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## Qualified Immunity For “Private” § 1983 Defendants After *Filarsky V. Delia*

Andrew W. Weis

*Georgia State University College of Law*, [andrew.weis@outlook.com](mailto:andrew.weis@outlook.com)

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## QUALIFIED IMMUNITY FOR “PRIVATE” § 1983 DEFENDANTS AFTER *FILARSKY V. DELIA*

Andrew W. Weis\*

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## INTRODUCTION

42 U.S.C. § 1983 provides a cause of action against any person who deprives an individual of federally guaranteed rights “under color” of state law.<sup>1</sup> Because courts interpret the statute “against the background

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1. The statute provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

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of tort liability[.]”<sup>2</sup> immunity doctrines apply to § 1983.<sup>3</sup> As under common law tort liability, certain categories of defendants are afforded *absolute* immunity from suit.<sup>4</sup> In determining whether absolute immunity is available, courts apply a “functional approach”—looking to the nature of the challenged conduct, rather than the title or position of the defendant.<sup>5</sup>

Government officials and employees not entitled to absolute immunity can instead assert *qualified* immunity,<sup>6</sup> which shields them from civil liability insofar as their conduct does not violate “clearly established” federally guaranteed rights of which a reasonable person would have known.<sup>7</sup> Qualified immunity aims to avoid (or limit) three main social costs: (1) the distractions that even insubstantial claims

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42 U.S.C. § 1983 (2006).

In *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), the Supreme Court held that a similar cause of action sometimes exists against persons who deprive an individual of federally guaranteed rights under color of *federal law*. *Id.* at 397. However, fewer federal rights can provide the basis for *Bivens* actions than § 1983 actions. See Alexander A. Reinert, *Measuring the Success of Bivens Litigation and its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809, 822–27 (2010).

While this Comment refers to and discusses the qualified immunity of available § 1983 defendants, the qualified immunity available to defendants under so-called *Bivens* actions is identical to that available to § 1983 defendants. See *Butz v. Economou*, 438 U.S. 478, 500 (1978) (“We agree . . . that, in the absence of congressional direction to the contrary, there is no basis for according to federal officials a higher degree of immunity from liability when sued for a constitutional infringement as authorized by *Bivens* than is accorded state officials when sued for the identical violation under § 1983.”).

2. *Monroe v. Pape*, 365 U.S. 167, 187 (1961), *overruled in part on other grounds by Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658 (1978).

3. *Filarsky v. Delia*, 132 S. Ct. 1657, 1660 (2012) (“At common law, those who carried out the work of government enjoyed various protections from liability when doing so, in order to allow them to serve the government without undue fear of personal exposure. Our decisions have looked to these common law protections in affording either absolute or qualified immunity to individuals sued under § 1983.”). On the Supreme Court’s reasoning in importing immunity doctrines to the statute, see discussion *infra* Parts I.A.2–3.

4. See discussion *infra* Part I.A.2.

5. *Forrester v. White*, 484 U.S. 219, 224 (1988) (“Running through our cases, with fair consistency, is a ‘functional’ approach to immunity questions other than those that have been decided by express constitutional or statutory enactment.”); see *infra* notes 40–45 and accompanying text.

6. See 2 SHELDON H. NAHMOD, *CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983* § 8:98 (4th ed. 2013) (“The decisions of the Supreme Court and the circuits demonstrate that the qualified immunity test covers all state and local government officials at all levels of responsibility, with the exception of those who have absolute immunity.”). On the history of the qualified immunity doctrine, see discussion *infra* Part I.A.3.

7. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). On *Harlow* and its reasoning, see discussion *infra* Part I.A.4.

can cause, (2) over-deterrence in the exercise of discretion, and (3) the deterrence of talented candidates from public service.<sup>8</sup>

Although § 1983 tends to target the abuse of state power,<sup>9</sup> the statute does permit suits against *private* defendants.<sup>10</sup> Courts have long struggled in applying the doctrine of qualified immunity to these private § 1983 defendants,<sup>11</sup> as the doctrine's rationales apply less forcefully in these cases.<sup>12</sup> The Supreme Court first addressed the availability of qualified immunity to private defendants in the 1992 case *Wyatt v. Cole*, where it found that immunity was unavailable because the defendants in that case were acting in furtherance of private, rather than governmental, interests.<sup>13</sup> In the 1997 case *Richardson v. McKnight*, the Court went further and found that even though the defendants in that case—employees of a private prison operated by a government contractor—were performing a public function, immunity was nevertheless unavailable because privatization and competitive pressures adequately mitigated the concerns that

8. *E.g.*, *Filarsky*, 132 S. Ct. at 1665 (“[Qualified] immunity ‘protect[s] government’s ability to perform its traditional functions’ . . . by helping to avoid ‘unwarranted timidity’ in performance of public duties[.]”) (second alteration in original) (quoting *Wyatt v. Cole*, 504 U.S. 158, 167 (1992)); *Richardson v. McKnight*, 521 U.S. 399, 409–11 (1997); *Gregg v. Ham*, 678 F.3d 333, 340 (4th Cir. 2012) (“Courts have traditionally afforded qualified immunity to public officials because susceptibility to suit would distract them from performing their public functions, inhibit discretionary action, and deter desirable candidates from performing public service.” (citing *Harlow*, 457 U.S. at 816)).

9. *See, e.g.*, *Wyatt*, 504 U.S. at 161 (“The purpose of § 1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails.” (citing *Carey v. Phipus*, 435 U.S. 247, 254–57 (1978))).

10. Part I.A.1 *infra* discusses the types of “private” § 1983 defendants. Merriam-Webster defines “private[.]” in part, as “not holding public office or employment <a *private* citizen>.” MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 988 (11th ed. 2003).

11. *See* discussion *infra* Parts I.A.2–3; *see generally* *Developments in the Law—State Action and the Public/Private Distinction*, 123 HARV. L. REV. 1248, 1271–77 (2010) [hereinafter *State Action and the Public/Private Distinction*] (documenting the difficulty lower courts face in determining the availability of qualified immunity following the Court’s decision in *Richardson*, 521 U.S. 399); Allison Hartwell Eid, Comment, *Private Party Immunities to Section 1983 Suits*, 57 U. CHI. L. REV. 1323, 1341–44 (1990) (documenting the diverse approaches among the circuits to private party immunity prior to the Supreme Court’s first private party immunity decision in *Wyatt*, 504 U.S. 158).

12. As Sheldon H. Nahmod notes, “if a primary purpose of qualified immunity is to protect persons from unexpected developments in constitutional law, then private defendants, like government officials and employees, should also be protected. . . . On the other hand, if qualified immunity is intended primarily to promote independent governmental decisionmaking, then perhaps it ought not to apply . . . .” SHELDON H. NAHMOD ET AL., CONSTITUTIONAL TORTS 524 (3d ed. 2010).

13. *See Wyatt*, 504 U.S. at 168 (“In short, the nexus between private parties and the historic purposes of qualified immunity is simply too attenuated to justify such an extension of our doctrine of immunity.”). On *Wyatt* and its reasoning, see discussion *infra* Part I.B.1.

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immunity would address.<sup>14</sup> In these cases, rather than a functional approach to the immunity question, the Court adopted a two-part test that weighs both the historical and policy bases for immunity.<sup>15</sup>

In 2012, the Supreme Court returned to the question of private party qualified immunity in *Filarsky v. Delia*.<sup>16</sup> There, the Court found that both the historical and policy bases for immunity under § 1983 supported extending qualified immunity to outside counsel retained by a municipality.<sup>17</sup> The Court noted that full-time government employees can always seek qualified immunity, so not extending it to individuals employed on some other basis would create “significant line-drawing problems . . . [which could] deprive state actors of the ability to ‘reasonably anticipate when their conduct may give rise to liability . . . .’”<sup>18</sup>

This Comment synthesizes the post-*Filarsky* framework for determining the availability of qualified immunity for private individuals. Part I reviews the text and background of § 1983, surveys the evolution of § 1983 immunities, and explores the historical and legal underpinnings of private party immunity.<sup>19</sup> Part II addresses the issues raised or left unanswered by *Filarsky*, and what questions lower courts are facing in *Filarsky*'s wake.<sup>20</sup> Part III resolves these questions by showing that *Filarsky* converts the historical and policy inquiries into a functional test that focuses on the nature of the challenged activity and asks whether the defendant's actions furthered government ends.<sup>21</sup> Part III, in other words, shows that while *Filarsky* preserved the *form* of the two-part test for immunity first articulated in *Wyatt* and clarified in *Richardson*, *Filarsky* adjusted these inquiries such that in *substance* they embody the functional approach advocated by the dissent in *Richardson*.

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14. *Richardson*, 521 U.S. at 407–11. On *Richardson* and its reasoning, see discussion *infra* Part I.B.2.

15. See discussion *infra* Part I.B.

16. *Filarsky v. Delia*, 132 S. Ct. 1657 (2012).

17. *Id.* at 1668. In *Filarsky*, the Court resolved a split between the Ninth and Sixth Circuits over whether outside counsel retained by a municipality could assert qualified immunity. *Id.* at 1661, 1668. On *Filarsky* and its reasoning, see discussion *infra* Part II.A.

18. *Filarsky*, 132 S. Ct. at 1666 (quoting *Anderson v. Creighton*, 483 U.S. 635, 646 (1987)).

19. See discussion *infra* Part I.

20. See discussion *infra* Part II.

21. See discussion *infra* Part III.

## I. § 1983 PRINCIPLES AND IMMUNITIES

## A. 42 U.S.C. § 1983 and the Evolution of Qualified Immunity

## 1. § 1983 Liability and “Private” § 1983 Defendants

42 U.S.C. § 1983 provides a cause of action against any person who deprives an individual of federally guaranteed rights “under color” of state law.<sup>22</sup> The purpose of the statute “is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails.”<sup>23</sup> Congress enacted § 1983 in the aftermath of the Civil War, and the statute, along with the Fourteenth Amendment, can be understood as shifting the role of protecting individual rights from states to the federal government.<sup>24</sup> By providing a cause of action for money damages to victims of constitutional deprivations, the statute serves a special function in reordering the relationship between not only the federal and state governments, but also between citizens and their local government.<sup>25</sup>

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22. For the relevant text of the statute, see *supra* note 1.

23. *Wyatt v. Cole*, 504 U.S. 158, 161 (1992).

24. 42 U.S.C. § 1983 began as section 1 of the Ku Klux Klan Act of April 20, 1871, enacted under section 5 of the 14th Amendment so as to enforce that amendment. The section’s title, “An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes[.]” illustrates the basic function and scope of the Act. Act of Apr. 20, 1871, ch. 22, § 1, 17 Stat. 13, 13 (codified as amended at 42 U.S.C. § 1983 (2006)); see also *Allen v. McCurry*, 449 U.S. 90, 98–99 (1980) (“The main goal of the Act was to override the corrupting influence of the Ku Klux Klan and its sympathizers on the governments and law enforcement agencies of the Southern States, and of course the debates show that one strong motive behind its enactment was grave congressional concern that the state courts had been deficient in protecting federal rights.” (citation omitted) (citing *Monroe v. Pape*, 365 U.S. 167, 174 (1961))); 1 NAHMOD, *supra* note 6, at § 2:2 (“The relation between § 1983 and the Fourteenth Amendment is best characterized as intimate.”).

25. See, e.g., *Allen*, 449 U.S. at 99 (“As the Court has understood the history of the legislation, Congress realized that in enacting § 1983 it was altering the balance of judicial power between the state and federal courts.”); CONG. GLOBE, 42d Cong., 1st Sess. 569 (1871) (“[Section 1 is] so very simple and really reenact[s] the Constitution . . .” (referring to Section 1 of the Civil Rights Act, 1871, the predecessor to 42 U.S.C. § 1983)); Charles F. Abernathy, *Section 1983 and Constitutional Torts*, 77 GEO. L.J. 1441, 1441 (1989) (“We have long recognized that the resurrection of § 1983 converted the [F]ourteenth [A]mendment from a shield into a sword by providing a civil action for vindication of constitutional rights . . .” (citing Marshall S. Shapo, *Constitutional Tort: Monroe v. Pape, and the Frontiers Beyond*, 60 NW. U. L. REV. 277, 322 (1965))).

