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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

CLERK, U.S. DISTRICT COURT
ST. PAUL, MINNESOTA

Joseph Kirchner,
Plaintiff,

Case No. _____
26-cv-726-JWB/ECW

vs.

MEMORANDUM OF LAW -
CONSTITUTIONAL FAILURES OF
HARLOW V. FITZGERALD

Keith Ellison, in his official capacity as
Attorney General of the State of
Minnesota,
Defendants.

TABLE OF CONTENTS

I. Introduction	3
II. BACKGROUND: THE DOCTRINAL SHIFT FROM WOOD TO HARLOW	4
A. The Two-prong Standard Of Wood V. Strickland	4
B. Harlow's Elimination Of The Subjective Prong	5
III. THE "ESSENTIALLY OBJECTIVE" CONTRADICTION	5
A. The Logical Impossibility Of Degrees Of Objectivity	5
B. The Practical Incoherence	6
C. The Ambiguity Of "generally"	7
IV. THE ELIMINATION OF MALICE: SHIELDING KNOWING VIOLATORS	8
A. The Perverse Incentive Structure	9
B. Justice Brennan's Incomplete Concurrence	9
V. The Catch-22 Of "clearly Established" Rights	10
A. The Requirement Of Factual Specificity	10
B. The Constitution Is Not Self-executing Under Harlow	11
C. The Empirical Record	11
D. The Ninth Amendment Inversion	12
VI. THE BURDEN SHIFT BETRAYAL OF BUTZ	15
A. Butz Required Officials To Justify Immunity	15
B. Harlow Reversed The Burden	15
C. The Verb "showing" Requires Adjudication	16
VII. THE SEVENTH AMENDMENT VIOLATION	18

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JAN 27 2026

1	A. The Constitutional Guarantee	18
2	B. Harlow's Express Purpose: Avoiding Jury Trials.....	19
3	C. The Seventh Amendment Problem	19
4	D. Stating The Obvious As If Novel: The Rhetorical Undermining Of Due	
5	Process	20
6	E. The Revolutionary Solution And The Absence Of Alternative	22
7	F. The Court's Constitutional Confession	25
8	VIII. THE COMMON LAW FICTION.....	27
9	A. The Claimed Common Law Foundation.....	27
10	B. The Historical Reality	28
11	C. The Judicial Creation	28
12	IX. FOOTNOTE 34: THE LIMITATION TO DAMAGES ACTIONS	29
13	A. The Text Of Footnote 34.....	29
14	B. The Significance.....	29
15	C. The Lower Court Extension	30
16	X. The Self-dealing Problem	30
17	A. Judges Enjoy Greater Immunity	30
18	B. The Structural Conflict.....	31
19	C. Jurisdictional Bootstrapping: How Harlow Reached The Court.....	31
20	XI. THE CONSTITUTIONAL ILLEGITIMACY OF JUDGE-MADE IMMUNITY	33
21	A. Legislative Immunity As Justiciability Constraint.....	33
22	B. The Article V Requirement	35
23	C. Amendment XIV Violations	37
24	D. Article IV Violations.....	39
25	E. The Ninth Amendment: Declaring Law Versus Creating Law	40
26	F. The Comprehensive Constitutional Indictment.....	48
27	XII. CONCLUSION	50
28	XIII. CERTIFICATE OF COMPLIANCE	51

I. Introduction

1. This memorandum analyzes the logical and constitutional failures embedded in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Supreme Court decision that established the modern doctrine of qualified immunity. While *Harlow* has been treated as settled law for over four decades, close examination reveals that the decision rests upon fundamental logical contradictions, betrays the framework established by its own precedents, and operates to nullify constitutional guarantees through judicial fiat.

2. The central holding of *Harlow*—that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known," *id.* at 818—contains within it multiple fatal defects. These defects are not merely academic concerns; they have produced a doctrine that systematically denies citizens remedies for constitutional violations while claiming to "balance" competing interests.

