state and local policy makers are indifferent to the cost of damages liability."<sup>321</sup>

Finally, while we agree with Huq that the Supreme Court should reexamine its qualified-immunity case law, Huq's singular focus on the Court gives a pass

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**320.** Rosenthal, *supra* note 317, at 586. Huq brushes aside concerns about "timidity" among police, suggesting that "coercive state action" is currently far above "social[ly] optimum" levels. HUQ, *supra* note 2, at 125. That is debatable. After a wave of efforts in major urban areas to slash police budgets in 2020, murder that year saw its largest increase in U.S. history. See German Lopez, *Murders Are Spiking. Police Should Be Part of the Solution*, VOX (Sept. 27, 2021), <https://www.vox.com/22580710/defund-the-police-reform-murder-spike-research-evidence> [<https://perma.cc/QL55-XMUS>]. Observers across the political spectrum have thus increasingly come to acknowledge the "solid evidence that more police officers and certain policing strategies reduce crime and violence" and that the benefits of these decreases are felt especially in communities of color. *Id.*

**321.** Rosenthal, *supra* note 317, at 579.

to Congress and state legislatures. Lawmakers, not judges, represent the best prospect of reform. “[I]t must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.”<sup>322</sup> In the fullness of time, we believe the doctrine of qualified immunity will be rightly rethought, but the best prospects for smart reform likely rest outside of the judiciary.

### B. *Bivens*

Huq is on similarly firm ground when he criticizes the modern Supreme Court for paring back the availability of relief under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, a 1971 case where the Court entertained an action for damages against federal officials alleged to have violated constitutional rights, even in the absence of a statute providing for such a cause of action.<sup>323</sup> Huq disapprovingly notes that in the decades since *Bivens*, the Court has generally refused to extend its logic to “new” or “‘different’ context[s]” – instead holding, with few exceptions, that it “was for Congress to decide” whether to broaden federal officials’ liability for damages.<sup>324</sup> Huq’s account is accurate. And it troubles us, as well, that without *Bivens* relief, some victims of discrete instances of unconstitutional conduct by federal officials will be denied any form of judicial redress. Put simply, “[p]rivate citizens who are brutalized – even killed – by rogue federal officers can find little solace in *Bivens*.”<sup>325</sup>

At the same time, Huq ducks the vexing question of whether the Constitution permits federal courts to recognize constitutional causes of action for damages without statutory authorization. On the one hand, it is undisputed that federal courts need no statutory basis to award *equitable* relief for constitutional violations.<sup>326</sup> But there is no comparable tradition dating back to the Framing of federal courts exercising inherent power to create constitutional causes of action for *damages* – at least not in cases arising under federal-question jurisdiction.<sup>327</sup>

**322.** *Mo., Kan. & Tex. Ry. Co. v. May*, 194 U.S. 267, 270 (1904).

**323.** 403 U.S. 388, 389 (1971).

**324.** HUQ, *supra* note 2, at 118 (quoting *Hernández v. Mesa*, 140 S. Ct. 735, 743 (2020) (internal quotation marks omitted)).

**325.** See *Byrd v. Lamb*, 990 F.3d 879, 883 (5th Cir. 2021) (Willett, J., concurring).

**326.** See *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 326-27 (2015).

**327.** Early federal courts sitting in diversity recognized nonstatutory rights of action in applying the common law of the states in which they sat, see *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 658 (1834), and in developing the long-since discarded body of “federal common law,” see *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 19 (1842). And, from the beginning, federal courts sitting in admiralty did the same with the common law of the sea, “as it has existed for ages.” *Am. Ins. Co. v. 356 Bales of Cotton*, 26 U.S. (1 Pet.) 511, 546 (1828).

Instead, suits against federal officers for unconstitutional acts were brought as state-law tort claims, and plaintiffs could argue the unconstitutionality of defendants' conduct in order to overcome any attempt at a public-authority defense.<sup>328</sup> But with state-tort actions against federal officers for official acts now preempted by federal law,<sup>329</sup> are federal courts justified in unilaterally exercising "common-law powers to create causes of action" based on "the mere existence of a . . . constitutional prohibition"?<sup>330</sup> Some say "no"; others say "yes."<sup>331</sup> In our view, neither side has set forth watertight evidence of original meaning that convincingly supports its position.<sup>332</sup>

In any event, we prefer not to frame the issue as one about the power of courts to "create" causes of action; rather, we think that the question of whether there is an entitlement to a damages remedy "depend[s] on . . . the meaning . . . of the 'substantive' provision[] of the Constitution" at issue.<sup>333</sup> Most would concede that it is possible for a constitutional guarantee to provide for a self-executing remedy for its violation. Even *Bivens* critics like Justices Rehnquist and Scalia agree that the Takings Clause by itself establishes a cause of action for inverse condemnation.<sup>334</sup> So who is to say that other constitutional provisions could not by themselves establish analogous rights to sue for damages? It was,

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328. See Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1506 (1987).

329. See 28 U.S.C. § 2679(b) (2018).

330. *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring).

331. *Compare id.*, *Bivens v. Six Unknown Named Agents Fed. Bureau Narcotics*, 403 U.S. 388, 427 (1971) (Black, J., dissenting) (arguing that courts may not infer causes of action absent a statutory basis), *Carlson v. Green*, 446 U.S. 14, 32 (1980) (Rehnquist, J., dissenting) (same), and *Hernandez v. Mesa*, 140 S. Ct. 735, 750 (2020) (Thomas, J., concurring) (same), with Stephen I. Vladeck, *The Disingenuous Demise and Death of Bivens*, 2020 CATO SUP. CT. REV. 263, 267-70 (arguing courts may infer constitutional causes of action, even absent a statutory basis).

332. Leading *Bivens* defenders cite various judicial decisions that purportedly show an understanding "[a]t the Founding" that "federal courts had the power to provide judge-made damages remedies" for violations of constitutional rights. Vladeck, *supra* note 331, at 267. The problem, however, is that the cases usually cited for that proposition are "suits premised on longstanding common-law actions," not "claims to entitlement to damages based on a raw violation of the federal Constitution." Brief of Professor Jennifer L. Mascott as Amicus Curiae in Support of Petitioner at 13, *Egbert v. Boule*, No. 21-147 (U.S. Dec. 27, 2021), 2021 WL 6205924. In order to say with certainty how a Founding Era federal court would have handled a claim of the latter sort, one would have to identify a case from that period in which (1) a plaintiff invoked federal-question jurisdiction to seek damages for a constitutional violation, and (2) there was no statute or body of common law (state, maritime, or federal) to apply. Unfortunately for modern scholars, there are probably no cases from the Founding Era that meet these criteria—primarily because federal courts lacked general federal-question jurisdiction until 1875. See *Merrell Dow Pharms. Inc. v. Thompson*, 478 U.S. 804, 807 (1986).

333. Alfred Hill, *Constitutional Remedies*, 69 COLUM. L. REV. 1109, 1149 (1969).

334. See *Preseault v. Interstate Com. Comm'n*, 494 U.S. 1, 14 (1990).

after all, an accepted canon of statutory construction during the nineteenth century that “whenever a statute gives a right, but without providing a specific remedy, a remedy may be drawn from the abundant stores of the common law.”<sup>335</sup> Sure enough, some nineteenth-century judicial decisions, carrying the logic of that rule beyond the statutory context, held that constitutional provisions gave rise to rights of action for damages without the need for implementing legislation.<sup>336</sup> It is true that there were other pre-1900 cases in which courts refused to infer entitlements to a damages remedy from constitutional guarantees alone.<sup>337</sup> It is also true that the decisions we uncovered that address this issue were decided too late to give much insight into how the relevant provisions of the federal Constitution were originally understood. But those decisions do suggest that perhaps *Bivens*’s holding was not the historically aberrant example of twentieth-century judicial excess that its critics think it is—and that faithful originalists, rather than dismissing *Bivens* outright, should undertake careful provision-by-provision inquiries into whether constitutional rights carry with them implied rights of action.