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Perhaps the most basic question in interpreting § 1983 is what conduct occurs "under color" of state law. Prior to 1961, courts interpreted this "under color" language as requiring a state statute or custom to cause the constitutional deprivation.<sup>26</sup> In *Monroe v. Pape*, however, the Court announced a broader standard, holding that "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law."<sup>27</sup>

Although *Monroe* answered the question of *what* action is taken under color of state law, the question remained of *who* acts or can act under color of state law; indeed, this point of interpretation plays a central function in defining the scope of § 1983 liability. Government employees and officials generally act under color of law so long as there is some nexus between their government position and the

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26. See, e.g., *Douglas v. City of Jeannette*, 319 U.S. 157, 161, 165 (1943) (finding respondents acted under color of state law where they arrested and detained petitioners "proceeding under the challenged ordinance").

27. *Monroe*, 365 U.S. at 184 (quoting *United States v. Classic*, 313 U.S. 299, 325–26 (1941), which interpreted similar language in § 1983's criminal counterpart). Liability under § 1983 expanded dramatically after this holding. 1 NAHMOD, *supra* note 6, at § 2:2 ("*Monroe* meant that much official conduct previously thought not to be actionable under § 1983 was now within its scope."); see generally *id.* (discussing factors that "were jointly responsible for the dormancy of § 1983 from the time of its enactment to the year 1961[.]" and noting that "the picture began to change dramatically in that year, largely because of the broad scope given § 1983 by the Supreme Court in *Monroe v. Pape*" (footnote omitted)).

The Court's decision in *Monell v. Department of Social Services*, 436 U.S. 658 (1978), further expanded the potential for liability under § 1983 by holding that municipalities are suable "persons" under the statute. *Id.* at 690. *Monell* actually overruled *Monroe* on this point, but limited municipal liability under § 1983 to instances where "execution of a [municipal] government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury." *Id.* at 694. In the wake of these decisions, the quantity of (and increase in) § 1983 litigation became a popular target for legal commentary. See generally Theodore Eisenberg & Stewart J. Schwab, *What Shapes Perceptions of the Federal Court System?*, 56 U. CHI. L. REV. 501, 501–03 (1989) (documenting the various perceptions of constitutional tort claims overloading federal dockets, but arguing that such perceptions are unfounded).

constitutional deprivation.<sup>28</sup> Nominally “private” actors can also act under color of law in certain circumstances.<sup>29</sup>

In *Lugar v. Edmondson Oil Co.*, for example, the Court found that a private defendant using state prejudgment attachment procedures acted under color of state law because (1) the constitutional deprivation resulted from the exercise of a right or privilege having its source in state authority, and (2) the defendant could be appropriately characterized as a state actor.<sup>30</sup> Other theories under which private parties act under state law include contracting to perform a public

28. *But see* NAHMOD ET AL., *supra* note 12, at 47–48 (“Though officers whose conduct is proscribed by state law nonetheless act under color of law, it does not follow that every single action taken by a state officer is actionable under section 1983. A distinction must be drawn between cases where the actor’s official status is more or less irrelevant, and those where, however personal the officer’s aims, his use of the authority or accoutrements of office contributes significantly to the harm he is able to do.”). Essentially, in determining whether state officers act “under color” of state law, courts look at the nexus between the government employment and the challenged action. *See, e.g.*, *Rossignol v. Voorhaar*, 316 F.3d 516, 519–20, 523 (4th Cir. 2003) (finding deputies’ attempt to purchase entire stock of newspapers critical of them and their favored candidates on election day amounted to action under color of law given the “requisite nexus between defendants’ public office and their actions during the seizure”). *But cf.* *Pitchell v. Callan*, 13 F.3d 545, 548 (2d Cir. 1994) (“However, while it is clear that ‘personal pursuits’ of police officers do not give rise to section 1983 liability, there is no bright line test for distinguishing ‘personal pursuits’ from activities taken under color of law.” (quoting *Screws v. United States*, 325 U.S. 91, 111 (1945))).

29. *See generally* 1 NAHMOD, *supra* note 6, at § 2:4 (analyzing who can be a § 1983 defendant and discussing the private variants).

30. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 940–42 (1982); *accord* *Filarsky v. Delia*, 132 S. Ct. 1657, 1661 (2012) (“Anyone whose conduct is ‘fairly attributable to the state’ can be sued as a state actor under § 1983.” (quoting *Lugar*, 457 U.S. at 937)).

In *Lugar*, the Court emphasized the relationship between § 1983’s “under color” language and the “state action” requirement in applying the 14th Amendment: “Similarly, it is clear that in a § 1983 action brought against a state official, the statutory requirement of action ‘under color of state law’ and the ‘state action’ requirement of the Fourteenth Amendment are identical.” *Lugar*, 457 U.S. at 929. *But see id.* at 946 (Powell, J., dissenting) (observing differences between the state action and “under color” inquiries and arguing that neither were met where a private actor used state attachment procedures). *See generally* 1 NAHMOD, *supra* note 6, at § 2:4 (“In order for the § 1983 plaintiff to state a cause of action based on a Fourteenth Amendment violation, the challenged conduct must constitute both color of law and state action. . . . For all practical purposes, according to the Supreme Court, ‘color of law’ and state action are the same where Fourteenth Amendment violations are involved and mean that § 1983 regulates state and local governmental conduct, as distinct from purely private conduct.” (footnote omitted)).

The Court first articulated the “state action” requirement in *The Civil Rights Cases*, 109 U.S. 3, 21 (1883), and restated it in *National Collegiate Athletic Association v. Tarkanian*, 488 U.S. 179, 191 (1988) (“Embedded in our Fourteenth Amendment jurisprudence is a dichotomy between state action, which is subject to scrutiny under the Amendment’s Due Process Clause, and private conduct, against which the Amendment affords no shield, no matter how unfair that conduct may be.” (footnote omitted)).

function,<sup>31</sup> conspiracy,<sup>32</sup> and private party “entwinement” with public institutions.<sup>33</sup> These inquiries often hinge on the nexus between the government interest involved and the challenged private activity and require careful weighing of the facts and circumstances of each case.<sup>34</sup>

## 2. *The Rise of Immunity Doctrines in § 1983 Litigation: Absolute Immunity*

The Court first addressed immunities under § 1983 in its 1951 decision *Tenney v. Brandhove*.<sup>35</sup> In *Tenney*, the plaintiff alleged that the defendants, members of a legislative committee, violated his constitutional rights in the course of a state senate investigation.<sup>36</sup> The Court began by discussing the history and purposes of legislative immunities and privileges available at common law.<sup>37</sup> The Court then considered whether Congress, with § 1983’s broad “every person” language, intended to abrogate or incorporate these legislative

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31. Two theories can support liability in government contract cases. First, if the contractor undertakes a traditional government function, such activity may be state action. *Marsh v. Alabama*, 326 U.S. 501, 505–07 (1946). Alternatively, if the contract arrangement gives rise to a close relationship between the state and contractor and there is a “sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself[.]” such action occurs under color of state law. *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974).

32. *See, e.g.*, *Dennis v. Sparks*, 449 U.S. 24, 27 (1980) (“[T]o act ‘under color of’ state law for § 1983 purposes does not require that the defendant be an officer of the State. It is enough that he is a *willful participant in joint action with the State or its agents*.” (emphasis added)); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 152 (1970) (finding a restaurant owner acted under color of law because he “reached an understanding” with a police officer to violate the plaintiff’s federal rights). To establish a conspiracy, “[c]ourts have demanded that plaintiffs make a strong showing of an agreement between the private actor and a public official to violate the plaintiff’s constitutional rights.” *NAHMOD ET AL.*, *supra* note 12, at 93.

33. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 298 (2001) (finding “[t]he nominally private character of [the defendant] is overborne by the pervasive entwining of public institutions and public officials in its composition and workings, and [that] there is no substantial reason to claim unfairness in applying constitutional standards to it”).

34. *See, e.g.*, *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961) (“Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance.”).

35. *Tenney v. Brandhove*, 341 U.S. 367 (1951).

36. *Id.* at 369–70.

37. The Court emphasized the *public* interest in these immunity doctrines: “These privileges are thus secured, not with the intention of protecting the members against prosecutions for their own benefit, but to support the rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecutions, civil or criminal.” *Id.* at 373–74 (quoting *Coffin v. Coffin*, 4 Mass. 1, 27 (1808)).

immunities.<sup>38</sup> Citing the basic policy considerations at stake, and the tradition “so well grounded in history[,]” the Court concluded that Congress intended to incorporate existing immunities when it enacted § 1983.<sup>39</sup> As to legislative immunity, the Court concluded that legislators enjoyed absolute immunity from suit so long as the alleged constitutional deprivation arose from acts “in the sphere of legitimate legislative activity.”<sup>40</sup>

The Court later extended absolute immunity from suit under § 1983 to those performing judicial<sup>41</sup> and prosecutorial<sup>42</sup> functions in light of historical immunities for these activities. In considering whether absolute immunity is available, the Court focuses on the nature of the act, rather than on the title of the actor.<sup>43</sup> For example, a prosecutor is absolutely immune for his prosecutorial acts, but not his investigative ones.<sup>44</sup> This is known as the “functional approach” to immunities.<sup>45</sup> The Court’s recognition of a *qualified* immunity represented the next major development in § 1983 immunities.

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38. The court framed the issue so as to leave little doubt as to its eventual conclusion. *See id.* at 376 (“Did Congress by the general language of its 1871 statute mean to overturn the tradition of legislative freedom achieved in England by Civil War and carefully preserved in the formation of State and National Governments here?”).

39. *Id.* (“We cannot believe that Congress—itsself a staunch advocate of legislative freedom—would impinge on a tradition so well grounded in history and reason by covert inclusion in the general language before us.”); *see also* NAHMOD ET AL., *supra* note 12, at 400 (“*Tenney* articulated an approach to section 1983 immunities that has dominated the Court’s immunities jurisprudence ever since.”).

40. *Tenney*, 341 U.S. at 376, 378. *Bogan v. Scott-Harris*, 523 U.S. 44, 53–54 (1998), a case in which the Court granted absolute immunity to local officials because the challenged action consisted of legislative activities, illustrates the functional approach courts take to these immunities.

41. *Pierson v. Ray*, 386 U.S. 547, 554–55 (1967) (holding that judges are absolutely immune from liability for damages for acts committed within their judicial jurisdiction, even where the judge acts maliciously or corruptly).

42. *Imbler v. Pachtman*, 424 U.S. 409, 420, 430 (1976) (finding prosecutors absolutely immune for their conduct in initiating a prosecution and in presenting the State’s case insofar as that conduct is “intimately associated with the judicial phase of the criminal process”).

43. *See, e.g.*, *Forrester v. White*, 484 U.S. 219, 225–26 (1988).

44. *Burns v. Reed*, 500 U.S. 478, 493, 496 (1991) (finding prosecutor can only assert qualified immunity for his investigative acts); *cf. Kalina v. Fletcher*, 522 U.S. 118, 129–31 (1997) (finding absolute prosecutorial immunity applicable for prosecutor’s act of moving for arrest warrant, but only qualified immunity applicable for prosecutor’s certification of affidavits).

45. *See, e.g., Forrester*, 484 U.S. at 224 (“Running through our cases, with fair consistency, is a ‘functional’ approach to immunity questions other than those that have been decided by express constitutional or statutory enactment.”).

### 3. *The Rise of Immunity Doctrines in § 1983 Litigation: Qualified Immunity*

The doctrine of qualified immunity represents further importation of traditional tort immunities as § 1983 defenses stemming from the conclusion that Congress would not have abrogated these immunities without doing so expressly.<sup>46</sup> The doctrine emerged in the Court's 1967 decision of *Pierson v. Ray*.<sup>47</sup> In *Pierson*, police officers who made arrests under a statute later held unconstitutional argued that they should not be held liable if they acted in good faith and with probable cause.<sup>48</sup> The Court agreed because police officers enjoyed such a defense at common law, and § 1983 "should be read against the background of tort liability."<sup>49</sup> Under *Pierson*, the police defendants established qualified immunity (as they would defend under the common law) by satisfying a two-part test that required good faith and probable cause.<sup>50</sup> The Court later extended this qualified immunity test to all government officials and employees.<sup>51</sup>

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46. See discussion *supra* Part I.A.3.

47. *Pierson v. Ray*, 386 U.S. 547, 554 (1967) ("The legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities.").

48. *Id.* at 555.