3. This memorandum identifies and analyzes the following failures: (1) the logical incoherence of an "essentially objective" standard; (2) the elimination of the subjective malice prong, which shields knowing violators; (3) the Catch-22 created by the "clearly established" requirement; (4) the betrayal of *Butz v. Economou*'s burden-shifting framework; (5) the systematic denial of Seventh Amendment jury trial rights; (6) the false claim that qualified immunity derives from common law; (7) the limitation to damages actions expressed in Footnote 34; (8) the self-dealing nature of judge-created immunity doctrines; and (9) the comprehensive constitutional illegitimacy of judge-

1 made immunity, which violates Article I (by extending immunity beyond the Speech or
2 Debate Clause), Article IV (by creating geographic inequality in constitutional
3 remedies), Article V (by amending the Constitution through judicial decree), and
4 Amendments VII, IX, and XIV.

5 **II. BACKGROUND: THE DOCTRINAL SHIFT FROM WOOD TO HARLOW**

6 **A. The Two-prong Standard Of Wood V. Strickland**

7 4. Prior to *Harlow*, the governing standard for qualified immunity was articulated in
8 *Wood v. Strickland*, 420 U.S. 308 (1975). Under *Wood*, qualified immunity contained
9 both an objective and a subjective component. An official would be denied immunity
10 if he "knew or reasonably should have known that the action he took within his sphere
11 of official responsibility would violate the constitutional rights of the [plaintiff], or if
12 he took the action with the malicious intention to cause a deprivation of constitutional
13 rights or other injury." *Id.* at 322.

14 5. The *Wood* framework thus provided two independent pathways to overcome
15 immunity. First, an official who violated clearly established law would be liable
16 regardless of his subjective intent (the objective prong). Second, an official who acted
17 with malicious intent to deprive constitutional rights would be liable even if the
18 specific right was not clearly established (the subjective prong). This dual structure
19 ensured that both negligent and intentional constitutional violations could be remedied.

B. Harlow's Elimination Of The Subjective Prong

6. *Harlow* eliminated the subjective prong entirely. The Court reasoned that "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." *Harlow*, 457 U.S. at 815-16. Because subjective intent is "a question of fact that some courts have regarded as inherently requiring resolution by a jury," *id.* at 816, the Court concluded that inquiries into malice could not be resolved on summary judgment and therefore frustrated the goal of early dismissal.

7. The Court's solution was to abolish the subjective inquiry altogether: "Henceforth, government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818. The word "henceforth" signals the Court's awareness that it was changing the law—not interpreting it, not applying it, but creating a new standard by judicial decree.

III. THE "ESSENTIALLY OBJECTIVE" CONTRADICTION

A. The Logical Impossibility Of Degrees Of Objectivity

8. The *Harlow* Court described its new standard as resting on "the objective reasonableness of an official's conduct." *Id.* at 818. Earlier in the opinion, the Court characterized the inquiry as involving "essentially objective" factors. *Id.* at 819. This formulation contains a fundamental logical error: objectivity admits no degrees.

1 **9.** A standard is either objective or it is not. To describe something as "essentially
2 objective" is to acknowledge that it is not, in fact, objective—that subjective elements
3 remain. If the Court meant that the standard was objective, the qualifier "essentially" is
4 meaningless surplusage. If the Court meant that the standard was mostly-but-not-
5 entirely objective, then it failed to identify what non-objective elements remain and
6 how they should be evaluated.

7 **10.** This is not mere semantic quibbling. The entire justification for eliminating the
8 subjective prong was that subjective inquiries could not be resolved on summary
9 judgment. If the replacement standard is only "essentially" objective, then it too will
10 require factual determinations that cannot be resolved as a matter of law. The Court
11 claimed to solve the problem of subjective factual inquiries by creating a standard that
12 is, by its own description, not fully objective.

13 **B. The Practical Incoherence**

14 **11.** The practical operation of "essentially objective" qualified immunity demonstrates
15 this incoherence. Courts must determine whether a "reasonable person" would have
16 known that certain conduct violated constitutional rights. But reasonableness is itself a
17 fact-intensive inquiry that varies based on context, training, experience, and
18 circumstances. Different reasonable people can reach different conclusions about what
19 other reasonable people would know.

20 **12.** The Court acknowledged this problem obliquely: "If the official pleading the
21 defense claims extraordinary circumstances and can prove that he neither knew nor
22 should have known of the relevant legal standard, the defense should be sustained." *Id.*

1 at 819. This exception reintroduces subjective considerations (what the official
2 actually knew) through the back door of "extraordinary circumstances." The standard is
3 not objective; it is objective with subjective exceptions—which is to say, it is not
4 objective at all.