Huq, for his part, sidesteps this debate by arguing that Congress has already given whatever statutory permission might have been necessary for freewheeling judicial broadening of *Bivens*. The 1988 amendments to the Westfall Act, he writes, “clarify that [Congress] intended to preserve *Bivens* and even allow courts to extend its coverage of constitutional wrongs.”<sup>338</sup> We almost agree, except that Huq again overreaches. The statute to which he alludes (but does not quote) provides that, although a suit against the United States under 28 U.S.C. §§ 1346(b) or 2672 is generally the “exclusive” remedy for torts committed by federal employees “acting within the scope of [their] office,” this exclusivity rule “does not . . . apply to a civil action” against a federal employee “for a violation of the Constitution of the United States.”<sup>339</sup> It is certainly possible to read this

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**335.** *Kneass v. Schuylkill Bank*, 14 F. Cas. 749, 750 (C.C.E.D. Pa. 1821) (No. 7876).

**336.** See *Johnson v. City of Parkersburg*, 16 W. Va. 402, 425 (1880); *Householder v. City of Kan.* 83 Mo. 488, 495 (1884); *Willis v. St. Paul Sanitation Co.*, 50 N.W. 1110, 1112 (Minn. 1892); *People ex rel. Decatur & State Line Ry. Co. v. McRoberts*, 62 Ill. 38 (1871); *Jones v. Jarman*, 34 Ark. 323, 335-36 (1879); *Cummings v. Winn*, 14 S.W. 512 (Mo. 1886).

**337.** This usually occurred when courts confronted constitutional provisions from which no sufficiently certain measure of damages could be derived without implementing legislation. See *Peck v. Miller*, 39 Mich. 594, 597 (1878); *French v. Teschemaker*, 24 Cal. 518, 540, 544 (1864); *Morley v. Thayer*, 3 F. 737, 739-40 (C.C.D. Mass. 1880); *Fusz v. Spaunhorst*, 67 Mo. 256, 269 (1878), *abrogated by Cummings v. Winn*, 14 S.W. 512, 513 (Mo. 1886).

**338.** HUQ, *supra* note 2, at 120.

**339.** 28 U.S.C. § 2679(b)(1)-(2)(A) (2018).



proviso as a sign of lawmakers' acceptance of *Bivens*'s holding. But "mere congressional acquiescence to *Bivens* may not be the same as . . . ratification."<sup>340</sup> Congress may have carved out *Bivens* claims from the exclusivity provision simply because it had no view on the matter or could not agree on whether to repudiate, ratify, or extend *Bivens*.

Even assuming the 1988 legislation signaled Congress's approval of *Bivens*, however, we see no basis for Huq's claim that the statute empowers courts to "extend" the doctrine's coverage as they see fit. The provision does no such thing. At most, it signifies Congress's "inten[t] to ratify *Bivens*'s scope as it was in 1988."<sup>341</sup> By then, the Supreme Court had been consistently refusing invitations to broaden *Bivens* since 1980,<sup>342</sup> sometimes even with respect to "constitutional violation[s]" that "would otherwise go unredressed."<sup>343</sup> Read against this backdrop, the statutory provision on which Huq hangs his hat does *not* give courts "license to create . . . *Bivens* remed[ies]" in "context[s] . . . never before addressed," but instead "simply le[aves] *Bivens* where it found it."<sup>344</sup> Whether federal courts may extend the doctrine beyond that point depends, once again, on the extent to which they have the power to recognize constitutional causes of action for damages without statutory authorization.

Resolving that question would require an article unto itself. It suffices to say for now, however, that simply pointing out that contraction of *Bivens* violates the maxim "where there is a right, there is a remedy" is insufficient to show that the contraction was—legally speaking—wrong. As Justice Story acknowledged, "[c]ases . . . may occur, in which [a citizen] may not . . . have an adequate redress, without some legislation by congress"; this is not "an objection to the constitution itself; but it lies, if at all, against congress, for not having provided . . . an adequate remedy."<sup>345</sup>

Huq is right, then, that "*Bivens* today is . . . technically on the books, but practically a dead letter."<sup>346</sup> At the same time, Huq somewhat exaggerates the impact of *Bivens*'s contraction. He suggests (inaccurately) that, as a result of that contraction, a reprisal of the shameful policy of Japanese-American internment

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**340.** Meshal v. Higgenbotham, 804 F.3d 417, 428 (D.C. Cir. 2015).

**341.** *Id.*

**342.** See Schweiker v. Chilicky, 487 U.S. 412, 421 (1988).

**343.** Bush v. Lucas, 462 U.S. 367, 388 (1983); accord United States v. Stanley, 483 U.S. 669, 683 (1987); Schweiker, 487 U.S. at 422.

**344.** Hernandez v. Mesa, 140 S. Ct. 735, 748 n.9 (2020).

**345.** STORY, *supra* note 112, §§ 1671-1672.

**346.** Byrd v. Lamb, 990 F.3d 879, 884 (5th Cir. 2021) (Willett, J., concurring).

would perhaps escape judicial review today.<sup>347</sup> And he neglects to mention that, even where *Bivens* relief is unavailable, a plaintiff may sue the government for damages for a federal official's wrongdoing under the Federal Tort Claims Act, if that wrongdoing is tortious<sup>348</sup> (as many constitutional violations are). Nevertheless, it does seem unjust when Congress, via Section 1983, subjects state officials to damages for violating constitutional rights but extends no equivalent liability to federal officials. So whatever the jurisprudential merits of Huq's critique, it certainly serves as a call to action for Congress.

#### IV. PRESCRIPTIONS FOR CHANGE

We now evaluate Huq's proposed solutions to the problems he perceives in federal courts' decision making. We resist his suggestions on several grounds, not least because (as the preceding pages have explained) his *prescriptions* are founded partly on inaccurate *descriptions*. We then propose alternative measures that we believe are more consistent with the rule of law and more conducive to achieving Huq's stated goals.

##### A. *Huq's Proposal: A Cure Worse than the Imaginary Disease*

In *Collapse's* final chapter, Huq suggests reforms meant to address the problems of which he complains throughout the book. Some are run-of-the-mill proposals for federal legislation eliminating qualified immunity and replacing current federal pleading rules with something more plaintiff-friendly, as well as for the appointment of "new judges."<sup>349</sup>

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**347.** Although the Roberts Court "repudiat[ed]" the precedent "embracing . . . internment of Japanese Americans," Huq says, the Court also "eliminated *Bivens* remedies for federal detainees" (which were "a critical constraint on lawless federal detentions"), thereby "ma[king] such a measure [as internment] extremely hard to challenge." HUQ, *supra* note 2, at 120. Huq's theory misses the mark. For one, the repudiated precedent to which he refers, *Korematsu v. United States*, upheld Japanese Americans' *exclusion* from West-Coast states, not their internment, 323 U.S. 214, 222 (1944)—which, on the contrary, was declared illegal on statutory grounds on the same day, *see Ex parte Endo*, 323 U.S. 283, 297 (1944). More importantly, neither policy was challenged in a *Bivens*-style suit for damages against federal officials. In *Korematsu*, the constitutional challenge was raised as a defense to criminal prosecution, *see Korematsu*, 323 U.S. at 222, whereas in *Endo* the legality of internment was assailed via a writ of habeas corpus, *see Endo*, 323 U.S. at 294. Neither of these avenues have been affected by the Court's *Bivens* case law.

**348.** *See* 28 U.S.C. §§ 1346(b), 2671-2680 (2018).

**349.** HUQ, *supra* note 2, at 159. Huq is unclear, however, as to whether he supports increasing the number of judgeships in order to "pack" the bench with such "new" jurists.