49. *Id.* at 556 (quoting *Monroe v. Pape*, 365 U.S. 167, 187 (1961) (internal quotation marks omitted)). The Court also noted the basic fairness considerations at play, reflecting that "[a] policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does." *Id.* at 555.

50. *Id.* at 555 ("Under the prevailing view in this country a peace officer who arrests someone with probable cause is not liable for false arrest simply because the innocence of the suspect is later proved." (citing RESTATEMENT (SECOND) OF TORTS § 121 (1965))); *id.* at 556–57 (repeating that § 1983 "should be read against the background of tort liability[.]" and noting that "[p]art of the background of tort liability, in the case of police officers making an arrest, is the defense of good faith and probable cause").

51. In *Scheuer v. Rhodes*, 416 U.S. 232 (1974), the Court discussed the rule established in *Pierson* that police officers could establish immunity from § 1983 suit by showing they acted in good faith and with probable cause. *Id.* at 245. The Court noted that like police officers, other "officials with a broad range of duties and authority must often act swiftly and firmly at the risk that action deferred will be futile or constitute virtual abdication of office." *Id.* at 246. The need for prompt action in often unclear factual situations led the Court to conclude that "in varying scope, a qualified immunity is available to officers of the executive branch of government." *Id.* at 247. In *Wood v. Strickland*, 420 U.S. 308 (1975), the Court considered an immunity claim by school board officials. *Id.* at 309–11, 314. The Court cited the need for such officials to exercise judgment "independently, forcefully, and in a manner best serving the long-term interest of the school and the students[.]" in extending a qualified immunity to the school board officials. *Id.* at 320.

In the wake of these decisions, lower courts permitted qualified immunity to government officials and employees without regard to analogous historical defenses. See generally 2 NAHMOD, *supra* note 6, at § 8:98 ("The decisions of the Supreme Court and the circuits demonstrate that the qualified immunity

#### 4. *Modern Qualified Immunity: Inquiring Into “Clearly Settled Law”*

Although this two-element qualified immunity provided a powerful tool to defendants, the Court eventually abandoned the subjective element and developed a purely objective standard for qualified immunity.<sup>52</sup> This modern transformation of qualified immunity began with *Harlow v. Fitzgerald*, where the Court found that the inability to dispose of insubstantial claims on summary judgment generated unacceptable social costs.<sup>53</sup> First, being exposed to discovery and trial can distract government workers.<sup>54</sup> Additionally, the public suffers when government officials and employees are over deterred in the execution of their duties and able candidates are deterred from public service for fear of liability.<sup>55</sup>

Because an individual’s subjective good faith often involves questions of fact, requiring defendants to show good faith makes it impossible for courts to dispose of these qualified immunity claims at the summary judgment phase.<sup>56</sup> Discarding the subjective element, the Court concluded that “bare allegations of malice should not suffice to

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test covers all state and local government officials at all levels of responsibility, with the exception of those who have absolute immunity.”); *State Action and the Public/Private Distinction*, *supra* note 11, at 1270 (“Yet by [1982,] the Court had abandoned any pretense of historical inquiry, largely because it had trouble interpreting the common law for many offices.”). Of course, some private defendants cannot assert qualified immunity. *Richardson v. McKnight*, 521 U.S. 399, 412 (1997) (prison guards); *Wyatt v. Cole*, 504 U.S. 158, 168–69 (1992) (private citizens invoking state replevin, garnishment, or attachment statutes); *see* discussion *infra* Part I.B.

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

53. *Id.* at 818–19. *But cf.* *Tower v. Glover*, 467 U.S. 914, 922–23 (1984) (“We do not have a license to establish immunities from § 1983 actions in the interests of what we judge to be sound public policy. It is for Congress to determine whether § 1983 litigation has become too burdensome to state or federal institutions and, if so, what remedial action is appropriate.”). On *Harlow* and its impact, see NAHMOD ET AL., *supra* note 12, at 461 (observing that *Harlow* is “[b]y far the most important qualified immunity case,” and that “*Harlow* and its progeny continue to generate a great deal of controversy and confusion”); 2 NAHMOD, *supra* note 6, at § 8:5 (“*Harlow*’s change in the qualified immunity test demonstrates the Supreme Court’s increased sensitivity to the costs to *defendants* of defending against § 1983 litigation, at the same time showing the Court’s reduced concern for the financial and psychological costs to § 1983 *plaintiffs* of conducting such litigation. It also reflects, in part, the Court’s own continuing split over the proper scope of § 1983 liability . . . .” (footnotes omitted)).

54. *Harlow*, 457 U.S. at 817–18.

55. *Id.* at 814.

56. *See id.* at 815–16 (“The subjective element of the good-faith defense frequently has proved incompatible with our admonition in *Butz* that insubstantial claims should not proceed to trial.” (referring to *Butz v. Economou*, 438 U.S. 478 (1978))).

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subject government officials either to the costs of trial or to the burdens of broad-reaching discovery.”<sup>57</sup>

Under the post-*Harlow* standard, “government officials performing discretionary functions generally [can assert qualified immunity] insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”<sup>58</sup> Thus, a plaintiff must establish not only (1) that a constitutional violation occurred, but also (2) that the law with respect to that violation was “clearly established” at the time. Under the Court’s decision in *Pearson v. Callahan*, courts can exercise discretion as to the order they make these determinations.<sup>59</sup>

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57. *Id.* at 817–18.

58. *Id.* at 818. The Court later addressed the difficult question of what it meant for a right to be “clearly established”:

The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

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

In *Anderson*, the defendant was alleged to have violated the plaintiff’s Fourth Amendment right against unreasonable searches. *Id.* at 637. The Eighth Circuit held that the defendant could not assert qualified immunity because the plaintiff’s right to be free from warrantless searches was clearly established at the time of the alleged violation. *Creighton v. City of St. Paul*, 766 F.2d 1269, 1277 (8th Cir. 1985), *vacated sub nom. Anderson*, 483 U.S. 635. The Supreme Court reversed, holding that the Eighth Circuit had misapplied the qualified immunity standard. *Anderson*, 483 U.S. at 640. The Court noted that under the Eighth Circuit’s approach, “[p]laintiffs would be able to convert the rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights.” *Id.* at 639. The Court held that the appropriate inquiry was more fact-specific: “whether a reasonable officer could have believed [the search] to be lawful, in light of clearly established law and the information the searching officers possessed.” *Id.* at 641.

59. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009); *accord Currie v. Cundiff*, No. 09-cv-866-MJR, 2012 WL 2711469, at \*3 (S.D. Ill. July 8, 2012) (“It is a matter of discretion whether to first determine whether the official’s conduct violated a constitutional right, or to determine whether the right was clearly established at the time of the conduct.” (citing *Pearson*, 555 U.S. at 242)), *aff’d sub nom. Currie v. Chhabra*, 728 F.3d 626 (7th Cir. 2013). Under this approach, if a court determines that certain conduct was not a violation of clearly established law, it can simply ignore the question whether there was a constitutional violation *at all*.

This discretionary approach inaugurated by *Pearson* marks a dramatic change from prior law. In *Siegert v. Gilley*, 500 U.S. 226 (1991), the Court emphasized the importance of investigating whether the plaintiff spelled out a constitutional violation before considering the (often more complex) “clearly settled law” question. *Id.* at 230–33 (discussing the advantages of this order of procedure). In *Conn v. Gabbert*, 526 U.S. 286 (1999), the Court again held that courts evaluating claims of qualified immunity should first determine whether the plaintiff spells out a constitutional violation *at all* before evaluating whether the

Just as decisions expanding the definitions of “under color of law,”<sup>60</sup> and “every person”<sup>61</sup> illustrate the ability of judicial opinions to expand the operation of 42 U.S.C. § 1983, this series of decisions outlining affirmative defenses to liability illustrate the ability of court decisions to restrict the statute’s operation.<sup>62</sup> The last thirty years have seen the ascent of the qualified immunity doctrine,<sup>63</sup> while the Court has also displayed an increased openness to suits against “private” § 1983 defendants.<sup>64</sup> These developments raise the question of under what circumstances private § 1983 defendants may claim qualified immunity.

## B. *Qualified Immunity for Private § 1983 Defendants Pre-Filarsky*

### I. *Wyatt v. Cole*

The Supreme Court first addressed private party qualified immunity in the 1992 case *Wyatt v. Cole*.<sup>65</sup> There, the Court considered whether a private defendant who used an unconstitutional state replevin statute

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relevant law was clearly established. *Id.* at 290; *accord* *Wilson v. Layne*, 526 U.S. 603, 609 (1999); *see also* *Saucier v. Katz*, 533 U.S. 194, 200–01 (2001) (explicitly mandating this procedure for lower courts). In 2009, the Court decided *Pearson* and abandoned this mandatory procedure in favor of the discretionary approach. *Pearson*, 555 U.S. at 236.

60. *Monroe v. Pape*, 365 U.S. 167, 187 (1961), *overruled in part on other grounds by* *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658 (1978); *see supra* note 27 and accompanying text.

61. *Monell*, 436 U.S. at 690 (holding that municipalities are suable persons under § 1983).

62. Many commentators criticize the modern qualified immunity doctrine as improper judicial interference with the statute. *See, e.g.*, Diana Hassel, *Living a Lie: The Cost of Qualified Immunity*, 64 MO. L. REV. 123, 123–26 (1999) (arguing that “immunity defenses, particularly qualified immunity, have developed as camouflage for civil rights policy decisions”). *Harlow*, especially, is often maligned as judicial overreaching. *See, e.g.*, Gary S. Gildin, *Immunizing Intentional Violations of Constitutional Rights Through Judicial Legislation: The Extension of Harlow v. Fitzgerald to Section 1983 Actions*, 38 EMORY L.J. 369, 386–89 (1989) (arguing that the *Harlow* immunity amounts to judicial overreaching that is inconsistent with the purposes of § 1983). *But see* Michael M. Rosen, *A Qualified Defense: In Support of the Doctrine of Qualified Immunity in Excessive Force Cases, With Some Suggestions for its Improvement*, 35 GOLDEN GATE U. L. REV. 139, 140 (2005) (defending the qualified immunity doctrine “as a reasonably coherent and effective mechanism for sorting out worthy from unworthy litigation”).

Often, the questions of immunity transcend § 1983 specifically and raise peculiarly basic (and politically charged) questions about the proper role of government. *See generally* Peter H. Schuck, *Suing Our Servants: The Court, Congress, and the Liability of Public Officials for Damages*, 1980 SUP. CT. REV. 281, 281 (“To pose the question of the appropriate scope of official immunity is one way to ask how we wish to govern ourselves.” (footnote omitted)).

63. *See* discussion *supra* Part I.A.2.

64. *See supra* notes 30–33 and accompanying text.

65. *Wyatt v. Cole*, 504 U.S. 158 (1992).

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to attach the plaintiff’s property could assert qualified immunity.<sup>66</sup> Justice O’Connor, writing for the Court, drew on the reasoning in *Pierson* and conducted a two pronged analysis of the defendant’s qualified immunity claim looking first for any analogous historical immunities<sup>67</sup> and then at relevant policy considerations.<sup>68</sup>

The Court found that the most analogous tort claims were malicious prosecution and abuse of process.<sup>69</sup> The defendants argued the Court should extend qualified immunity in light of the common law defenses to these torts.<sup>70</sup> The Court rejected this argument, responding that even if the common law supported a good faith defense that was fundamentally different from what the defendants sought: the objectively-tested qualified immunity established in *Harlow*.<sup>71</sup> The Court emphasized this distinction between the modern post-*Harlow* immunity and the historically available defenses.<sup>72</sup> Although recognizing these historical defenses, the Court was unwilling to translate them into the post-*Harlow* immunity given the inapplicability of the *Harlow* policy factors.<sup>73</sup> In denying qualified immunity to the

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66. *Id.* at 159–60. Prior to *Wyatt*, a majority of circuits granted qualified immunity to private defendants. 2 NAHMOD, *supra* note 6, at § 8:99.

67. *Wyatt*, 504 U.S. at 164 (“In determining whether there was an immunity at common law that Congress intended to incorporate in the Civil Rights Act, we look to the most closely analogous torts—in this case, malicious prosecution and abuse of process.”).

68. *Id.* at 167–68.

69. *Id.* at 164.