5 **C. The Ambiguity Of "generally"**

6 **13.** The *Harlow* holding contains a second oxymoronic qualifier: "government officials
7 performing discretionary functions **generally** are shielded from liability." *Id.* at 818.

8 The term "generally" is ambiguous between two meanings: (1) universally, in all cases,
9 as a general rule without exception; or (2) usually, in most cases, but not all. The
10 opinion does not specify which meaning is intended, but the very use of the qualifier
11 indicates the latter—otherwise the word would be unnecessary.

12 **14.** This ambiguity creates a logical contradiction. If "generally" means universally,
13 then *Harlow* creates absolute immunity for discretionary functions—but the Court
14 explicitly distinguished qualified immunity from absolute immunity and purported to
15 create only the former. If "generally" means usually-but-not-always, then there exist
16 cases outside the general rule—but the opinion never identifies what those cases are or
17 how courts should determine whether a particular case falls within or outside the
18 "general" protection.

19 **15.** The problem compounds when combined with the "essentially objective" qualifier.
20 For qualified immunity to function as *Harlow* describes, it must satisfy two conditions:
21 (1) the standard must be objective, enabling resolution without subjective factual

inquiry; and (2) the standard must apply uniformly within its scope, enabling consistent application. But *Harlow* hedges on both conditions:

Condition	Requirement	<i>Harlow's</i> Language	Effect
Objectivity	Fully objective standard	"Essentially objective"	Admits not fully objective
Universality	Applies uniformly to discretionary functions	"Generally shielded"	Admits not universally applicable

16. These qualifiers destroy both necessary conditions for the doctrine to work as advertised. If the standard is only "essentially" objective, then subjective determinations remain necessary. If immunity applies only "generally," then case-by-case determination of which cases fall within the general rule is required—and such determination is inherently subjective. The Court eliminated the explicit subjective prong, then reintroduced subjectivity through hedged language describing the replacement standard.

17. The ambiguity serves a function: it provides cover for discretionary outcomes while claiming objectivity. If a court wishes to grant immunity, officials are "generally shielded." If a court wishes to deny immunity, this particular case falls outside the "general" rule. The word "generally" does no analytical work; it merely signals that the standard is not what it claims to be—neither fully objective nor uniformly applicable.

IV. THE ELIMINATION OF MALICE: SHIELDING KNOWING VIOLATORS

1 **A. The Perverse Incentive Structure**

2 **18.** The elimination of the subjective malice prong creates a perverse incentive
3 structure: an official who knows he is violating constitutional rights is protected so
4 long as no prior case with substantially similar facts exists. Consider two officials who
5 commit identical unconstitutional acts. Official A is ignorant of the constitutional
6 implications; Official B knows the conduct is unconstitutional but acts anyway because
7 no "clearly established" precedent prohibits it. Under *Harlow*, both receive immunity.
8 The knowing violator is treated identically to the ignorant one.

9 **19.** This outcome contradicts basic principles of culpability that pervade American law.
10 In criminal law, intentional wrongdoing is punished more severely than negligent
11 wrongdoing. In tort law, intentional torts are treated more seriously than negligent
12 torts. Only in constitutional tort law, after *Harlow*, is the intentional wrongdoer treated
13 the same as—or better than—the negligent one. The official who carefully researches
14 the law to find constitutional violations that have not yet been prohibited by "clearly
15 established" precedent is rewarded for his diligence in evading accountability.

16 **B. Justice Brennan's Incomplete Concurrence**

17 **20.** Justice Brennan recognized this problem in his concurrence: "This standard would
18 not allow the official who actually knows that he was violating the law to escape
19 liability for his actions, even if he could not 'reasonably have been expected' to know
20 what he actually did know." *Id.* at 821 (Brennan, J., concurring). Justice Brennan thus
21 attempted to read into the majority opinion a preservation of actual-knowledge
22 liability.