One might expect, in addition, a proposal to create additional judgeships or otherwise address the excessive caseloads that Huq claimed several chapters ago were partly to blame for today's "remedial poverty." But no. Huq's final suggestion is jurisdiction-stripping legislation designed to keep litigants who invoke constitutional provisions he doesn't like out of court:

[We could] channel judicial power back toward the goal of checking illegal state coercion, while also reigning in its power to serve as a free-ranging innovator of constitutional theories to use against the regulatory state . . . . The sheer extent of the elected branches' control over federal court jurisdiction is not just a problem. It is also an opportunity.<sup>350</sup>

Huq's radical proposal, a thinly veiled call for hijacking the courts in service of his favored political ends, betrays the insincerity of his concerns that "[l]egality and compliance with federal law are . . . becoming an increasingly unevenly distributed goods under our Constitution."<sup>351</sup> How would stripping courts of power to hear cases arising under certain constitutional provisions ensure more uniform "[l]egality and compliance with federal law?" As Huq admits, even Seila Law asserted "plausible constitutional claims."<sup>352</sup> Should courts be barred from hearing such claims because Huq finds the claimants unsympathetic? And what would stripping litigants of constitutional protections disfavored by Huq do for those he believes have been unfairly left without remedies?

The self-described object of Huq's book is "to insist on . . . the value of the rule of law . . . by showing how" that principle is currently being "selectively supplied by courts to some while being denied to others."<sup>353</sup> Not only is the descriptive claim entirely unproven in the course of *Collapse*, but Huq's "solution" to alleged selective judicial adherence to the rule of law is to substitute an even more blatantly selective regime, one under which courts can liberally award relief to litigants Huq likes but are denied jurisdiction to do the same for those he does not. To our ears, this does not sound like "insist[ence] on th[e] value" of the rule of law.<sup>354</sup>

### B. *Our Alternatives*

We offer a few modest counterproposals, some of which draw upon the very principles of constitutional structure that Huq waves off. For the most part, our

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**350.** *Id.* at 159.

**351.** *Id.* at 157-58.

**352.** *Id.* at 2.

**353.** *Id.* at 16.

**354.** *Id.*

suggestions are not nearly as bold as Huq’s—but then again, neither are they founded on hyperbolized contentions of remedial collapse.

First, and most obviously, if Huq’s radical proposals for appointing “new judges” that share his priorities or enacting jurisdiction-stripping statutes ever garnered enough support to secure their adoption, why not instead put that political capital toward enacting legislation that directly implements the doctrinal changes he advocates? As Huq notes, Congress could, by ordinary statute, abolish qualified immunity (or substantially reform it)<sup>355</sup> and relax federal pleading rules. Federal legislation could also establish a general cause of action for damages against federal officials for constitutional violations, liberalize habeas procedures, broaden the exclusionary rule in federal courts, confine the executive’s discretion in the law-enforcement or immigration contexts such that its actions would no longer warrant deference when challenged in court, and decelerate across the board (if not reverse) the enormous growth in the government’s coercive capacity that creates the conditions for so many constitutional violations in the first place. Legislation, moreover, could tackle another of Huq’s alleged causes of remedial collapse—federal judges’ “[w]orries about . . . caseload[s]”—by providing for additional judgeships, court staff, or other resources.<sup>356</sup> Some of these proposals have our tentative support; others less so. But all seem far less detrimental to the rule of law and judicial independence (and far more apt to achieve Huq’s professed goals) than the extreme measures he proposes in *Collapse’s* final chapter.

In keeping with our earlier homage to federalism, we remind would-be reformers that efforts at change via the political process ought not be directed exclusively at Washington, D.C. Many, if not most, consequential policy decisions are made by state and local governments. And reform efforts have better prospects of at least some success at the subnational level, since there is usually a

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**355.** There are many potential doctrinal refinements short of abolition that could mitigate qualified immunity’s worst excesses without undermining the policy goals that such immunity is intended to serve. Judges could be required to address the constitutional merits in every case rather than leapfrogging to whether a right was “clearly established.” The Court could also clear up what constitutes “clearly established law.” (The standard need not be the same for split-second official decisions as for less exigent situations.) Moreover, why not let plaintiffs overcome immunity by presenting objective evidence of an official’s bad faith? Or why not at least pare back qualified immunity in Fourth Amendment cases, where such immunity is largely redundant given that the constitutional guarantee itself already gives officials breathing room to make reasonable mistakes of law or fact without fear of liability? *See, e.g., Heien v. North Carolina*, 574 U.S. 54, 60–61 (2014).

**356.** HUQ, *supra* note 2, at 133. Reforms could take cues from the U.S. Judicial Conference’s proposals for new judgeships in certain districts and circuits. BARRY J. McMILLION, CONG. RSCH. SERV., IN11639, RECOMMENDATION FOR NEW U.S. CIRCUIT AND DISTRICT COURT JUDGESHIPS BY THE JUDICIAL CONFERENCE OF THE UNITED STATES (117TH CONGRESS) 2 (2021), <https://sgp.fas.org/crs/misc/IN11639.pdf> [<https://perma.cc/ZG28-E36W>].

narrower array of factions and interests that stand ready to obstruct change in a single jurisdiction than must be placated to transform policy at the federal level. Moreover, an incremental, decentralized strategy would allow for variation among reform approaches so as to suit local conditions, as well as for the policy experimentation that ranks as one of the key virtues of our federal system.

Second, instead of lamenting helplessly that “Hamilton’s assum[ed] . . . protection[s] of judicial independence . . . did not survive . . . the Republic’s first decade,”<sup>357</sup> why not take steps to restore those protections? Consider Huq’s contention that, contrary to the Framers’ expectations, we can no longer “look to substantive federal law as a constraint on judicial discretion” due to the “increased . . . volume and complexity of federal legislation,” which affords courts “a degree of freedom that they lacked in the early Republic.”<sup>358</sup> Compounding that problem, Huq writes disappointedly, is that another of the Framers’ assumptions – “that Congress has an incentive to enact clear laws” – has “come unmoored”; lawmakers of today “often agree that a policy problem exists, but disagree about how to solve it,” so they end up “enacting vague statutes” that effectively “leave matters to the executive.”<sup>359</sup>

Indeed they do. But various prescriptions for keeping these problems in check, some of them overlooked or even maligned by Huq, are weaved into our existing constitutional architecture. For one, there are the Constitution’s subject-matter limitations on congressional power. Ironically, far from embracing these, Huq attacks courts of today for even timidly enforcing them, even as he frets about the increasing in the volume and complexity of federal legislation that courts’ post-New-Deal neglect of these limitations has enabled. On that score, we also renew our recommendation to start taking seriously the nondelegation doctrine – which, as was previously explained, would limit the breadth of regulatory authority that Congress may delegate to agencies. We think a renewed respect for this constitutional rule, as well as for limits on congressional enumerated power, would do more to address Huq’s concerns about the current surfeit of federal law than would an assault on federal courts’ jurisdiction.

Finally, Huq levies complaints against the Constitution’s judicial selection process for having “accelerat[ed] the pace and intensity of partisan competition over the judiciary.”<sup>360</sup> Contrary to the Framers’ hopes, he writes, the Senate has proven more “likely to act for partisan advantage . . . than out of public-spirited, good-governance motives.”<sup>361</sup> Few would disagree that the confirmation process

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357. HUQ, *supra* note 2, at 37.

358. *Id.* at 44.

359. *Id.*

360. *Id.* at 41-42.