70. *Id.* at 165 (“[The defendants] argue[d] that at common law, private defendants could defeat a malicious prosecution or abuse of process action if they acted without malice and with probable cause, and that [the Court] should therefore infer that Congress did not intend to abrogate such defenses when it enacted [§ 1983].”).

71. *Id.* (“Even if there were sufficient common law support to conclude that respondents, like the police officers in *Pierson*, should be entitled to a good faith defense, that would still not entitle them to what they sought and obtained in the courts below: the qualified immunity from suit accorded government officials under *Harlow v. Fitzgerald*.”). Compare *Anderson v. Creighton*, 483 U.S. 635, 653 (1987) (emphasizing the advantages of immunities over mere defenses), with *Wyatt*, 504 U.S. at 165 (emphasizing the difference between a good faith defense and qualified immunity in deciding not to extend the immunity to a private defendant).

72. *Wyatt*, 504 U.S. at 165 (discussing differences between common law defenses and the post-*Harlow* qualified immunity); *id.* at 168 (denying defendants the “qualified immunity, as enunciated in *Harlow*”). But see *id.* at 170 (Kennedy, J., concurring) (arguing that the “good-faith and probable-cause defense evolved into our modern qualified-immunity doctrine”).

73. *Id.* at 167–68 (“In short, the qualified immunity recognized in *Harlow* acts to safeguard government, and thereby to protect the public at large, not to benefit its agents. These rationales are not transferable to private parties.”). On the policy factors discussed in *Harlow v. Fitzgerald*, 457 U.S. 800, 817–18 (1982), see *supra* notes 54–55 and accompanying text.

defendants, the Court carefully avoided ruling on the availability of some other affirmative defense for the defendant, leaving that possibility open on remand.<sup>74</sup>

At a minimum, *Wyatt* ruled out qualified immunity for private persons using attachment, replevin, or garnishment statutes.<sup>75</sup> Lower courts still lacked guidance, however, with respect to other types of private § 1983 defendants, knowing only the question should be guided by history and policy.<sup>76</sup> Because of the language in *Wyatt* and the narrowness of the holding, lower courts did not interpret *Wyatt* as a complete bar on qualified immunity for private defendants, sometimes permitting it where the defendants acted pursuant to government contract or court order.<sup>77</sup>

Unlike *Wyatt*, where “[the defendant] had no connection to government and pursued purely private ends[,]”<sup>78</sup> the conduct of some private § 1983 defendants is more closely tied to governmental objectives.<sup>79</sup> In *Warner v. Grand County*, for example, the Tenth

74. *Wyatt*, 504 U.S. at 169 (“[W]e do not foreclose the possibility that private defendants faced with § 1983 liability under *Lugar v. Edmondson Oil Co.* . . . could be entitled to an affirmative defense based on good faith and/or probable cause or that § 1983 suits against private, rather than governmental, parties could require plaintiffs to carry additional burdens.”). Before *Wyatt*, the circuits differed greatly in their approach to qualified immunity for private defendants. See 2 NAHMOD, *supra* note 6, at § 8:99 (providing an in-depth discussion of the approaches seen in the circuit cases before 1992). Nahmod notes that for private defendants “sued in connection with their use of allegedly unconstitutional state garnishment or prejudgment attachment statutes[,]” like those at issue in *Wyatt*, the majority of circuits permitted qualified immunity. *Id.*

75. *Wyatt*, 504 U.S. at 168–69 (“The precise issue . . . is whether qualified immunity, as enunciated in *Harlow*, is available for private defendants faced with § 1983 liability for invoking a state replevin, garnishment, or attachment statute. That answer is no.”).

76. *Id.* at 164.

77. *E.g.*, *Sherman v. Four Cnty. Counseling Ctr.*, 987 F.2d 397 (7th Cir. 1993). In *Sherman* the plaintiff argued that under *Wyatt*, private parties were not entitled to seek qualified immunity under any circumstances. *Id.* at 402. The court rejected this interpretation of *Wyatt* and allowed the defendant to claim qualified immunity because the defendant acted pursuant to court order and in accordance with state law. *Id.* at 405. The court found the policy rationales underlying the doctrine of qualified immunity to apply with “full force” to the defendant’s actions as it “was fulfilling a public duty.” *Id.* at 405–06.

78. *Filarsky v. Delia*, 132 S. Ct. 1657, 1667 (2012) (describing *Wyatt*, 504 U.S. at 168). *Filarsky* continued: “Put simply, *Wyatt* involved no government agents, no government interests, and no government need for immunity.” *Id.*

79. See generally 2 NAHMOD, *supra* note 6, at § 8:101 (“The major rationale for the distinction [between *Wyatt*-type cases and those where the private party contracted with the government] was that private persons acting pursuant to government contract, request or court order were the functional equivalent of government officials because, unlike private persons using attachment statutes, they did not act solely for their own private benefit.”).

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Circuit considered the qualified immunity claim of a crisis center director who conducted a strip search incident to an arrest.<sup>80</sup> The court noted that having already granted qualified immunity to the officer who requested the search—and who would have received immunity had he performed the search—"[i]t would be anomalous to deny [the private defendant] qualified immunity . . . ."<sup>81</sup>

## 2. Richardson v. McKnight

The Supreme Court finally addressed whether those acting pursuant to government contract could assert qualified immunity in 1997 when it decided *Richardson v. McKnight*.<sup>82</sup> In *Richardson*, the plaintiff, a prisoner in a privately-operated prison in Tennessee, alleged that his prison guards violated his constitutional rights by injuring him with extremely tight physical restraints.<sup>83</sup>

The district court and the Sixth Circuit Court of Appeals both denied qualified immunity to the defendants because they worked for a private company and not for the government.<sup>84</sup> The Court, in an opinion by Justice Breyer, affirmed the Sixth Circuit's denial of qualified immunity, holding that "private prison guards, unlike those who work directly for the government, do not enjoy immunity from suit in a § 1983 case."<sup>85</sup> The Court explained that under *Wyatt*, the private party qualified immunity inquiry hinges on the historical and policy bases for the immunity.<sup>86</sup> The Court found that history did not reveal a firmly

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80. *Warner v. Grand Cnty.*, 57 F.3d 962, 963 (10th Cir. 1995). In *Warner*, a male police officer detained the plaintiff's suspecting they possessed marijuana. *Id.* The police officer requested that female personnel be available to conduct strip searches. *Id.* The defendant, the female director of a local crisis center who assisted male officers in transporting female detainees, agreed to conduct the search. *Id.*

81. *Id.* at 967. The court concluded: "[W]hen private defendants fulfill a state official's request to perform a governmental function, denial of qualified immunity would undermine its underlying purpose." *Id.* at 966.

82. *Richardson v. McKnight*, 521 U.S. 399 (1997). The Court's decision in *Richardson* did not resolve the availability of qualified immunity for *all* government contractors, however. *See Filarsky v. Delia*, 132 S. Ct. 1657, 1667 (2012) (describing *Richardson* as a "self-consciously 'narrow[]' decision . . . not meant to foreclose all claims of immunity by private individuals" (alteration in original) (citation omitted)).

83. *Richardson*, 521 U.S. at 401.

84. *Id.* at 402.

85. *Id.* at 412.

86. *Id.* at 403 (noting that *Wyatt* specified the legal source of § 1983 immunities: "where a 'tradition of immunity was so firmly rooted in the common law and was supported by such strong policy reasons

rooted tradition of immunity applicable to privately employed prison guards, despite the fact that correctional functions have never been exclusively public.<sup>87</sup>

The inquiry into the *policy* of the immunity doctrine and its applicability to private prison guards proved more difficult.<sup>88</sup> Here, the Court weighed the defendant's argument that because he performed the same function as state prison guards, he should have access to the same defense of qualified immunity.<sup>89</sup> The Court responded that such a functional approach to immunity questions only governed its inquiries into what type of immunity, absolute or qualified, it should apply to public officers.<sup>90</sup> After rejecting the functional approach, the Court turned to the three principal policy concerns at stake in immunity questions: unwarranted timidity, distraction, and the deterrence of able people from public service.<sup>91</sup>

Applying these concerns to private prisons, the Court found “the most important special government immunity-producing concern—unwarranted timidity—[is not as prevalent] . . . when a private company subject to competitive market pressures operates a prison.”<sup>92</sup> The Court reasoned that these ordinary “marketplace pressures [would] provide the private firm with strong incentives to avoid overly timid . . . employee job performance.”<sup>93</sup> Similarly, with respect to whether denying qualified immunity would deter “talented candidates” from public service, the Court found privatization an adequate mitigation mechanism through its provision of

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that “Congress would have specifically so provided had it wished to abolish the doctrine.”” (quoting *Wyatt v. Cole*, 504 U.S. 158, 164 (1992)).

87. *Id.* at 404.

88. *Id.* at 407 (“Whether the immunity doctrine’s purposes warrant immunity for private prison guards presents a closer question.”).

89. *Richardson*, 521 U.S. at 408. The Court previously held that public-employee prison guards could assert qualified immunity in *Procunier v. Navarette*, 434 U.S. 555, 561 (1978).

90. *Richardson*, 521 U.S. at 408 (“The Court has sometimes applied a functional approach in immunity cases, but only to decide which type of immunity—absolute or qualified—a public officer should receive.”). The Court reflected that “a purely functional approach bristles with difficulty, particularly since, in many areas, government and private industry may engage in fundamentally similar activities.” *Id.* at 409; *cf.* *Kalina v. Fletcher*, 522 U.S. 118, 135 (1997) (Scalia, J., concurring) (observing that “no analytical approach based upon ‘functional analysis’ can faithfully replicate the common law”).

91. *Richardson*, 521 U.S. at 409–12.

92. *Id.* at 409.

93. *Id.* at 410.

comprehensive insurance coverage requirements and freedom from other civil service law restraints.<sup>94</sup>

Finally, the Court acknowledged that the lack of immunity could result in the distraction of the private defendants, but held that this risk alone “cannot be sufficient grounds for an immunity[,]” as the Court’s qualified immunity cases “do not contemplate the complete elimination of lawsuit-based distractions.”<sup>95</sup> Ultimately, because history did not afford a basis for immunity and because policy did not weigh sufficiently in favor of immunity, the Court denied qualified immunity to the defendants.<sup>96</sup> In a strong dissent joined by three other justices, Justice Scalia rejected the Court’s analysis and conclusions, arguing that the Court’s “market pressure” rationale was misplaced and that the functional approach to immunities ought to apply in these cases.<sup>97</sup>

### 3. *Division in Lower Courts Following Richardson*

*Richardson* presented problems for lower courts.<sup>98</sup> First, *Richardson*, like *Wyatt*, specified that the inquiry into private party qualified immunity proceeds by analyzing the historical and policy bases for immunity, but failed to show to what extent these bases must be present to actually support immunity.<sup>99</sup> Additionally, *Richardson* left open the question of whether a historical or policy basis *alone* might support immunity, or whether both were required.<sup>100</sup> Finally,

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94. *Id.* at 411.

95. *Id.*

96. *Id.* at 412.

97. *Richardson*, 521 U.S. at 414–20 (Scalia, J., dissenting) (“This holding is supported neither by common-law tradition nor public policy, and contradicts our settled practice of determining § 1983 immunity on the basis of the public function being performed.”).

98. See generally *State Action and the Public/Private Distinction*, *supra* note 11, at 1271–77 (discussing the difficulties lower courts face in applying *Richardson* and the diverse approaches taken as a result).

99. See, e.g., *id.* at 1271 (“*Richardson* . . . uses the [policy] rationales as a multifactor test with caveats for granting immunity itself, yet provides no guidance on balancing the factors or on which ones are dispositive. The Court did not explain who has the burden to prove the factors’ existence or to what extent they must be shown.”).

100. See, e.g., *McCullum v. Tepe*, 693 F.3d 696, 700 n.7 (6th Cir. 2012) (“[I]t may be questionable whether the Supreme Court’s jurisprudence in this area would allow a court to extend qualified immunity where there was no history of immunity at common law, even if sound policy justified the extension.”).