1 **21.** But the majority opinion provides no mechanism to enforce this reading. The test
2 announced is purely objective: whether a "reasonable person would have known" that
3 the conduct was unlawful. *Id.* at 818. An official's actual knowledge is irrelevant to
4 this inquiry. If a reasonable person would not have known (because no clearly
5 established precedent existed), the official is immune—regardless of whether that
6 particular official did, in fact, know.

7 **22.** Justice Brennan's concurrence reads like a dissent masquerading as agreement. He
8 identified a fatal flaw in the majority's reasoning, then expressed hope that the flaw
9 would not produce unjust results. That hope has proven unfounded. In the decades
10 since *Harlow*, courts have consistently applied the objective test without regard to
11 actual knowledge, exactly as the majority opinion requires.

12 **V. The Catch-22 Of "clearly Established" Rights**

13 **A. The Requirement Of Factual Specificity**

14 **23.** The "clearly established" requirement has evolved to demand extraordinary factual
15 specificity. Courts routinely hold that constitutional rights must be established
16 "beyond debate" in the specific factual context at issue. General principles—even ones
17 as fundamental as "officers cannot use excessive force"—are deemed insufficient. The
18 plaintiff must identify a prior case involving materially identical facts.

19 **24.** This requirement creates an insurmountable Catch-22: the first victim of any novel
20 constitutional violation can never obtain relief because, by definition, no prior case
21 exists. The second victim cannot obtain relief because the first case (even if litigated)

1 may not have produced a final judgment establishing the right. The third victim may
2 still be unable to obtain relief if courts find the prior cases factually distinguishable.
3 The right is never "clearly established" until someone wins a case—but no one can win
4 because the right is not clearly established.

5 **B. The Constitution Is Not Self-executing Under Harlow**

6 **25.** The text of the Constitution does not condition rights on prior judicial enforcement.
7 The Fourth Amendment provides: "The right of the people to be secure in their
8 persons, houses, papers, and effects, against unreasonable searches and seizures, shall
9 not be violated." U.S. Const. amend. IV. It does not say: "shall not be violated, unless
10 the specific manner of violation has not been previously litigated in the same circuit."

11 **26.** *Harlow* effectively rewrites constitutional provisions to include a judicial
12 enforcement prerequisite. Constitutional rights exist on paper but are unenforceable
13 until activated by prior litigation. This transforms the Constitution from a charter of
14 rights into a catalog of suggestions awaiting judicial approval. The Framers did not
15 establish a government of enumerated powers constrained by a Bill of Rights only to
16 have those rights rendered unenforceable by judicial doctrine.

17 **C. The Empirical Record**

18 **27.** The practical effect of the "clearly established" requirement is documented
19 extensively. Studies demonstrate that qualified immunity is granted in the
20 overwhelming majority of cases, often at the motion to dismiss stage before any

discovery occurs. Courts have found no "clearly established" right violated in cases involving:

Conduct	Court's Finding
Shooting a child while aiming at the family dog	No clearly established prohibition
Stealing \$225,000 during a search warrant execution	No clearly established prohibition
Siccing a police dog on a surrendering suspect	No clearly established prohibition
Tasering a suspect who was doused in gasoline	No clearly established prohibition

28. These outcomes are not aberrations; they are the predictable result of a doctrinal framework that demands factual identity between the case at bar and prior precedent. The doctrine has become a one-way ratchet: novel violations are never clearly established, so novel violations are never remedied, so the universe of "clearly established" rights never expands to cover the full scope of constitutional protections.

D. The Ninth Amendment Inversion

29. The *Harlow* Court justified the "clearly established" requirement by asserting: "If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful." *Harlow*, 457 U.S. at 818-19. This reasoning grants the benefit of legal uncertainty to the officer. But the Ninth Amendment establishes precisely the opposite presumption.

1 **30.** The Ninth Amendment provides: "The enumeration in the Constitution, of certain
 2 rights, shall not be construed to deny or disparage others retained by the people." U.S.
 3 Const. amend. IX. This establishes a constitutional rule of construction: where rights
 4 are not clearly restricted, they are retained by the people. Legal uncertainty, under the
 5 Ninth Amendment, benefits citizens—not government officials.