361. *Id.* at 40.

has become more contentious in recent decades (though we question whether the qualifications of nominees have suffered as a result).<sup>362</sup> But the solution is *not* to blame the Constitution. Rather, we must restore the constraints on courts' decision making that inhere to the notion of "judicial power" as it is contemplated in the Constitution. According to this view, "[c]ourts are the mere instruments of the law . . . . When they . . . exercise a discretion, it is a mere . . . discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the Court to follow it."<sup>363</sup>

Unfortunately, as Huq notes, "[t]he Framers' account of an independent judiciary"<sup>364</sup> – which "rested on [a] view of 'law as sufficiently determinate'" and a "belief that 'judicial interpretation [was] constrained'" by that determinacy<sup>365</sup> – is nowadays regarded as "an artifact of history"<sup>366</sup> by much of legal culture. The primary reason for this, we submit, is the influence of so-called "Legal Realism," the "[c]ore [c]laim" of which consists of the "descriptive thesis . . . that judges reach decisions based on what they think would be fair on the facts of the case, rather than on the basis of the applicable rules of law."<sup>367</sup> This theory masquerades as descriptive, but any jurist who accepts it will surely recognize its normative implications: "if judges inevitably contort the law according to their policy preferences in deciding cases, then there is nothing wrong with me doing the same." So long as there is a risk of this attitude taking hold within the federal bench (as it already has, to an extent),<sup>368</sup> the Hamiltonian notion of substantive law as a constraint on judges cannot hold, and the politicization of

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**362.** See BARRY J. McMILLION, CONG. RSCH. SERV., R45622, JUDICIAL NOMINATION STATISTICS AND ANALYSIS: U.S. CIRCUIT AND DISTRICT COURTS, 1977-2020, at 28 (2021), <https://crsreports.congress.gov/product/pdf/R/R45622> [<https://perma.cc/6Q8S-D7XW>] (showing no downward trend in ABA qualification ratings of district or appellate judges).

**363.** *Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738, 866 (1824).

**364.** HUQ, *supra* note 2, at 37.

**365.** *Id.* (quoting Jonathan T. Molot, *The Judicial Perspective in the Administrative State: Reconciling Modern Doctrines of Deference with the Judiciary's Structural Role*, 53 STAN. L. REV. 1, 19 (2000)).

**366.** *Id.* at 45.

**367.** Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267, 275 (1997); see also RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 23.4 (2021) (defining legal realism).

**368.** See, e.g., Adam Liptak, *An Exit Interview with Richard Posner, Judicial Provocateur*, N.Y. TIMES (Sept. 11, 2017), <https://www.nytimes.com/2017/09/11/us/politics/judge-richard-posner-retirement.html> [<https://perma.cc/P9NJ-6PGF>] ("I pay very little attention to legal rules, statutes, constitutional provisions," Judge Posner said, "A case is just a dispute. The first thing you do is ask yourself—forget about the law—what is a sensible resolution of this dispute?"); Deborah L. Rhode, *Letting the Law Catch Up*, 44 STAN. L. REV. 1259, 1259 (1992) (quoting Justice Marshall describing his philosophy as, "You do what you think is right and let the law catch up").

the judicial selection process that so demoralizes Huq will certainly follow. After all, if judges intend to act as policymakers upon taking office, who can blame our representatives for making that process as bare-knuckled as any other campaign, with the added vitriol one would expect during a race the winner of which will serve for life?

Rather than surrender to the politicization of the judiciary, we think it preferable for current and future judges, as well as the elected officials charged with selecting and confirming judicial nominees, to return to the traditional understanding that “judicial tribunals, as such, cannot decide upon political considerations,” which lack “the requisite certainty to afford rules of juridical interpretation.”<sup>369</sup> Trite as it may sound, “every prudent and cautious judge” must “remember, that his duty . . . is, not to make the law, but to interpret and apply it.”<sup>370</sup> While some dismiss this notion as fanciful, citing the law’s inherent indeterminacy, we believe the extent of the problem is often overstated. Over 95% of all cases decided each year by federal courts of appeals (which issued over 50,600 decisions in 2020) are resolved unanimously.<sup>371</sup> Even of the sixty-five cases decided by the U.S. Supreme Court last term (which tend to present issues debatable enough to produce disagreement among lower courts), 46.1% generated no dissenting votes, while 58.5% generated no more than one.<sup>372</sup>

Incredibly, even without uniform agreement among today’s federal judges about methods of interpretation, it seems the Framers’ understanding of “judicial interpretation [as] constrained in a way that political decision making was not” was not so far off, after all.<sup>373</sup> The sooner we collectively accept that judges’ adherence to these constraints is not only realistically possible, but constitutionally mandated, the sooner we can begin reversing the deterioration of the judicial selection process into raw political blood sport. This attitudinal shift is not only perhaps the most important of our recommendations, but also the most ambitious. It cannot be achieved through legislation or litigation; it requires broad-based buy-in from legal academia, incumbent and prospective federal judges, the

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**369.** *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 620-21 (1857) (Curtis, J., dissenting).

**370.** 2 WORKS OF THE HONOURABLE JAMES WILSON, L.L.D. 303 (Philadelphia, Bronson & Chauncey 1804).

**371.** See Neil M. Gorsuch, *Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia*, 66 CASE W. RESV. L. REV. 905, 916 (2016); *Federal Judicial Caseload Statistics 2020*, U.S. CTS., <https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2020> [<https://perma.cc/D9XN-V2YK>].

**372.** Harold J. Spaeth, Lee Epstein, Ted Ruger, Jeffrey Segal, Andrew D. Martin & Sara Benesh, *Analysis, SUP. CT. DATABASE*, <http://scdb.wustl.edu/analysisFrequencies.php?sid=2101-TWODOOR-8094#mid> [<https://perma.cc/9V45-G9SV>]. To access the data, select the “minority votes” variable.

**373.** HUQ, *supra* note 2, at 37 (quoting Molot, *supra* note 365, at 19).

elected officials charged with nominating and confirming those judges, and the public. Simply put, the original understanding of judicial power must be restored through the same slow processes through which legal realism eroded it.

## CONCLUSION

*The Collapse of Constitutional Remedies* is, regrettably, something of a bait-and-switch. Based on the book's Introduction, one may think that Huq's concern is simply that "the rule of law" is being "selectively supplied by courts to some while being denied to others"<sup>374</sup> and that he seeks only parity in judicial treatment of "individual claims based on unconstitutional state coercion" and "structural constitutional challenges."<sup>375</sup> That sounds reasonable enough. But then the wheels start to come off.

*Collapse* builds up to a proposal intended not to ensure evenhanded adjudication of constitutional claims but rather to do the opposite. Huq's goal, readers discover, was never judicial impartiality, but rather a different (and more unabashed) form of judicial partiality, to be achieved by exploiting the same institutional weaknesses of the court system that he decried in the Introduction. Huq insists the modern Court's legitimacy is imperiled. But his swing-for-the-fences prescription—that the Court embrace, or that Congress manipulate federal jurisdiction in order to achieve, a redistributive agenda—is unbound by legal principle and seems to us far more likely to sink the Court's legitimacy than to save it. Even worse, Huq argues for these "reforms" on the back of claims about judicial behavior and case law that range from unsubstantiated to plainly wrong.

All of this is too bad, since *Collapse* does feature sound criticisms of qualified immunity, a dubious doctrine that ought not be immune from thoughtful reappraisal. America recently marked the sesquicentennial of our nation's preeminent civil-rights statute, Section 1983, the text of which promises a remedy for state officials' violations of constitutional liberties. Qualified immunity as it exists today, in shielding too many lawbreaking officials from accountability, betrays that aspiration. Similarly, Huq's normative and public-policy concerns about the remedial gap left by the Court's retreat from *Bivens* are legitimate, even if his attack on the retreat's doctrinal underpinnings is disputable. We thus share Huq's hope that the appropriate institutional actor (whether it be the Supreme Court or Congress) will soon take action to address some of these deficiencies in our system of constitutional remedies.

Unfortunately, the rhetorical force of Huq's arguments is undercut by his inconstant invocation of, and devotion to, rule-of-law values. For example, there

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374. *Id.* at 16.