*Richardson* included ambiguous dicta that “the law *did* provide a kind of immunity for certain private defendants, such as doctors or lawyers who performed services at the behest of the sovereign.”<sup>101</sup>

A circuit split emerged in the wake of *Richardson* on the question of whether private attorneys retained by municipalities could assert qualified immunity.<sup>102</sup> The Sixth Circuit, in *Cullinan v. Abramson*, held that private attorneys retained by the government as outside counsel could assert qualified immunity.<sup>103</sup> *Cullinan* reasoned that, unlike *Richardson* where the Court did not find any historical basis for extending immunity to private jailers, lawyers did enjoy some immunity at common law.<sup>104</sup> The court in *Cullinan* also emphasized that as attorney for the city, the defendant was “clearly acting as the city’s agent[,]” and felt the rationale for qualified immunity applied as well to the private lawyer as to the city’s in house counsel.<sup>105</sup>

In *Gonzalez v. Spencer*, the Ninth Circuit considered a claim of qualified immunity by a private attorney retained on a part-time basis to defend a county against civil rights litigation.<sup>106</sup> The court held that the attorney could *not* assert qualified immunity, applying a narrow reading of *Richardson* and disposing of the qualified immunity issue in two sentences.<sup>107</sup> The court did not evaluate any historical basis for immunity, but simply rejected the defendant’s qualified immunity claim because “she ha[d] pointed to ‘no special reasons significantly favoring an extension of governmental immunity’ to private parties in her position.”<sup>108</sup>

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101. *Richardson*, 521 U.S. at 407.

102. See generally *State Action and the Public/Private Distinction*, *supra* note 11, at 1274–76 (discussing the split and the reasoning of lower courts).

103. *Cullinan v. Abramson*, 128 F.3d 301, 310 (6th Cir. 1997).

104. *Id.* (“[T]he common law ‘*did* provide a kind of immunity for certain private defendants, such as doctors or lawyers who performed services at the behest of the sovereign.’” (quoting *Richardson*, 521 U.S. at 407)).

105. *Id.* In analyzing the policy considerations, however, the court did not mention or apply market pressure rationale or analyze whether that might mollify the need for immunity. See *id.* at 310–11.

106. *Gonzalez v. Spencer*, 336 F.3d 832, 834 (9th Cir. 2003), *abrogated by* *Filarsky v. Delia*, 132 S. Ct. 1657 (2012).

107. *Id.* at 835 (“*Spencer* is not entitled to qualified immunity. She is a private party, not a government employee . . .”).

108. *Id.* (quoting *Richardson*, 521 U.S. at 412).

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In *Delia v. City of Rialto*, the Ninth Circuit relied on the circuit precedent of *Gonzalez* and held that Filarsky, a private attorney retained by the city for an internal affairs investigation, could not assert qualified immunity.<sup>109</sup> The U.S. Supreme Court granted certiorari in that case and returned to the question of private party qualified immunity in *Filarsky v. Delia*.<sup>110</sup>

## II. THE CHANGING FRAMEWORK FOR ANALYZING THE AVAILABILITY OF QUALIFIED IMMUNITY

### A. *Filarsky v. Delia*

#### 1. *Review in the Supreme Court*

In a unanimous opinion, the Supreme Court reversed the Ninth Circuit's denial of qualified immunity to Filarsky.<sup>111</sup> Chief Justice Roberts, writing for the Court, began (as in *Wyatt* and *Richardson*) by noting that the qualified immunity inquiry begins with an examination of the historical and policy bases for immunity.<sup>112</sup> The Court then diverged from the analytical framework of *Wyatt* and *Richardson*, reflecting that "[u]nderstanding the protections the common law afforded to those exercising government power in 1871 requires an appreciation of the nature of government at that time."<sup>113</sup>

The Court emphasized the more limited role of government in the nineteenth century, when "the common law did not draw a distinction between public servants and private individuals engaged in public service in according protection to those carrying out government

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109. *Delia v. City of Rialto*, 621 F.3d 1069, 1071, 1080–81 (9th Cir. 2010), *cert. granted sub nom. Filarsky v. Delia*, 132 S. Ct. 70 (2011) (mem.), *and rev'd*, 132 S. Ct. 1657. On *Gonzalez*, 336 F.3d 832, see *infra* notes 106–08 and accompanying text.

110. *Filarsky*, 132 S. Ct. 1657.

111. *Id.* Justices Ginsburg and Sotomayor filed concurring opinions. See *infra* notes 126–29 and accompanying text.

112. *Id.* at 1662; see discussion *supra* Parts I.B.1–2.

113. *Id.* The Court continued: "In the mid-nineteenth century, government was smaller in both size and reach. . . . Local governments . . . generally had neither the need nor the ability to maintain an established bureaucracy staffed by professionals." *Id.* On the ambiguous import of this portion of the Court's analysis, see discussion *infra* Parts II.B–C.

responsibilities.”<sup>114</sup> Transitioning to a more fact-specific inquiry into historical bases for immunity, the Court next identified several analogous historical protections that extended to “individuals engaged in law enforcement activities.”<sup>115</sup>

Finding sufficient historical support for extending immunity to *Filarsky*, the Court next weighed the policy considerations. The Court found the interest in avoiding unwarranted timidity for those performing public duties applicable regardless of the nature of employment.<sup>116</sup> The Court also found the interest in not deterring able candidates from public service especially applicable to parties other than full-time employees, as “it is often when there is a particular need for specialized knowledge or expertise that the government must look outside its permanent work force to secure the services of private individuals.”<sup>117</sup> Finding the distraction piece of the policy inquiry similarly applicable, the Court noted that public employees working in close coordination with private individuals could be distracted by litigation related to their shared work.<sup>118</sup> Finally, the Court cited administrative concerns, seeking to avoid a rule that would prove difficult to apply.<sup>119</sup>

In synthesizing and distinguishing *Wyatt* and *Richardson*, the Court gave narrow readings to those opinions, glossing over potential tensions.<sup>120</sup> The Court characterized *Wyatt* as concerning defendants

114. *Filarsky*, 132 S. Ct. at 1663; *see also id.* at 1665 (“[E]xamples of individuals receiving immunity for actions taken while engaged in public service on a temporary or occasional basis are as varied as the reach of government itself.”).

115. *Id.* at 1664. For two examples among several, the Court cited *Gregory v. Brooks*, 37 Conn. 365, 372 (1870), which held that public wharf masters were not liable for ordering removal of a vessel unless the order was issued maliciously, and *Henderson v. Smith*, 26 W. Va. 829, 836–38 (1885), which held that notaries public were immune for discretionary acts taken in good faith. *Filarsky*, 132 S. Ct. at 1665.

116. *Filarsky*, 132 S. Ct. at 1665 (finding the unwarranted timidity concern applicable “whether the individual sued as a state actor works full-time or on some other basis”).

117. *Id.* at 1665–66.

118. *Id.* at 1666. The Court concluded: “[n]othing about the reasons we have given for recognizing immunity under § 1983 counsels against carrying forward the common law rule.” *Id.* at 1665.

119. *Id.* at 1666 (“Distinguishing among those who carry out the public’s business based on the nature of their particular relationship with the government also creates significant line-drawing problems.”). The Court continued: “It is unclear, for example, how *Filarsky* would be categorized if he regularly spent half his time working for the City, or worked exclusively on one City project for an entire year.” *Id.*

120. *Id.* at 1666–67.

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“using the mechanisms of government to achieve their own ends.”<sup>121</sup> With regard to *Richardson*, the Court seemingly narrowed the reach of that decision.<sup>122</sup> The Court listed the circumstances distinguishing *Richardson*,<sup>123</sup> and found that “[n]othing of the sort is involved here, or in the typical case of an individual hired by the government to assist in carrying out its work.”<sup>124</sup>

Justices Ginsburg and Sotomayor filed concurring opinions. Justice Ginsburg agreed to a narrow version of the Court’s holding that *Filarsky* could assert immunity.<sup>125</sup> She noted that although *Filarsky* could assert qualified immunity, he would not be immune if he violated clearly established law.<sup>126</sup> Justice Ginsburg focused her concurrence on whether *Filarsky* might have violated clearly established law, and which facts the court should weigh in addressing that question on remand.<sup>127</sup> Justice Sotomayor focused on the availability of the immunity and stressed that private individuals must still satisfy a two-part inquiry examining both historical and policy support.<sup>128</sup> She argued that private party immunity cases should be decided “as they arise, as is our longstanding practice in the field of immunity law.”<sup>129</sup>

## 2. *The Importance of the Qualified Immunity Analysis*

The pressing issue facing lower courts is now how broadly (or narrowly) *Filarsky* should be read. Justice Scalia’s dissent in

121. *See id.*

122. *Filarsky*, 132 S. Ct. at 1667 (emphasizing that *Richardson v. McKnight*, 521 U.S. 399 (1997), was confined to the “particular circumstances of that case”); *see discussion supra* Part I.B.2.

123. *Filarsky*, 132 S. Ct. at 1667 (“[*Richardson* involved] a private firm, systematically organized to assume a major lengthy administrative task (managing an institution) with limited direct supervision by the government, undertak[ing] that task for profit and potentially in competition with other firms . . . .” (quoting *Richardson*, 521 U.S. at 413) (internal quotation marks omitted)).

124. *Id.*

125. *Id.* at 1669 (Ginsburg, J., concurring).

126. *Id.* at 1668 (“Qualified immunity may be overcome, however, if the defendant knew or should have known that his conduct violated a right ‘clearly established’ at the time of the episode in suit.” (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982))).

127. *Id.* at 1668–69.

128. *Id.* at 1669 (Sotomayor, J., concurring) (“[I]t does not follow that every private individual who works for the government in some capacity necessarily may claim qualified immunity . . . . Such individuals must satisfy our usual test for conferring immunity.”).

129. *Filarsky*, 132 S. Ct. at 1670 (Sotomayor, J., concurring).

*Richardson* underscored the importance of the line-drawing in this area of the law: denying qualified immunity to certain categories of government contractors will inevitably increase the costs of the services they provide.<sup>130</sup> If local governments increasingly turn to privatization efforts to cut costs, the interpretation of *Filarsky* (and resultant cost-shifting) could influence this local government decision-making at the margins.<sup>131</sup> Additionally, uncertainty in this area of law complicates matters for private firms operating in multiple jurisdictions<sup>132</sup> and prevents state actors from being able to “reasonably . . . anticipate when their conduct may give rise to liability . . . .”<sup>133</sup>

Ultimately, *Filarsky* consisted of two pieces. First, *Filarsky* announced a broad rule in favor of qualified immunity for those working for the government.<sup>134</sup> Unfortunately, the one issue with this rule is whether it encompasses the employees of government contractors.<sup>135</sup> The second piece of *Filarsky* contained an application of the historical and policy inquiries conducted in *Wyatt* and *Richardson*.<sup>136</sup>

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130. See *Richardson v. McKnight*, 521 U.S. 399, 422 (1997) (Scalia, J., dissenting) (“The only sure effect of today’s decision—and the only purpose, as far as I can tell—is that it will artificially raise the cost of privatizing prisons.”); Paul Howard Morris, Note, *The Impact of Constitutional Liability on the Privatization Movement After Richardson v. McKnight*, 52 VAND. L. REV. 489, 517 (1999) (“Even if the Court’s analysis is not driven by its view of the political merits of privatization, though, the Court’s decision in *Richardson* has the effect of unjustifiably handicapping the privatization movement.”).

131. See generally Morris, *supra* note 130, at 492–97 (documenting the rise of the privatization movement and how it might be affected by the Court’s framework for determining constitutional liability).

132. See generally *State Action and the Public/Private Distinction*, *supra* note 11, at 1277–78 (discussing the costs associated with the lack of a clear standard and arguing that “the vitality of privatization counsels for federal reform”).

133. *Anderson v. Creighton*, 483 U.S. 635, 646 (1987) (quoting *Davis v. Scherer*, 468 U.S. 183, 195 (1984)).

134. See *Filarsky*, 132 S. Ct. at 1665 (“[I]mmunity under § 1983 should not vary depending on whether an individual working for the government does so as a full-time employee, or on some other basis.”); *id.* at 1662–65 (discussing how common law protections to individuals from suit did not depend on that individual’s engagement with the government specifically); Karen Blum, Erwin Chemerinsky & Martin A. Schwartz, *Qualified Immunity Developments: Not Much Hope Left for Plaintiffs*, 29 TOURO L. REV. 633, 641 (2013) (“Thus, it appears, *Filarsky* may signal to a new trend: private actors working closely with the government may obtain qualified immunity based on the nature of their relationship with state officials, even if the private actor had independent profit incentive.”).

