United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
March 30, 2023
Lyle W. Cayce
Clerk

No. 21-20200

KEVION ROGERS,

Plaintiff—Appellant,

versus

JEFFREY JARRETT; JEREMY BRIDGES; TEXAS DEPARTMENT OF CRIMINAL JUSTICE,

Defendants—Appellees.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:19-CV-2330

Before RICHMAN, *Chief Judge*, and WIENER and WILLETT, *Circuit Judges*.

DON R. WILLETT, *Circuit Judge*:

A trusted prison inmate was working unsupervised in a hog barn when the ceiling collapsed, striking him in the head. He told the prison agricultural specialist that he needed medical attention. But the specialist thought the inmate looked no worse for wear and ordered him back to work. A short while later, the inmate asked another prison staffer for medical attention. The staffer radioed a supervisor. Based on the staffer's report, the supervisor, too, thought nothing serious had happened and did not immediately grant the

[OPINION ABOUT THIS CASE REMOVED]

DON R. WILLETT, *Circuit Judge*, concurring:

Today's decision upholding qualified immunity is compelled by our controlling precedent. I write separately only to highlight newly published scholarship that paints the qualified-immunity doctrine as flawed—foundationally—from its inception.[1]

For more than half a century, the Supreme Court has claimed that (1) certain common-law immunities existed when § 1983 was enacted in 1871,[2] and (2) "no evidence" suggests that Congress meant to abrogate these immunities rather than incorporate them.[3] But what if there *were* such evidence? Indeed, what if the Reconstruction Congress had explicitly stated—right there in the original statutory text—that it was nullifying all common-law defenses against § 1983 actions? That is, what if Congress's literal language unequivocally negated the original interpretive premise for qualified immunity? Professor Alexander Reinert argues precisely this in his new article, *Qualified Immunity's Flawed Foundation*—that courts have been construing the wrong version of § 1983 for virtually its entire legal life.

Wait, what?

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[1] Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*, 111 CAL. L. REV. 201 (2023) ("This Article takes aim at the roots of the doctrine—fundamental errors that have never been excavated.").

[2] *Pierson v. Ray*, 386 U.S. 547, 556–57 (1967) (tethering qualified immunity to common-law defenses that existed circa 1871, like subjective good faith). Professor William Baude has challenged this historical premise—forcefully and methodically—arguing that qualified immunity departs significantly from traditional common-law principles. *See* William Baude, *Is Qualified Immunity Unlawful?*, 106 CAL. L. REV. 45, 49–60 (2018). Professor Joanna Schwartz likewise questions the doctrine's origins, contending there were no common-law immunities. *See* Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797 (2018).

[3] *Briscoe v. Lahue*, 460 U.S. 325, 337 (1983) ("[W]e find no evidence that Congress intended to abrogate the traditional common-law . . . immunity in § 1983 actions.").

As passed by the Reconstruction Congress, Section 1 of the Civil Rights Act of 1871 (now colloquially known as § 1983) read this way:

> [A]ny person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall*, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding,* be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress . . . .[4]

The italicized language—the "Notwithstanding Clause," as Professor Reinert calls it—explicitly displaces common-law defenses.[5] The language that Congress passed makes clear that § 1983 claims are viable notwithstanding "any such law, statute, ordinance, regulation, custom, or usage of the State to contrary." The language is unsubtle and categorical, seemingly erasing any need for unwritten, gap-filling implications, importations, or incorporations. Rights-violating state actors are liable—period—*notwithstanding* any state law to the contrary.

Then things went off the rails, quickly and stealthily. For reasons lost to history, the critical "Notwithstanding Clause" was inexplicably omitted from the first compilation of federal law in 1874.[6] The Reviser of Federal

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

[5] Reinert, *supra* at 235 and n.230 (observing that "this clause meant to encompass state common law principles," noting that this understanding—that "custom or usage" was synonymous with common law—was, "after all," why the Court overruled *Swift v. Tyson*, 41 U.S. 1 (1842), in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), and also citing *W. Union Tel Co. v. Call Pub. Co.*, 181 U.S. 92, 102 (1901), which in turn cites BLACK'S LAW DICTIONARY for the proposition that common law derives from "usages and customs").

[6] Reinert, *supra* at 207, 237.

Statutes made an unauthorized alteration to Congress's language. And that error was compounded when the various revised statutes were later published in the first United States Code in 1926. The Reviser's error, whether one of omission or commission, has never been corrected. Today, 152 years after Congress enlisted the federal courts to secure Americans' constitutional rights, if one were to Google "42 U.S.C. § 1983," the altered version that pops up says nothing about common-law defenses. According to Professor Reinert, that fateful, unexplained omission means that courts and scholars have never "grappled" with the Notwithstanding Clause's significance.[7]

All to say, the Supreme Court's original justification for qualified immunity—that Congress wouldn't have abrogated common-law immunities absent explicit language—is faulty because the 1871 Civil Rights Act *expressly included such language*. Those sixteen lost words, by presumably encompassing state common-law principles, undermine the doctrine's long-professed foundation and underscore that what the 1871 Congress meant for state actors who violate Americans' federal rights is not immunity, but liability—indeed, liability *notwithstanding* any state law to the contrary.[8]

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[7] *Id.* at 236, 244.