375. *Id.* at 8.



is a growing, cross-ideological chorus of jurists and scholars urging recalibration of the modern qualified-immunity regime. But it is difficult to credit Huq's solid points on immunity doctrine when in the same breath he calls for stripping courts of jurisdiction in hopes of enfeebling constitutional protections he dislikes.

Overall, *Collapse* is of a piece with the litany of purple-prose denunciations of the Rehnquist Court and Roberts Court that are ceaselessly churned out by legal academia. With any luck, future scholarly treatments will steer a more nuanced course that generates more light and less heat—and that earnestly sees the rule of law not as a finite, divisible good but as a bedrock principle to which every American is an equal heir.

## APPENDIX

We consulted the Judicial Review of Congress Database (JRCD) to identify Rehnquist and Roberts Court cases considering the constitutionality of federal legislation. We coded each of the 219 cases based on whether the constitutional issue decided was structural or rights-based. The 4 cases that considered both rights-based and structural questions were included in both sets of cases. We also removed 10 nonconstitutional decisions that we felt were improperly characterized as constitutional cases.<sup>376</sup> For the Roberts Court, we further broke down the rights category into a) “rights against regulation” and b) other rights.

As for the Supreme Court database (SCDB), our search methodology was as follows: First, we set out to determine the number of Roberts Court cases that interpreted the Constitution’s structural provisions, excluding cases that implicated the Constitution only to the extent they involved standing or preemption. On the SCDB’s “Analysis” page, we first selected “All Roberts Courts.” For “Decision Type,” we included orally argued judgments and opinions, as well as all per curiam decisions. For “Declaration Unconstitutional,” we included cases in which an “act of congress”; “state or territorial law, reg, or const provision”; or “municipal or other local ordinance” was held unconstitutional. Finally, we selected “Organize by Issue or Legal Provision” for the “DATA GROUPING” option, since organizing by citation or docket will omit cases in which a constitutional issue was decided but was not the “lead” issue according to the database’s coding. This produced 22 results. (To recreate our query, use the search code “2101-FLIPFLOP-3106” on the SCDB’s “Analysis” page.) After removing all duplicates (i.e., those separate search results that are shown by their citations to be a single decision), we were left with 12 cases.

However, these results are incomplete, as they do not include cases where government action other than a statute, regulation, or ordinance was declared unconstitutional. (We include successful invocations of sovereign immunity in this class of cases.) Thus, we ran another search with nearly identical parameters, except this time only for cases coded as having “no declaration of unconstitutionality”—a misnomer, since cases in which something other than a statute, regulation, or ordinance is declared unconstitutional are coded as falling into this category. To see these results, search for the SCDB Search Code “2101-BLUEJAY-

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**376.** *Mesa v. California*, 489 U.S. 121 (1989); *Coit Indep. Joint Venture v. Fed. Sav. & Loan Ins. Corp.*, 489 U.S. 561 (1989); *Gomez v. United States*, 490 U.S. 858 (1989); *Pub. Citizen v. U.S. Dep’t of Just.*, 491 U.S. 440 (1989); *Burns v. United States*, 501 U.S. 129 (1991); *Gregory v. Ashcroft*, 501 U.S. 452 (1991); *Lebron v. Nat’l R.R. Passenger Corp.*, 513 U.S. 374 (1995); *Johnson v. United States*, 529 U.S. 694 (2000); *Nguyen v. United States*, 539 U.S. 69 (2003); *Clark v. Martinez*, 543 U.S. 371 (2005).

3743.” This produced 45 results. Removing all duplicates (as well as *NFIB v. Sebelius*, 567 U.S. 519 (2012), since that case involved at least one declaration of unconstitutionality on structural grounds and thus appeared among the 12 results of the search described in the preceding paragraph), we were left with 34 cases. Among those were 5 cases in which structural constitutional claimants prevailed.<sup>377</sup> Adding those 5 to the 12 from the previous search left us with 17 total Roberts Court cases where litigants invoking the Constitution’s structural provisions prevailed at least in part, and 29 where they did not.

We then set out to cross-check these 46 SCDB results against the JRCD. In doing so, we discovered 2 more Roberts Court cases rejecting structural constitutional arguments<sup>378</sup> and 2 more accepting them<sup>379</sup> that were incorrectly coded by the SCDB as nonconstitutional. Also, delving into the cases the SCDB coded as constitutional revealed four cases that were not, in our estimation, structural constitutional decisions.<sup>380</sup> We then searched Westlaw for Roberts Court cases with at least 2 uses of the phrases “separation of powers,” “federalism,” or “Tenth Amendment,” as well as at least 2 uses of either “constitution” or “unconstitutional” (or derivatives of either) anywhere in the decision, including in separate opinions. Sorting through these 141 results turned up 1 more case rejecting a federalism challenge to a federal statute.<sup>381</sup> We also cross-checked our SCDB results against *The Constitution of the United States: Analysis and Interpretation*,<sup>382</sup> but found no additional cases. At this point, our tally of Roberts Court cases deciding issues of constitutional structure was 47, including 19 cases where constitutional claimants prevailed at least in part.

We repeated essentially the same process to identify Roberts Court cases considering the Constitution’s individual-rights provisions. First, we searched the SCDB for cases holding a statute, regulation, or ordinance unconstitutional on that basis (Search Code “2101-FASTPITCH-4803”); this produced 57 cases after duplicates were removed from the results. We then searched for cases considering the Constitution’s individual-rights provisions coded as featuring “No Declaration of Unconstitutionality” (Search Code “2101-BLUEBIRD-7010”), and

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**377.** *NLRB v. Noel Canning*, 573 U.S. 513 (2014); *Franchise Tax Bd. Cal. v. Hyatt*, 578 U.S. 171 (2016); *V.L. v. E.L.*, 577 U.S. 404 (2016); *Lucia v. SEC*, 138 S. Ct. 2044 (2018); *Franchise Tax Bd. Cal. v. Hyatt*, 139 S. Ct. 1485 (2019).

**378.** *United States v. Georgia*, 546 U.S. 151 (2006); *Artis v. D.C.*, 138 S. Ct. 594 (2018).

**379.** *Shelby Cnty. v. Holder*, 570 U.S. 529 (2013); *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461 (2018).

**380.** *Bond v. United States*, 564 U.S. 211 (2011); *Bosse v. Oklahoma*, 137 S. Ct. 1 (2016); *Florida v. Georgia*, 141 S. Ct. 1175 (2021); *Carr v. Saul*, 141 S. Ct. 1352 (2021).

**381.** *PennEast Pipeline Co. v. New Jersey*, 141 S. Ct. 2244 (2021).

**382.** CONG. RSCH. SERV., S. DOC. NO. 112-9, at 2325-66 (2017) (listing laws struck down by the Court); CONG. RSCH. SERV., S. DOC. NO. 116-20, at 231-41 (Supp. 2020) (same).

removed duplicates from those results. 236 cases remained. We then identified and removed 15 cases that, for various reasons, we felt had been miscoded by the SCDB. Of the 221 cases that remained, we identified 93 coded as featuring “No Declaration of Unconstitutionality” in which a constitutional-rights claimant did in fact prevail. After cross-checking against the JRCD and *The Constitution of the United States: Analysis and Interpretation*, we identified 3 more Roberts Court cases striking legislation down on individual-rights grounds.<sup>383</sup> Finally, we added to these data a case in which a rights claimant prevailed that the SCDB had miscoded as a structural constitutional case.<sup>384</sup> Our tally of Roberts Court cases deciding issues of constitutional rights at this point was 282, including 154 cases where constitutional claimants at least partially prevailed.

Note that we count partial, as well as “inchoate,” victories for constitutional claimants as victories for coding purposes. For instance, in *Expressions Hair Design v. Schneiderman*, the Court accepted the claimants’ argument that a state statute regulated “speech” for First Amendment purposes, but rather than deciding the statute’s constitutionality itself, the Court vacated and remanded to allow the court of appeals to apply appropriate First Amendment scrutiny in the first instance.<sup>385</sup> We would say the constitutional argument “prevailed” there.