135. Part II.B analyzes the questions related to the employment analysis in *Filarsky*.

136. See discussion *infra* Part II.C; see generally *State Action and the Public/Private Distinction*, *supra* note 11, at 1270–77 (discussing problems with the current private party immunity analysis—examining historical and policy bases for immunity—as well as the approaches taken by lower courts).

*B. Problems Raised by Filarsky: The Employment Analysis*

Whereas *Wyatt* and *Richardson* looked solely at the historical and policy bases for immunity, *Filarsky* emphasized the employment relationship as a major consideration.<sup>137</sup> *Filarsky* focused on the different nature of government employment in the nineteenth century and documented the many defenses the common law made available to persons employed part-time by the government.<sup>138</sup> The *Filarsky* argument channeled *Tenney* and *Pierson*: because these defenses existed at the time Congress enacted § 1983, courts should infer that Congress intended that they be incorporated into the statute.<sup>139</sup> *Filarsky* concluded with the broad language that “immunity under § 1983 should not vary depending on whether an individual working for the government does so as a full-time employee, or on some other basis.”<sup>140</sup>

The employment analysis in *Filarsky* raises two basic questions: (1) what employment relationships satisfy the “some other basis” language, and (2) what is the effect of establishing such a relationship—is qualified immunity then automatic, or must some historical or policy support be established? The following sections consider these two questions.

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137. See *Filarsky*, 132 S. Ct. at 1665.

138. *Id.* (“[E]xamples of individuals receiving immunity for actions taken while engaged in public service on a temporary or occasional basis are as varied as the reach of government itself.”).

139. See *id.* (finding nothing to “counsel[] against carrying forward the common law rule”). On *Tenney v. Brandhove*, 341 U.S. 367 (1951), see *supra* notes 37–40 and accompanying text. On *Pierson v. Ray*, 386 U.S. 547 (1967), see *supra* notes 47–50 and accompanying text. Of course, the Court had previously found it untenable to use evidence of historical defenses to extend what it felt was the fundamentally different modern qualified immunity. See *Wyatt v. Cole*, 504 U.S. 158, 165 (1992); *supra* notes 71–72 and accompanying text. The tensions between *Wyatt* and *Filarsky* on this point are discussed *infra* Part II.B.2.

140. *Filarsky*, 132 S. Ct. at 1665; see also *id.* (“Ensuring that those who serve the government do so ‘with the decisiveness and the judgment required by the public good’ is of vital importance regardless whether the individual sued as a state actor works full-time or on some other basis.” (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 240 (1974))).

1. “Or Some Other Basis”: What Employment Relationship is Required?

*Filarsky* repeatedly rejected the notion that immunity should be reserved to full-time government officials or employees.<sup>141</sup> The question remaining after *Filarsky* is how expansively lower courts should interpret the “some other basis” language, and whether it encompasses a defendant who does not work directly for the government but for an entity that contracts with the government.<sup>142</sup> This issue underlies a split between the Sixth Circuit Court of Appeals and a District Court in the Southern District of Illinois.<sup>143</sup>

In *McCullum v. Tepe*, the Sixth Circuit considered the qualified immunity claim of a doctor who worked at a public prison but was employed by a private non-profit healthcare provider.<sup>144</sup> The Court stated that when a private party seeks qualified immunity from a § 1983 suit, the inquiry hinges on whether there was immunity for similarly situated parties historically and whether granting immunity would be consistent with the policy underlying § 1983.<sup>145</sup> The court found no common law tradition of immunity for a private doctor working for a public institution at the time that Congress passed

141. See *supra* notes 113–19 and accompanying text.

142. *Richardson v. McKnight*, 521 U.S. 399, 422 (1997) (Scalia, J., dissenting). Justice Scalia questioned the meaning and viability of such distinctions, arguing for a functional approach. *Id.*

143. Compare *McCullum v. Tepe*, 693 F.3d 696, 700 (6th Cir. 2012) (finding qualified immunity unavailable to private defendant employed by a government contractor because neither history nor policy offered sufficient support), with *Currie v. Cundiff*, No. 09-cv-866-MJR, 2012 WL 2711469, at \*10 (S.D. Ill. July 8, 2012) (finding qualified immunity available to private defendant employed by a government contractor), *aff’d sub nom. Currie v. Chhabra*, 728 F.3d 626 (7th Cir. 2013).

144. *McCullum*, 693 F.3d at 697–99. In *McCullum*, a prisoner with a history of depression told prison officers that he had attempted suicide within the last year and had been previously hospitalized for suicidal tendencies. *Id.* at 698. The prisoner filled out a request to see the prison doctor to discuss resuming his bipolar and depression medication. *Id.* Two weeks later, after an altercation with his cell mate that led to his being placed in an isolation cell, the prisoner hanged himself, having never been seen by the prison doctor. *Id.* at 698–99. The prisoner’s mother, individually and as administrator of the prisoner’s estate, sued the doctor alleging deliberate indifference to the prisoner’s medical needs. *Id.* at 699.

145. *Id.* at 700 (“Thus, when a private party—including a private person working for the government part-time—seeks qualified immunity from a § 1983 suit, we determine whether: (1) there was a firmly rooted history of immunity for similarly situated parties at common law; and (2) whether granting immunity would be consistent with the history and purpose of § 1983.” (citing *Filarsky v. Delia*, 132 S. Ct. 1657, 1662, 1667–68 (2012))). Although *McCullum* cites *Filarsky* for this statement of law, the approach is difficult to reconcile with the admonition in *Filarsky* that “immunity under § 1983 should not vary depending on whether an individual working for the government does so as a full-time employee, or on some other basis.” *Filarsky*, 132 S. Ct. at 1665.

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§ 1983.<sup>146</sup> In analyzing the policy piece of the inquiry, the court applied the three basic rationales: avoiding (1) unwarranted timidity on the part of public officials, (2) deterrence of talented candidates from public service, and (3) the distraction from job duties that lawsuits can create.<sup>147</sup> The court seemed to implicitly accept the presence of these concerns, but relied on the market pressure rationale from *Richardson* in finding the policy considerations appropriately mitigated.<sup>148</sup> Finding inadequate historical or policy support, the court denied qualified immunity to the doctor.<sup>149</sup>

In *Currie v. Cundiff*, the District Court for the Southern District of Illinois faced similar facts but found that the doctor *could* assert qualified immunity.<sup>150</sup> In *Currie*, an individual died while being held in a county jail.<sup>151</sup> The plaintiff, administrator of the decedent's estate, sued the decedent's medical providers, employees of a private health care company under contract with the state.<sup>152</sup> The court noted

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146. *McCullum*, 693 F.3d at 704. But compare the narrowness of the language in *McCullum* (finding no "tradition of immunity for a private doctor working for a public institution at the time that Congress passed § 1983"), with the broad inquiry of *Filarsky* (noting the "common law also extended certain protections to individuals engaged in law enforcement activities, such as sheriffs and constables"). *McCullum*, 693 F.3d at 704; *Filarsky*, 132 S. Ct. at 1664. The confusion courts face in ascertaining an appropriate level of generality for historical support is discussed *infra* Part II.C.2.

147. *McCullum*, 693 F.3d at 704 (citing *Richardson*, 521 U.S. at 408, 411).

148. *See id.* ("But just as market pressures, a private firm's ability to 'offset any increased employee liability risk with higher pay or extra benefits' . . . vitiated any policy-based concerns in *Richardson*, these same factors suggest that immunity would be inappropriate here." (citation omitted) (quoting *Richardson*, 521 U.S. at 412)).

149. *Id.* The court "acknowledge[d] that it is somewhat odd for a government actor to lose the right to assert qualified immunity . . . because a private entity, rather than the government, issued his paycheck." *Id.* The court did not discuss, however, whether this consideration might be informed at all by the broad discussion of employment relationships in *Filarsky*, 132 S. Ct. at 1662–65. *See generally* *McCullum*, 693 F.3d 696.

150. *Currie v. Cundiff*, No. 09-cv-866-MJR, 2012 WL 2711469, at \*3 (S.D. Ill. July 8, 2012), *aff'd sub nom.* *Currie v. Chhabra*, 728 F.3d 626 (7th Cir. 2013).

151. *Id.* at \*1.

152. *Id.*

conflicting Seventh Circuit precedent,<sup>153</sup> but found *Filarsky* to control.<sup>154</sup>

Noting that *Filarsky* “distinguished *Richardson* and *Wyatt* and offered a broader statement regarding the applicability of qualified immunity to private actors[,]”<sup>155</sup> the court emphasized the (albeit indirect) employment relationship and the great weight *Filarsky* placed on that factor.<sup>156</sup> Ultimately, the court echoed *Filarsky* and found qualified immunity available to those working on behalf of the government, regardless of whether the individual sued works full-time or on some other basis, implicitly reasoning that an employee of a government contractor satisfies this language.<sup>157</sup>

This split raises basic questions about the interpretation of *Filarsky*. The first is fact-specific: whether employment through a company or non-profit satisfies the “any other basis” language of *Filarsky*.<sup>158</sup> Second, if such indirect “sub-contract” employment does satisfy the employment piece of *Filarsky*, the question becomes what further importance, if any, the history and policy inquiries have.<sup>159</sup> This aspect of *Filarsky* is discussed in the following section.

## 2. *What is the Effect of an Employment Relationship?*

The plain language of *Filarsky* seems to conflict with the Court’s analysis. On one hand, *Filarsky* stated, in seemingly categorical language, that “immunity under § 1983 should not vary depending on

153. The court contrasts *Williams v. O’Leary*, 55 F.3d 320, 324 (7th Cir. 1995) (finding that a private health care provider can assert qualified immunity when providing services the state is constitutionally obligated to provide) with *Estate of Gee v. Johnson*, 365 F. App’x 679, 682–83 (7th Cir. 2010) (finding nurses working for private healthcare company in a county jail cannot assert qualified immunity, because there was no historical support for such an immunity and the nurses worked as independent contractors rather than agents of the county sheriff). *Currie*, 2012 WL 2711469, at \*4.

154. *Currie*, 2012 WL 2711469, at \*4 (“In any event, the Supreme Court’s recent decision in *Filarsky v. Delia* . . . makes clear that qualified immunity is a defense available in this case.” (citing *Filarsky*, 132 S. Ct. 1657)).

155. *Id.* at \*5.

156. *Id.*

157. *Id.* (citing *Filarsky*, 132 S. Ct. at 1665–66).

158. This question is explored *infra* Part III.A.1.

159. See *Braswell v. Shoreline Fire Dep’t*, No. C08-924-RSM, 2012 WL 1857858, at \*5–7 (W.D. Wash. May 22, 2012) (suggesting that if there is a requisite employment relationship, the absence of analogous common law defenses is irrelevant).

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whether an individual working for the government does so as a full-time employee, or on some other basis.”<sup>160</sup> This language suggests that “private” defendants with the requisite employment relationship should be treated as “public” defendants for immunity purposes.<sup>161</sup> After this statement, which could function as a logical ending point, *Filarsky* then continued by establishing analogous historical immunities and the presence of policy considerations.<sup>162</sup> However, courts do not conduct these inquiries for public defendants, and courts do not require historical or policy support to permit a public defendant to assert qualified immunity.<sup>163</sup> If immunities “should not vary” based on the type of employment, why should the analysis vary?<sup>164</sup>

This tension in *Filarsky* raises the question of how these different factors—employment, history, and policy—interact. If a court finds the requisite employment relationship, should the court grant qualified immunity without regard for historical or policy support?<sup>165</sup> Or does the analysis in *Filarsky* suggest that in the case of employees employed on some other basis than full-time, some deficiency in historical or policy support could prevent an extension of immunity?

*Filarsky* provided three possibilities. First, *Filarsky* could be understood as simply broadening the definition of “public” for immunity purposes to include those employed on some other basis than full-time.<sup>166</sup> Second, *Filarsky* and its treatment of employment

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160. *Filarsky*, 132 S. Ct. at 1665.

161. *Id.*

162. *Id.* at 1665–66.

163. *See supra* note 51 and accompanying text.

164. *Filarsky*, 132 S. Ct. at 1665.