[8] Beyond excavating the long-lost text of what the Reconstruction Congress actually passed, Professor Reinert asserts a second fundamental misstep: qualified immunity is rooted in a flawed application of the checkered "Derogation Canon." This canon of statutory interpretation urges that statutes in "derogation" of the common law should be strictly construed. The Court misapplied this canon, says Professor Reinert, reading § 1983's silence regarding immunity as implicit *adoption* of common-law immunity defenses rather than *rejection* of them. *Id.* at 211 n.56 (collecting cases). Professor Reinert maintains that the Derogation Canon has always rested on shaky ground, with Justice Scalia, writing with lexicographer Bryan Garner, branding it "a relic of the courts' historical hostility to the emergence of statutory law." *Id.* at 218 (citing ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 318 (2012)). Even more importantly, Reconstruction-era legislators would

These are game-changing arguments, particularly in this text-centric judicial era when jurists profess unswerving fidelity to the words Congress chose. Professor Reinert's scholarship supercharges the critique that modern immunity jurisprudence is not just *a*textual but *counter*textual. That is, the doctrine does not merely *complement* the text—it brazenly *contradicts* it.

In arguing that qualified immunity is flawed from the ground up, Professor Reinert poses a provocative question: "If a legislature enacts a statute, but no one bothers to read it, does it still have interpretive force?"[9] It seems a tall order to square the modern qualified-immunity regime with Congress's originally enacted language. But however seismic the implications of this lost-text research, "'[a]s middle-management circuit judges,' we cannot overrule the Supreme Court."[10] Only that Court can definitively grapple with § 1983's enacted text and decide whether it means what it says—and what, if anything, that means for § 1983 immunity jurisprudence.[11]

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not have understood the canon as operating to dilute § 1983 by implying common-law defenses. Why? Because since the Founding era, the Supreme Court had only used the Derogation Canon (criticized by mid-nineteenth courts and treatises for arrogating power to judges) to protect preexisting common law *rights*, never to import common law *defenses* into new remedial statutes. Reinert, *supra* at 221–28. In short, the Derogation Canon does not validly apply to defenses. The more applicable canon, around which Reconstruction-era courts *had* coalesced, was a contrary one: remedial statutes—such as § 1983—should be read broadly. *Id.* at 219, 227–28. In any event, as argued above, even if the Derogation Canon *did* apply to defenses, the as-passed language of § 1983 explicitly displaced any existing common-law immunities.

[9] *Id.* at 246.

[10] *Sims v. Griffin*, 35 F.4th 945, 951 n.17 (5th Cir. 2022) (quoting *Whole Woman's Health v. Paxton*, 978 F.3d 896, 920 (5th Cir. 2020) (Willett, J., dissenting), *rev'd en banc*, 10 F.4th 430 (5th Cir. 2021)).

[11] Not all Supreme Court Justices have overlooked the Notwithstanding Clause. In *Butz v. Economou*, the Court quoted the as-passed statutory language, including the Notwithstanding Clause, yet, in the same breath, remarked that § 1983's originally enacted

text "said nothing about immunity for state officials." 438 U.S. 478, 502–03 & n.29 (1978) (citing *Pierson v. Ray*, 386 U.S. 547 (1967), *Imbler v. Pachtman*, 424 U.S. 409 (1976), and *Scheuer v. Rhodes*, 416 U.S. 232 (1974)). Indeed, members of the Supreme Court have often noted the Notwithstanding Clause's existence and omission from the U.S. Code. *See Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 510 (1939); *Monroe v. Pape*, 365 U.S. 167, 228 (1961) (Harlan, J., concurring); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 203 n.15 (1970) (Brennan, J., concurring); *see also Screws v. United States*, 325 U.S. 91, 99 n.8 (1945) (quoting the originally enacted text, including the Notwithstanding Clause); *Monroe*, 365 U.S. at 181 n.27 (majority) (same); *Examining Bd. of Eng'rs, Architects, & Surveyors v. Flores de Otero*, 426 U.S. 572, 582 n.11 (1976) (same); *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691–92 (1978) (same); *Chapman v. Hous. Welfare Rights Org.*, 441 U.S. 600, 608 n.15 (1979) (same); *Briscoe v. LaHue*, 460 U.S. 325, 357 n.17 (1983) (Marshall, J., dissenting) (same); *Wilson v. Garcia*, 471 U.S. 261, 262 n.1 (1985) (same); *Jett v. Dall. Indep. Sch. Dist.*, 491 U.S. 701, 723 (1989) (same); *Ngiraingas v. Sanchez*, 495 U.S. 182, 188 n.8 (1990) (same).