A harder question was presented by cases in which the Roberts Court disposed of constitutional claims on qualified-immunity grounds by holding that the constitutional rights at issue were not clearly established. It is debatable whether these are true constitutional decisions, since they interpret existing caselaw rather than the Constitution itself. We resolved our doubts in Huq’s favor and included all such cases in our data as losses for constitutional claimants (though we identified them in the spreadsheet in case readers wish to run the numbers without these decisions). On the other hand, we decided to exclude cases in which the Court’s review was governed by a provision of the federal habeas statute that, when applicable, allows a federal court to set aside a state court’s rejection of a collateral attack on a criminal conviction only if the state court’s decision is “contrary to, or involve[s] an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.”<sup>386</sup> We thought the Court’s resolution of constitutional questions under this deferential standard was not an accurate benchmark of the Court’s own biases, since the justices are bound by statute to apply a standard unfavorable to constitutional claimants. We omitted all cases of this description from

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**383.** *United States v. Windsor*, 570 U.S. 744 (2013); *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007); *United States v. Alvarez*, 567 U.S. 709 (2012).

**384.** *Bosse v. Oklahoma*, 137 S. Ct. 1 (2016).

**385.** 137 S. Ct. 1144, 1151 (2017).

**386.** 28 U.S.C. § 2254(d)(1) (2018).

our calculations—including, in the spirit of fairness, a few such cases in which rights claimants actually prevailed under the stringent habeas standard—though we nonetheless included all of these habeas decisions in our spreadsheet, marked with an “A,” for those who are curious. This left us with 271 total constitutional rights cases, among which were 152 wins for rights claimants.

To compile data on what Huq calls “rights against regulation” (which he says include Second Amendment rights, First Amendment freedom of speech and free exercise of religion, and Fifth Amendment rights against takings of private property without just compensation), we first searched the SCDB for Roberts Court cases involving the following legal provisions: “Fifth Amendment (takings clause),” “First Amendment (free exercise of religion),” “First Amendment (speech, press, and assembly),” “Fourteenth Amendment (takings clause),” and “Second Amendment.” Before clicking “analyze,” we opted to “Organize by Issue or Legal Provision,” for reasons explained earlier. This procedure produced 81 results, which can be seen by entering the Search Code “2101-COLDSPELL-6143.” We then removed all duplicate cases from the results, leaving 68 cases. For good measure, we ran another search for Roberts Court cases, except this time selecting “First Amendment” under “Issues” (the only option under “Issues” pertinent to our search) while leaving the boxes for “Legal Provision” blank. We again chose, “Organize by Issue or Legal Provision.” This search produced 101 results, which can be seen by entering the Search Code “2101-POTLUCK-5732.” Combing through these revealed 2 cases concerning First Amendment speech rights that our prior search had missed.<sup>387</sup> We cross-checked our list of 70 “rights against regulation” cases against the JRCD but found no additional overlooked cases.

In checking the coding of cases identified through SCDB searches, we also discovered that certain cases raised multiple constitutional questions such that they properly belonged in more than one of our categories. Specifically, in sifting through the individual-rights cases identified through the SCDB, we found 1 that had been coded as a Fourth-Amendment case that had in fact rejected a freedom-of-speech claim, which warranted coding it as a “rights against regulation” decision.<sup>388</sup> Similarly, we discovered that another case coded by the SCDB as a rights case also rejected a dormant-commerce claim and hence also belonged in our list of structural cases.<sup>389</sup> For those keeping score, this brought us to grand totals of 271 constitutional-rights decisions (including 71 involving “rights against regulation”) and 48 constitutional-structure decisions.

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**387.** Fed. Election Comm’n v. Wis. Right to Life, Inc., 551 U.S. 449 (2007); United States v. Alvarez, 567 U.S. 709 (2012).

**388.** Wood v. Moss, 572 U.S. 744 (2014).

**389.** *McBurney v. Young*, 569 U.S. 221 (2013).

After cross-checking our SCDB data against other sources and confirming that each case in the SCDB dataset had been correctly coded, we embarked on a scorched-earth campaign to track down any Roberts Court constitutional cases we had not yet identified. We accordingly conducted a series of Westlaw searches and manually sifted through between 1,150 and 1,200 different merits decisions handed down between September 29, 2005 and October 3, 2021 (the end of the Court’s most recent full term) in order to identify stragglers.<sup>390</sup> This produced 43 additional constitutional cases (39 rights-based and 4 structural) that our prior search methods had all overlooked. It also produced another 32 cases in which the Court considered a constitutional question under the deferential standard set forth in the habeas statute – which we included in our spreadsheet but, for reasons already explained, not in our calculations. All 75 of these cases appear at the bottom of the appropriate tables in our spreadsheet, with text in the lefthanded column identifying them as having been found via Westlaw. There were also 8 “borderline” cases identified through Westlaw searches that we ultimately determined were not constitutional; we listed these separately to the right of our main data in the first sheet of our Excel file so that others can judge for themselves if these cases belong or not. Otherwise, where our coding of any case was arguable, we noted as much in the spreadsheet and explained our rationale for the coding choice in question.

To determine the rate at which criminal defendants and habeas petitioners prevailed before the Roberts Court, we searched the SCDB for Roberts Court cases in which a petitioner or respondent was coded as “person accused, indicted, or suspected of crime” (Search Codes “2101-TWODOOR-5697” and “2101-OVERCOAT-1063,” respectively). Based on the disposition (i.e., whether favorable to the petitioner), we determined that persons accused, indicted, or suspected of crimes prevailed in 12 of 37 cases. We then did the same with Roberts Court cases in which the petitioner or respondent was a “person convicted of crime” (Search Codes “2101-BLUEBIRD-1721” and “2101-FIRSTBASE-1044,” respectively). There were 182 cases meeting these criteria, including 84 where such a litigant prevailed. The overall win rate for “person[s] accused, indicted, or suspected of crime” and those “convicted of crime” is thus 43.8%.

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**390.** Specifically, we searched U.S. Supreme Court cases using the following four search strings: 1) “advanced: (ATLEAST2(constitution!) (consti! & right!) (consti! & amend!) (ATLEAST2(amend!) and const!)) & DATE(aft 09-28-2005 & bef 10-04-2021) & HEADNOTE(const! or amend! or right!)”; 2) “advanced: DATE(aft 09-28-2005 & bef 10-04-2021) & HEADNOTE(a! b! c! d! e! f! g! h! i! j! k! l! m!) % ATLEAST2(constitution!) (consti! & right!) (consti! & amend!) (ATLEAST2(amend!) & const!)”; 3) “advanced: (constitution! unconstitution! amend! right!) & DATE(aft 09-28-2005 & bef 10-04-2021) % (petition! /p certior! /p den!)”; 4) “advanced: (ATLEAST2(constitution!) ATLEAST2(const!) (const! & amend!)) & DATE(aft 09-28-2005 & bef 10-04-2021) & HEADNOTE(const! or art! or amend!).”