165. On the relationship between the historical and policy inquiries, see discussion *infra* Part II.C. The policy factors—avoiding (1) unwarranted timidity, (2) the deterrence of talented candidates from public service, and (3) the distractions that lawsuits can cause—are presumably easily satisfied wherever an individual works for the government, however limited his role or indirect his employment. *See, e.g., Filarsky*, 132 S. Ct. at 1665–66 (finding the policy rationale was satisfied without considering countervailing interests or the purposes underlying § 1983); *Currie v. Cundiff*, No. 09-cv-866-MJR, 2012 WL 2711469, at \*5 (S.D. Ill. July 8, 2012) (finding the policy rationale was satisfied without considering historical support or weighing the policy considerations against the interest in compensating victims), *aff’d sub nom. Currie v. Chhabra*, 728 F.3d 626 (7th Cir. 2013). *But see Wyatt v. Cole*, 504 U.S. 158, 164 (1992) (“Additionally, irrespective of the common law support, we will not recognize an immunity available at common law if § 1983’s history or purpose counsel against applying it in § 1983 actions.” (citing *Tower v. Glover*, 467 U.S. 914, 920 (1984))).

166. This method of statutory interpretation is supported by the discussion in *Filarsky* stating that when Congress enacted what is now § 1983 in 1871, government employment differed radically and included

relationships can be understood as broadening, yet still within, the historical inquiry.<sup>167</sup> Under this approach, because the common law protected private individuals engaged in public service to the same extent it did public officials, § 1983 immunity doctrines should do the same. This would represent a dramatic reformulation of the historical inquiry as conducted in *Wyatt* and *Richardson*, where the Court required some close analog.<sup>168</sup> Although conceptually distinct from the first approach, the effect would be the same: a broad rule of qualified immunity for those working for the government, regardless of the type of employment.<sup>169</sup> Third and finally, employment on some other basis than full-time may function just as the historical and policy inquiries have done: as an unquantifiable “factor” to be weighed at the discretion of lower courts.<sup>170</sup>

### C. Problems Unresolved by *Filarsky*: The Historical and Policy Inquiries

In the wake of *Wyatt* and *Richardson*, lower courts faced great difficulty in analyzing private party immunity and took divergent approaches as a result.<sup>171</sup> The difficulties stemmed principally from a lack of guidance as to (1) how the historical and policy inquiries relate, and (2) under what circumstances they are sufficient to support extending immunity.<sup>172</sup> This section reviews the basic problems and the guidance offered by *Filarsky*.

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far fewer full-time employees. *See Filarsky*, 132 S. Ct. at 1662 (“Understanding the protections the common law afforded to those exercising government power in 1871 requires an appreciation of the nature of government at that time. . . . [Government at that time] generally had neither the need nor the ability to maintain an established bureaucracy staffed by professionals.”).

167. Some of the language in *Filarsky* seems to suggest this approach. *See id.* at 1663 (“Given all this, it should come as no surprise that the common law did not draw a distinction between public servants and private individuals engaged in public service in according protection to those carrying out government responsibilities.”).

168. *See* discussion *infra* Part II.C.2.

169. Part III *infra* examines to what extent *Filarsky* marks a shift towards a “functional approach” to private party immunity.

170. Part III.A *infra* addresses this question and argues that the second approach is correct.

171. *See* discussion *supra* Part I.B.

172. *See id.*; *see generally State Action and the Public/Private Distinction*, *supra* note 11, at 1270–77 (discussing the confusion surrounding the historical and policy inquiries).

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*1. Relationship of the Historical and Policy Bases for Immunity: What is the Test?*

The Supreme Court clearly established that historical and policy bases for immunity are each relevant to the private party immunity analysis,<sup>173</sup> but it has not given clear guidance as to precisely how these bases interact.<sup>174</sup> There are three possible ways of stating the law and at different times the Court has seemed to suggest all three approaches. First, the Court has suggested qualified immunity requires both historical and policy support.<sup>175</sup> Second, the Court has suggested that either basis by itself is sufficient.<sup>176</sup> Finally, the Court sometimes states the matter ambiguously, simply saying that both are relevant to the qualified immunity inquiry as if they were factors to be weighed.<sup>177</sup> *Filarsky* did not explicitly resolve the confusion, conducting both inquiries but not specifying which is necessary or sufficient to extend immunity.<sup>178</sup>

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173. See discussion *supra* Part I.B.

174. See, e.g., *McCullum v. Tepe*, 693 F.3d 696, 700 n.7 (6th Cir. 2012) (“[I]t may be questionable whether the Supreme Court’s jurisprudence in this area would allow a court to extend qualified immunity where there was no history of immunity at common law, even if sound policy justified the extension.”); *State Action and the Public/Private Distinction*, *supra* note 11, at 1271 (“Further, [*Richardson v. McKnight*, 521 U.S. 399 (1997)] never explained whether policy and history form a conjunctive or disjunctive test, instead leaving their roles uncertain.”).

175. See, e.g., *Wyatt v. Cole*, 504 U.S. 158, 163–64 (1992) (“Nonetheless, we have accorded certain government officials either absolute or qualified immunity from suit if the ‘tradition of immunity was so firmly rooted in the common law and was supported by such strong policy reasons that ‘Congress would have specifically so provided had it wished to abolish the doctrine.’” (emphasis added) (quoting *Owen v. City of Independence*, 445 U.S. 622, 637 (1980))).

176. This interpretation is supported most soundly by the Court’s analysis in *Richardson v. McKnight*, in which the Court found a complete lack of historical support, then found the defendant not entitled to qualified immunity only after careful evaluation of the policy considerations and finding these appropriately mitigated by market forces. See *Richardson*, 521 U.S. at 407–13; see also *Wyatt*, 504 U.S. at 179 (Rehnquist, C.J., dissenting) (“This, in turn, leads to the second basis on which we have previously recognized a qualified immunity—reasons of public policy.”).

177. See, e.g., *Richardson*, 521 U.S. at 404 (interpreting precedent as requiring the Court to “look both to history and to the purposes that underlie government employee immunity in order to find the answer” as to whether to extend immunity to the private defendant); *Wyatt*, 504 U.S. at 175–76 (Rehnquist, C.J., dissenting) (“The Court notes that we have recognized an immunity in the § 1983 context in two circumstances. The first is when a similarly situated defendant would have enjoyed an immunity at common law at the time § 1983 was adopted. The second is when important public policy concerns suggest the need for an immunity.” (citation omitted)).

178. See *Filarsky v. Delia*, 132 S. Ct. 1657, 1661–66 (2012) (reviewing historical analogs and policy considerations).

## 2. *The Historical Basis Inquiry: Reconciling Wyatt and Richardson*

In applying the historical prong of the qualified immunity inquiry, the *Filarsky* Court cited a wealth of analogous common law defenses.<sup>179</sup> In doing so, however, the Court raised the question of what level of generality courts should apply when analyzing analogous common law immunities.<sup>180</sup> In examining historical immunities to support extending immunity to outside counsel retained for a human affairs investigation, *Filarsky* cited defenses available to “individuals engaged in law enforcement.”<sup>181</sup> This inquiry is distinctly broader than that conducted in *Richardson*, where the Court looked for common law support of defenses from private jailers.<sup>182</sup>

## 3. *The Policy Inquiry and Richardson’s “Market Pressure” Rationale*

Even as the Court has offered little guidance as to how the history and policy inquiries relate, the Court has not clearly framed the policy inquiry itself.<sup>183</sup> At times—and somewhat tautologically—the Court suggests the policy inquiry requires that extending immunity be consistent with the general purposes behind the immunity.<sup>184</sup> On other

179. *See id.* at 1664.

180. *Compare Richardson*, 521 U.S. at 404–06 (conducting a fact-specific historical inquiry and finding no evidence of a tradition of immunity for “privately employed prison guards”), with *Filarsky*, 132 S. Ct. at 1664 (granting qualified immunity to private attorney in part by finding ample support of historical defenses for “individuals engaged in law enforcement”).

181. *Filarsky*, 132 S. Ct. at 1664.

182. *Richardson*, 521 U.S. at 404 (conducting a fact-specific historical inquiry and finding no evidence of a “firmly rooted” tradition of immunity applicable to “privately employed prison guards”); *cf. Wyatt*, 504 U.S. at 164 (“In determining whether there was an immunity at common law that Congress intended to incorporate . . . we look to the most closely analogous torts . . .”). The Court has long recognized latent problems in applying the historical inquiry. *See, e.g., Kalina v. Fletcher*, 522 U.S. 118, 135 (1997) (Scalia, J., concurring) (“[N]o analytical approach based upon ‘functional analysis’ can faithfully replicate the common law . . .”).

183. *See discussion supra* Part II.C.1.

184. *See Filarsky*, 132 S. Ct. at 1662 (noting that the policy inquiry requires looking to “the reasons we have afforded protection from suit under § 1983”); *id.* at 1665 (“Nothing about the reasons we have given for recognizing immunity under § 1983 counsels against carrying forward the common law rule.”). By this language the Court seems to indicate whether the defendant’s case implicates the three basic concerns from *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). *See Filarsky*, 132 S. Ct. at 1665–66 (applying the *Harlow* factors); *supra* note 8 and accompanying text.

occasions, the Court suggests that the policy inquiry requires that extending immunity be consistent with the purposes underlying § 1983 itself.<sup>185</sup> As a result of these diverse approaches, lower courts not only suffer from a lack of clear guidance, but are able to choose language that steers toward a desirable outcome.

The confusion related to the policy inquiry is twofold. First, the policy inquiry essentially operates as a functional approach. As the policy factors are so broadly applied, wherever the defendant is performing a government function, the policy concerns will be implicated.<sup>186</sup> This broad application of the policy factors is problematic where, instead of weighing the factors against the countervailing interest in compensating victims, the court simply checks to see whether they are present.<sup>187</sup> In such cases, the policy inquiry acts as a kind of subterfuge for simply seeing whether any government interest is implicated. The second problem with the policy inquiry concerns the extent to which the policy factors can be mitigated by the market pressure rationale in *Richardson v. McKnight*.<sup>188</sup> Like the policy factors themselves, the market pressure rationales have proven susceptible to broad application.<sup>189</sup>

### III. *FILARSKY* EXPANDS THE AVAILABILITY OF QUALIFIED IMMUNITY BY EMPHASIZING FUNCTIONAL PRINCIPLES

As previously discussed, *Filarsky* can be understood as two distinct pieces: a quite useful rule extending qualified immunity to those working for the government, and a less useful piece that applies the

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185. See *Wyatt*, 504 U.S. at 164 (“[W]e will not recognize an immunity available at common law if § 1983’s history or purpose counsel against applying it . . .”).

186. The factors—avoiding distraction, inhibition of discretionary action, and the deterrence of talented candidates from public service—all relate to the nature of the activity, rather than the status or title of the actor. See *supra* note 165.

187. Compare *Filarsky*, 132 S. Ct. at 1665–66 (applying the *Harlow* factors to see whether they are present), with *Richardson*, 521 U.S. at 411–12 (applying the *Harlow* factors but noting the “continual and conceded need for deterring constitutional violations”).

188. *Richardson*, 521 U.S. at 409–12.

189. See, e.g., *McCullum v. Tepe*, 693 F.3d 696, 704 (6th Cir. 2012) (“But just as market pressures, a private firm’s ability to ‘offset any increased employee liability risk with higher pay or extra benefits’ . . . vitiated any policy-based concerns in *Richardson*, these same factors suggest that immunity would be inappropriate here.”).

historical and policy inquiries. Part III.A analyzes the first piece and argues that the rule in *Filarsky* encompasses those employed by government contractors. Part III.B synthesizes the Supreme Court's cases on the historical and policy inquiries and shows how *Filarsky* redefined these inquiries to operate much like a functional approach.

*A. Employment Relationship: Filarsky Applies Functional Principles and Expands the Availability of Qualified Immunity*

*1. Filarsky Encompasses Indirect Government Employment*

*Currie v. Cundiff* correctly interpreted *Filarsky* as applying to employees of government contractors.<sup>190</sup> Although it is technically possible to distinguish *Filarsky* as a case involving direct employment,<sup>191</sup> such a formalistic distinction runs contrary to the basic reasoning in *Filarsky*. First, *Filarsky* continually employed broad “some other basis” language rather than specifying that direct employment was required.<sup>192</sup> Second, in establishing historical support for extending immunity, *Filarsky* characterized the cases not as examples of immunities for government employment, but the broader description of immunity “for actions taken while engaged in public service.”<sup>193</sup> Most convincing is the Court’s concern that “[d]istinguishing among those who carry out the public’s business based on the *nature of their particular relationship with the government* also creates significant line-drawing problems.”<sup>194</sup>

This language demonstrates that although *Filarsky* did not explicitly employ a “functional approach,” the reasoning behind this approach

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190. *Currie v. Cundiff*, No. 09-cv-866-MJR, 2012 WL 2711469, at \*4–5 (S.D. Ill. July 8, 2012), *aff’d sub nom. Currie v. Chhabra*, 728 F.3d 626 (7th Cir. 2013).

191. *See, e.g., McCullum*, 693 F.3d at 704 (“We acknowledge that it is somewhat odd for a government actor to lose the right to assert qualified immunity, not because his job changed, but because a private entity, rather than the government, issued his paycheck.”).

192. *See, e.g., Filarsky*, 132 S. Ct. at 1665 (“Under this assumption, immunity under § 1983 should not vary depending on whether an individual working for the government does so as a full-time employee, or on some other basis.”); *id.* (finding that the interest in avoiding over-deterrence “is of vital importance regardless whether the individual sued as a state actor works full-time or on some other basis”).

193. *Id.*

194. *Id.* at 1666 (emphasis added).

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underpins the *Filarsky* analysis.<sup>195</sup> Indeed, *Filarsky* framed the overarching qualified immunity inquiry by noting that “there is no dispute that qualified immunity is available for the sort of investigative activities at issue.”<sup>196</sup> In sum, the analysis in *Filarsky* eschewed formalism and emphasized policy concerns whose presence is determined by the type of work being performed, and not by whether the individual is employed directly by the government or through a government contractor. The court in *McCullum v. Tepe* denied immunity to the employee of a government contractor without any effort to reconcile the broad language in *Filarsky* and through suspect application of *Richardson*’s market pressure rationale.<sup>197</sup> The analysis in *McCullum* is inconsistent with *Filarsky*, which strongly favored granting qualified immunity to those performing government functions.

## 2. *Employment Satisfies the Historical Inquiry*

As previously discussed, some tension exists in *Filarsky* as to the necessity of the historical and policy inquiries where a government employment relationship is established.<sup>198</sup> At times, the language in *Filarsky* suggests that those working for the government, on whatever basis, can assert immunity without regard for historical or policy support.<sup>199</sup> Despite this language, *Filarsky* continued its analysis by establishing historical and policy bases for immunity, creating tension

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195. *See id.* at 1662.

196. *Id.* (citing *Pearson v. Callahan*, 555 U.S. 223, 243–44 (2009)).

197. *See McCullum v. Tepe*, 693 F.3d 696, 704 (6th Cir. 2012). *Filarsky* suggests that the market pressure rationale in *Richardson* should be reserved—if not to the specific situation of private prisons—to the situation of “a private firm, systematically organized to assume a major lengthy administrative task (managing an institution) with limited direct supervision by the government, undertak[ing] that task for profit and potentially in competition with other firms.” *Filarsky*, 132 S. Ct. at 1667 (alteration in original) (quoting *Richardson v. McKnight*, 521 U.S. 399, 413 (1997)). *McCullum* makes no attempt to establish the presence of these limitations. *See McCullum*, 693 F.3d at 704.

198. *See supra* notes 160–65.

199. *See Filarsky*, 132 S. Ct. at 1665 (“[I]mmunity under § 1983 should not vary depending on whether an individual working for the government does so as a full-time employee, or on some other basis.”). In a sense they are automatically satisfied. The historical support is satisfied by the analysis in *Filarsky* showing the different nature of government in the nineteenth century and the flexibility of immunities at common law. *See id.* at 1661–65 (nothing that the common law did not distinguish based on the nature of the worker’s engagement with the government). Similarly, the substance of the policy factors is such that they are implicated wherever government ends are involved. *See supra* note 165.

between the plain language of the decision and its analytical structure.<sup>200</sup>

Ultimately, the employment factor should be understood as providing historical support for immunity because *Filarsky* continuously emphasized the protections the common law made available to those working for the government.<sup>201</sup> *Filarsky* avoided a narrow, fact-specific inquiry into analogous historical defenses, instead recognizing the broader principle that the common law provided defenses to those “engaged in public service on a temporary or occasional basis.”<sup>202</sup> Where an employment relationship exists, even if other than full-time, *Filarsky* can be understood as creating a strong presumption in favor of qualified immunity because the common law did not draw such distinctions.<sup>203</sup> Once the historical basis is established, the questions become: (1) to what extent the policy factors weigh in favor of immunity, and (2) whether *Richardson*’s market pressures rationale operates to negate them.<sup>204</sup>

### *B. The Policy Inquiry After Filarsky: Towards a Functional Approach*

#### *1. The Substance of the Policy Inquiry Embodies a Functional Approach*

As early as *Wyatt*, the Court recognized that the application of the *Harlow* policy factors embodied a functional approach, because the factors address the type of activity being performed and ask whether government ends were involved.<sup>205</sup> What distinguished the application

200. See discussion *supra* Part II.B.2.

201. *Filarsky*, 132 S. Ct. at 1664–66.

202. *Id.* at 1665.

203. *Id.* at 1663 (“[T]he common law did not draw a distinction between [full-time] public servants and private individuals engaged in public service in according protection to those carrying out government responsibilities.”).

204. See *id.* at 1667 (suggesting immunity may not be available in the case of “a private firm, systematically organized to assume a major lengthy administrative task (managing an institution) with limited direct supervision by the government, undertak[ing] that task for profit and potentially in competition with other firms.” (alteration in original) (quoting *Richardson v. McKnight*, 521 U.S. 399, 413 (1997))).

205. See *Wyatt v. Cole*, 504 U.S. 158, 167–68 (1992) (finding policy factors inapplicable where

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of the policy factors from a purely functional approach in *Richardson* was that the Court in *Richardson* did not simply ask whether the factors were *present*, but whether they were *sufficient* in light of the countervailing interest in deterring constitutional violations.<sup>206</sup> However misplaced *Richardson*'s "market pressures" rationale,<sup>207</sup> the analysis in *Richardson* at least reflected the Court's understanding that immunity questions are, ultimately, *balancing* questions that require consideration of the countervailing interests of deterring violations and compensating victims.<sup>208</sup> Where *Richardson* proved problematic was in the application of this balancing, as it provided lower courts no clear guidance as to when market pressures have adequately mitigated the need for immunity and when they have not.<sup>209</sup>

*Filarsky* resolved the issue by showing lower courts precisely where the balance is struck.<sup>210</sup> *Filarsky* made no mention of the interest in deterring constitutional violations, and simply applied the *Harlow* policy factors to see if they were present.<sup>211</sup> Rather than preserve a case by case balancing, *Filarsky* cabined *Richardson*'s "market pressures" rationale to the special circumstances of that case and strongly suggests that immunity is applicable elsewhere.<sup>212</sup>

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defendant acts towards private ends rather than "serv[ing] the public good").

206. *Richardson*, 521 U.S. at 411–12 (referring to the "continual and conceded need for deterring constitutional violations").

207. See generally *id.* at 418–22 (Scalia, J., dissenting) (criticizing the Court's analysis of market pressures); Morris, *supra* note 130, at 512–18 (arguing that *Richardson* was wrongly decided and that the "market pressures" rationale amounts to a political decision more appropriate for a legislative body).

208. E.g., *Wyatt*, 504 U.S. at 167 ("Qualified immunity strikes a balance between compensating those who have been injured by official conduct and protecting government's ability to perform its traditional functions.").

209. See generally *State Action and the Public/Private Distinction*, *supra* note 11, at 1277–78 (documenting the problems with the post-*Richardson* standard and the difficulties lower courts face in applying it).

210. *Filarsky v. Delia*, 132 S. Ct. 1657, 1667 (2012) ("[T]he particular circumstances of that case—'a private firm, systematically organized to assume a major lengthy administrative task (managing an institution) with limited direct supervision by the government, undertak[ing] that task for profit and potentially in competition with other firms'—combined sufficiently to mitigate the concerns underlying recognition of governmental immunity under § 1983." (alteration in original) (quoting *Richardson*, 521 U.S. at 413)).

211. *Id.* at 1665–66.

212. *Id.* at 1667 (listing the features distinguishing *Richardson* and finding that "[n]othing of the sort is involved here, or in the typical case of an individual hired by the government to assist in carrying out its work").

## 2. *Both History and Policy Must Support Immunity*

As previously discussed, the Court has failed to clearly articulate how the historical and policy inquiries interact to support immunity for private defendants.<sup>213</sup> While the analysis in *Richardson* strongly suggests that either inquiry, by itself, can support immunity, the language of that decision is ambiguous.<sup>214</sup> *Wyatt* remains the Court's most definitive pronouncement on this issue, as both the language and analytical structure clearly require both to be present.<sup>215</sup> *Wyatt* notes the clear presence of historical support for immunity, and then proceeds to deny immunity based on the defendant's failure to establish policy support.<sup>216</sup>

*Filarsky* did not explicitly resolve this issue, but by analyzing both elements it added to the weight of authority suggesting that both are necessary. In the end, however, *Filarsky* conflated the inquiries to the point that each asks the same question: whether the defendant is serving a public function. In this respect, whether this same question is asked once or twice becomes academic.

### C. *A Synthesized Framework for Determining Private Party Immunity*

The analysis in *Filarsky* demonstrates that the central focus of immunity questions is on the function the defendant performs, rather than the defendant's title or status. To avoid conflicting with its earlier decision in *Richardson*, the *Filarsky* Court did not explicitly adopt a functional approach to the immunity question, but rather reaffirmed the traditional two-part test. *Filarsky* nevertheless shifted towards a functional approach by redefining the elements of this two-part test.

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213. *See supra* notes 174–78 and accompanying text.

214. *See supra* notes 176–78 and accompanying text.

215. *Wyatt v. Cole*, 504 U.S. 158, 163–64 (1992) (“Nonetheless, we have accorded certain government officials either absolute or qualified immunity from suit if the ‘tradition of immunity was so firmly rooted in the common law *and* was supported by such strong policy reasons that ‘Congress would have specifically so provided had it wished to abolish the doctrine.’” (emphasis added) (quoting *Owen v. City of Independence*, 445 U.S. 622, 637 (1980))).

216. *See id.* at 168 (“In short, the nexus between private parties and the historic purposes of qualified immunity is simply too attenuated to justify such an extension of our doctrine of immunity.”).

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First, *Filarsky* broadened the historical inquiry so that working in a public function presumptively satisfies this basis, because the common law protected those engaged in public service without regard for the type of employment. Second, with respect to the policy basis for immunity, *Filarsky* clarified that this is not subject to a fact-sensitive balancing test. As such, the policy inquiry weighs in favor of immunity for those engaged in public service, regardless of the type of employment. Here, *Filarsky* preserved a narrow exception for *Richardson*-type cases. Whereas *Richardson* rejected the functional approach, *Filarsky* adopted what is essentially a functional approach while preserving *Richardson* as an exception. To its credit, this approach manages not only to advance the fundamental policy goals for immunity outlined in the Court's decisions, but avoids the difficult problems in applying the historical and policy inquiries as they existed before *Filarsky*.

## CONCLUSION

In determining the availability of qualified immunity to private § 1983 defendants, the Court employs a two-part test that looks to historical and policy bases for immunity. The Court's first two decisions addressing private party qualified immunity were narrow decisions denying immunity to the private defendant. As a result, lower courts lacked guidance as to when a private defendant *could* assert qualified immunity, if ever.

The Court's decision in *Filarsky* brings much needed clarity in this regard. *Filarsky* offers a broad rule in favor of immunity for those private party § 1983 defendants working for the government, and helps define the reach of the Court's earlier decisions. The analysis in *Filarsky* shows that the paramount concern in immunity questions is the function the defendant performs, rather than the defendant's title or status. To avoid conflicting with the Court's earlier decision in *Richardson*, however, *Filarsky* did not explicitly adopt a functional approach to the immunity question, but modified the existing two-part test. As a result, the two-part test is needlessly complicated and

redundant, and at least one lower court seems to have misapplied *Filarsky*.<sup>217</sup>

In light of the needlessly complex standard, lower courts will likely continue to reach different conclusions as to how to best reconcile *Filarsky* with the Court's earlier decisions denying immunity, and will apply immunities inconsistently to similar factual situations as a result. This could generate needless costs not only for lower courts and the litigating parties, but for local governments privatizing government services and private firms forced to adapt to different jurisdictional approaches.

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217. See discussion *supra* Parts II.B and III.A.