Lastly, to compile our tally of cases that decided a point of law regarding standing to press a constitutional claim, we first ran a simple Westlaw search of Supreme Court cases decided since Chief Justice Roberts assumed office that both (1) used the word “standing” in the headnotes and (2) cited Article III and used the word “standing” in the same paragraph anywhere in the decision. Our search string consisted of the following: “advanced: ((‘article III’ or ‘art. III’) /p standing) & DATE(aft 09-29-2005) & HEADNOTE(standing).” This search produced 50 results. We manually sorted through these results to identify cases where the underlying claim for which a litigant’s standing was in question was constitutional in nature. We count 28 such cases.<sup>391</sup> We cross-checked these results against 2 SCDB searches, the first for Roberts Court cases by topic; within “Judicial Power,” we selected nine topics categorized as “standing to sue”<sup>392</sup> (Search Code “2101-JUMPROPE-9955”). We sorted through the 43 results but found no overlooked cases that fit our criteria. Next, we searched for Roberts Court cases by legal provision, specifically “Article III, Section 2, Paragraph 1 (case or controversy requirement),” the provision from which modern case law derives standing doctrine (Search Code “2101-SLIPKNOT-2860”). Again, we found no cases among the 41 results that our Westlaw search missed. We then repeated the process for the Rehnquist Court with the following Westlaw search string: “advanced: (standing /p (interest! or stake! or concret! or injur! or harm!)) & DATE(aft 09-24-1986 & bef 09-05-2005) & HEADNOTE(standing).” We adjusted our Roberts-Court search terms slightly so as to capture some earlier constitutional standing cases that did not expressly cite Article III as the basis for standing doctrine. We also ran SCDB searches corresponding to our SCDB searches of Roberts-Court cases (Search Codes “2101-HOTDOG-9081” and “2101-FLYBALL-9966,” respectively), again finding no cases that our Westlaw search had failed to uncover.

### SCDB Constitutional Provisions We Categorized as “Structural”:<sup>393</sup>

- Article I, Section 1 (delegation of powers)

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**391.** We omitted a case involving the misnamed concept of “Fourth Amendment standing,” which “is subsumed under substantive Fourth Amendment doctrine” and “should not be confused with Article III standing.” *Byrd v. United States*, 138 S. Ct. 1518, 1530 (2018).

**392.** These consisted of the following: adversary parties, direct injury, justiciable question, legal injury, live dispute, miscellaneous, *parens patriae* standing, personal injury, and taxpayer’s suit. We omitted “private or implied cause of action” and “statutory standing” because these legal concepts, while often casually referred to as implicating “standing,” in fact relate to the merits of the underlying claim. See *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 n.4 (2014).

**393.** The labels for these categories are based on those found in the SCDB. See *The Supreme Court Database*, *supra* note 183.

## RIGHTS, STRUCTURE, AND REMEDIATION

- Article I, Section 10, Paragraph 2 (Import-Export Clause)
- Article I, Section 10, Paragraph 3 (Compact Clause)
- Article I, Section 2, Paragraph 1 (composition of the House of Representatives)
- Article I, Section 2, Paragraph 3 (apportionment of representatives)
- Article I, Section 4, Paragraph 1 (Elections Clause)
- Article I, Section 5, Paragraph 1 (congressional qualifications)
- Article I, Section 6, Paragraph 1 (Speech or Debate Clause)
- Article I, Section 6, Paragraph 2 (civil appointments)
- Article I, Section 7, Paragraph 1 (Origination Clause)
- Article I, Section 7, Paragraph 2 (separation of powers)
- Article I, Section 8, Paragraph 1 (Taxing, Spending, General Welfare, or Uniformity Clauses)
- Article I, Section 8, Paragraph 11 (war power)
- Article I, Section 8, Paragraph 14 (governance of the armed forces)
- Article I, Section 8, Paragraph 15 (call-up of militia)
- Article I, Section 8, Paragraph 16 (organizing the militia)
- Article I, Section 8, Paragraph 17 (governance of the District of Columbia and lands purchased from the states)
- Article I, Section 8, Paragraph 18 (Necessary and Proper Clause)
- Article I, Section 8, Paragraph 3 (Interstate Commerce Clause)
- Article I, Section 8, Paragraph 4 (Bankruptcy Clause)
- Article I, Section 8, Paragraph 7 (postal power)
- Article I, Section 8, Paragraph 8 (Patent and Copyright Clause)
- Article I, Section 9, Paragraph 4 (direct tax)
- Article I, Section 9, Paragraph 5 (Export Clause)
- Article I, Section 9, Paragraph 6 (preference to ports)
- Article I, Section 9, Paragraph 7 (Appropriations Clause)
- Article II, Section 1, Paragraph 1 (executive power)
- Article II, Section 1, Paragraph 8 (oath provision)
- Article II, Section 2, Paragraph 1 (commander-in-chief power)
- Article II, Section 2, Paragraph 1 (presidential pardoning power)
- Article II, Section 2, Paragraph 2 (Appointments Clause)
- Article III, Section 1, Paragraph 1 (judicial power)
- Article III, Section 1 (good behavior and compensation clause of federal judges)
- Article III, Section 2, Paragraph 1 (extent of judicial power)
- Article III, Section 2, Paragraph 2 (original jurisdiction)
- Article III, Section 3, Paragraph 1 (Treason Clause)



- Article IV, Section 1 (Full Faith and Credit Clause)
- Article IV, Section 2, Paragraph 2 (Extradition Clause)
- Article IV, Section 3, Paragraph 2 (Property Clause)
- Article IV, Section 4 (Guarantee Clause)
- Article V (Amendment Clause)
- Article VI, Paragraph 3 (oath provision)
- Tenth Amendment
- Eleventh Amendment
- Twelfth Amendment
- Thirteenth Amendment, Sections 1 and 2
- Fourteenth Amendment, Section 2 (Reduction in Representation Clause)
- Fourteenth Amendment, Section 5 (Enforcement Clause)
- Fifteenth Amendment, Section 2 (Enforcement Clause)
- Sixteenth Amendment
- Seventeenth Amendment
- Twenty-First Amendment

**SCDB Constitutional Provisions We Categorized as “Rights”:**

- “Freedom of contract” (no article)
- Article I, Section 10 (Contract Clause”)
- Article I, Section 10 (state bill of attainder, ex post facto law, or bills of credit)
- Article I, Section 10, Paragraph 1 (Contract Clause)
- Article I, Section 9, Paragraph 2 (suspension of the writ of habeas corpus)
- Article I, Section 9, Paragraph 3 (bill of attainder or ex post facto law)
- Article III, Section 2, Paragraph 3 (vicinage requirement)<sup>394</sup>
- Article IV, Section 2, Paragraph 1 (Privileges and Immunities Clause)
- First Amendment (freedom of association)
- First Amendment (establishment of religion)
- First Amendment (free exercise of religion)
- First Amendment (Petition Clause)
- First Amendment (Speech, Press, and Assembly Clauses)
- Second Amendment
- Seventh Amendment (civil jury trial right)
- Fourth Amendment
- Fifth Amendment (Double Jeopardy Clause)

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**394.** The SCDB labeled this provision the “vicinage requirement.” It would be more properly labeled the “venue requirement.” (It does not refer to the Sixth Amendment’s Vicinage Clause.)

## RIGHTS, STRUCTURE, AND REMEDIATION

- Fifth Amendment (Due Process Clause)
- Fifth Amendment (Equal Protection Clause)
- Fifth Amendment (grand jury)
- Fifth Amendment (*Miranda* warnings)
- Fifth Amendment (self-incrimination)
- Fifth Amendment (Takings Clause)
- Sixth Amendment (other provisions)
- Sixth Amendment (right to confront and cross-examine, compulsory process)
- Sixth Amendment (right to counsel)
- Sixth Amendment (right to trial by jury)
- Sixth Amendment (Speedy Trial Clause)
- Eighth Amendment (cruel and unusual punishment)
- Eighth Amendment (prohibition of excessive bail or fines)
- Ninth Amendment
- Fourteenth Amendment, Section 1 (Citizenship Clause)
- Fourteenth Amendment, Section 1 (Due Process Clause)
- Fourteenth Amendment, Section 1 (Equal Protection Clause)
- Fourteenth Amendment (Privileges and Immunities Clause)
- Fourteenth Amendment (Takings Clause)<sup>395</sup>
- Fifteenth Amendment (other provisions)
- Twenty-Fourth Amendment

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**395.** This SCDB category captures a set of takings cases from the early twentieth century rooted in the Fourteenth Amendment rather than the Fifth Amendment. See, e.g., *Nectow v. City of Cambridge*, 277 U.S. 183, 185 (1928); *Chi., St. Paul, Minneapolis & Omaha Ry. Co. v. Holmberg*, 282 U.S. 162, 167 (1930); *Panhandle E. Pipe Line Co. v. State Highway Comm'n*, 294 U.S. 613, 618 (1935).

FIGURE 1. PROPERTY OWNERS AND TAKINGS CASES

CASE NAME	CITATION	DID PROPERTY INTEREST HOLDER / TAKINGS CLAIMANT PREVAIL AT LEAST IN PART?	TAKINGS CASE?
MURR V. WISCONSIN	137 S. Ct. 1933	No	Yes
STOP THE BEACH RENOURISHMENT, INC. V. FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION	560 U.S. 702	No	Yes
ALVAREZ V. SMITH	558 U.S. 87	No	No
ATLANTIC RICHFIELD CO. V. CHRISTIAN	140 S. Ct. 1335	No	No
WILKIE V. ROBBINS	551 U.S. 537	No	No
ARMOUR V. CITY OF INDIANAPOLIS	566 U.S. 673	No	No
CTS CORP. V. WALDBURGER	573 U.S. 1	No	No
HALL STREET ASSOCIATES, LLC V. MATTEL, INC.	552 U.S. 576	No	No
JOHN R. SAND & GRAVEL CO. V. UNITED STATES	552 U.S. 130	No	No
KAWASAKI KISEN KAISHA LTD. V. REGAL-BELOIT CORP.	561 U.S. 89	No	No
PATCHAK V. ZINKE	138 S. Ct. 897	No	No
PHILIPPINES V. PIMENTEL	553 U.S. 851	No	No
STANTON V. SIMS	571 U.S. 3	No	No
FREEMAN V. QUICKEN LOANS, INC.	566 U.S. 624	No	No
TEXACO INC. V. DAGHER	547 U.S. 1	No	No
UPPER SKAGIT INDIAN TRIBE V. LUNDGREN	138 S. Ct. 1649	No	No

RIGHTS, STRUCTURE, AND REMEDIATION

CASE NAME	CITATION	DID PROPERTY INTEREST HOLDER / TAKINGS CLAIMANT PREVAIL AT LEAST IN PART?	TAKINGS CASE?
ARKANSAS GAME AND FISH COMMISSION V. UNITED STATES	568 U.S. 23	Yes	Yes
CEDAR POINT NURSERY V. HASSID	141 S. Ct. 2063	Yes	Yes
HORNE V. DEPARTMENT OF AGRICULTURE	576 U.S. 351	Yes	Yes
KNICK V. TOWNSHIP OF SCOTT	139 S. Ct. 2162	Yes	Yes
KOONTZ V. ST. JOHNS RIVER WATER MANAGEMENT DISTRICT	570 U.S. 595	Yes	Yes
PAKDEL V. CITY AND COUNTY OF SAN FRANCISCO	141 S. Ct. 2226	Yes	Yes
MARVIN M. BRANDT REVOCABLE TRUST V. UNITED STATES	572 U.S. 93	Yes	No
SACKETT V. ENVIRONMENTAL PROTECTION AGENCY	566 U.S. 120	Yes	No
CITY OF LOS ANGELES V. PATEL	576 U.S. 409	Yes	No
DAN'S CITY USED CARS, INC. V. PELKEY	569 U.S. 251	Yes	No
LOZMAN V. CITY OF RIVIERA BEACH	568 U.S. 115	Yes	No
JONES V. FLOWERS	547 U.S. 220	Yes	No
RAPANOS V. UNITED STATES	547 U.S. 715	Yes	No
JERMAN V.	559 U.S. 573	Yes	No

CASE NAME	CITATION	DID PROPERTY INTEREST HOLDER / TAKINGS CLAIMANT PREVAIL AT LEAST IN PART?	TAKINGS CASE?
<b>CARLISLE, MCNELLIE, RINI, KRAMER &amp; ULRICH LPA</b>			
<b>LINCOLN PROPERTY CO. V. ROCHE</b>	546 U.S. 81	Yes	No
<b>TIMBS V. INDIANA</b>	139 S. Ct. 682	Yes	No
<b>WEYERHAEUSER CO. V. U.S. FISH AND WILDLIFE SERVICE</b>	139 S. Ct. 361	Yes	No

**FIGURE 2. ROBERTS COURT CASES DECIDING STANDING ISSUE, WHERE UNDERLYING CLAIM FOR WHICH STANDING WAS SOUGHT WAS CONSTITUTIONAL**

CASE NAME	CITATION	TYPE OF UNDERLYING CONSTITUTIONAL CLAIM	STANDING FOUND?
<b>ARIZONA CHRISTIAN SCHOOL TUITION ORGANIZATION V. WINN</b>	563 U.S. 125	Rights	No
<b>CLAPPER V. AMNESTY INTERNATIONAL USA</b>	568 U.S. 398	Rights	No
<b>GILL V. WHITFORD</b>	138 S. Ct. 1916	Rights	No
<b>HEIN V. FREEDOM FROM RELIGION FOUNDATION, INC.</b>	551 U.S. 587	Rights	No
<b>HOLLINGSWORTH V. PERRY</b>	570 U.S. 693	Rights	No
<b>VIRGINIA HOUSE OF DELEGATES V. BETHUNE-HILL</b>	139 S. Ct. 1945	Rights	No

RIGHTS, STRUCTURE, AND REMEDIATION

CASE NAME	CITATION	TYPE OF UNDERLYING CONSTITUTIONAL CLAIM	STANDING FOUND?
WITTMAN V. PERSONHUBALLAH	136 S. Ct. 1732	Rights	No
JUNE MEDICAL SERVICES LLC V. RUSSO	140 S. Ct. 2103	Rights	Yes
SALAZAR V. BUONO	559 U.S. 700	Rights	Yes
TRUMP V. HAWAII	138 S. Ct. 2392	Rights	Yes
UNITED STATES V. WINDSOR	570 U.S. 744	Rights	Yes
WHOLE WOMAN'S HEALTH V. JACKSON	142 S. Ct. 522	Rights	Yes
CARNEY V. ADAMS	141 S. Ct. 493	Rights Against Regulation	No
TOWN OF CHESTER V. LAROE ESTATES, INC.	137 S. Ct. 1645	Rights Against Regulation	No
DAVIS V. FEDERAL ELECTION COMMISSION	554 U.S. 724	Rights Against Regulation	Yes
JANUS V. AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 31	138 S. Ct. 2448	Rights Against Regulation	Yes
RUMSFELD V. FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS, INC.	547 U.S. 47	Rights Against Regulation	Yes
SUSAN B. ANTHONY LIST V. DRIEHAUS	573 U.S. 149	Rights Against Regulation	Yes
UZUEGBUNAM V. PRECZEWSKI	141 S. Ct. 792	Rights Against Regulation	Yes
CALIFORNIA V. TEXAS	141 S. Ct. 2104	Structural	No
DAIMLERCHRYSLER CORP. V. CUNO	547 U.S. 332	Structural	No
LANCE V. COFFMAN	549 U.S. 437	Structural	No
TRUMP V. NEW YORK	141 S. Ct. 530	Structural	No
ARIZONA STATE LEGISLATURE V.	576 U.S. 787	Structural	Yes

CASE NAME	CITATION	TYPE OF UNDERLYING CONSTITUTIONAL CLAIM	STANDING FOUND?
ARIZONA INDEPENDENT REDISTRICTING COMMISSION			
BOND V. UNITED STATES	564 U.S. 211	Structural	Yes
COLLINS V. YELLEN	141 S. Ct. 1761	Structural	Yes
DEPARTMENT OF COMMERCE V. NEW YORK	139 S. Ct. 2551	Structural	Yes
SEILA LAW LLC V. CONSUMER FINANCIAL PROTECTION BUREAU	140 S. Ct. 2183	Structural	Yes