6 **31.** Law enforcement officers must know the law to enforce it. This is logical
 7 necessity: one cannot enforce what one does not know. If an officer is uncertain
 8 whether citizen conduct is unlawful, the officer cannot enforce against that conduct.
 9 Enforcement presupposes legal certainty; uncertainty precludes enforcement. The
 10 Ninth Amendment codifies the constitutional consequence of this uncertainty: where
 11 the law does not clearly restrict citizen conduct, the right to engage in that conduct is
 12 retained by the people.

13 **32.** *Harlow* inverts this constitutional structure. Under the Ninth Amendment, legal
 14 uncertainty should operate as follows:

Condition	Constitutional Result (Ninth Amendment)
Law clearly restricts citizen conduct	Government may enforce
Law unclear whether conduct is restricted	Right to act retained by the people

15 Under *Harlow*, legal uncertainty operates inversely:

Condition	<i>Harlow's</i> Result
Law clearly prohibits officer conduct	Officer liable
Law unclear whether officer conduct is prohibited	Officer immune

16 The same uncertainty that should protect the citizen (Ninth Amendment) is converted
 17 into a shield protecting the officer.

1 **33.** This inversion creates an irreconcilable double standard. Citizens are held to the
2 principle that "ignorance of the law is no excuse"—they are presumed to know the law,
3 and uncertainty does not protect them from enforcement. Officers, by contrast, may
4 claim "I didn't know the law" as a complete defense under *Harlow*—they are presumed
5 not to know the law unless it is "clearly established," and uncertainty protects them
6 from accountability. The constitutional structure says uncertainty benefits citizens;
7 *Harlow* says uncertainty benefits officers. These positions cannot be reconciled.

8 **34.** The logical contradiction deepens upon examination. If an officer claims immunity
9 because "I didn't know my conduct was unlawful—the law wasn't clearly established,"
10 then by the same reasoning, the officer could not have known that the citizen's conduct
11 was unlawful either. If the law was insufficiently clear for the officer to recognize that
12 their own conduct violated constitutional rights, the law was equally insufficient to
13 authorize enforcement against the citizen. The officer cannot simultaneously claim: (1)
14 "I didn't know my conduct was unlawful" (immunity defense), and (2) "I knew the
15 citizen's conduct was unlawful" (basis for enforcement). If legal uncertainty protects
16 the officer from liability, it should equally preclude the officer from enforcement—
17 because enforcement requires the very certainty the officer claims they lacked.

18 **35.** The Ninth Amendment argument is therefore dispositive. Where law is unclear:
19 the Ninth Amendment reserves the right to act to the people; the officer, lacking clear
20 legal authority, cannot enforce; the citizen, possessing reserved rights, may act freely.
21 *Harlow* inverts this by granting the benefit of uncertainty to the government official
22 rather than to the citizen whose rights the Ninth Amendment was designed to protect.

1 The "clearly established" doctrine takes the Ninth Amendment's reservation of rights to
2 the people and converts it into a reservation of immunity to the government.

3 **VI. THE BURDEN SHIFT BETRAYAL OF BUTZ**

4 **A. Butz Required Officials To Justify Immunity**

5 **36.** *Butz v. Economou*, 438 U.S. 478 (1978), established that "federal officials who seek
6 absolute exemption from personal liability for unconstitutional conduct must bear the
7 burden of showing that public policy requires an exemption of that scope." *Id.* at 506.
8 The official claiming immunity bore the burden of justification. The citizen seeking
9 redress for constitutional violations did not bear the burden of establishing that redress
10 was available; redress was presumed available, and the official had to overcome that
11 presumption.

12 **37.** This allocation of burdens reflected constitutional structure. The Constitution
13 establishes rights; officials claiming exemption from those rights must justify the
14 exemption. Citizens do not petition for permission to enforce their constitutional
15 rights; they possess those rights inherently, and officials must demonstrate why
16 enforcement should be barred.

17 **B. Harlow Reversed The Burden**

18 **38.** *Harlow* inverted this framework. Under *Harlow*, the burden falls on the plaintiff to
19 identify a "clearly established" right. The official need not justify immunity; the
20 citizen must overcome it by producing sufficiently specific precedent. This reversal

1 transforms the constitutional relationship between citizen and state. The citizen now
2 petitions for permission to enforce constitutional rights, and that permission is granted
3 only if the citizen can satisfy an onerous evidentiary requirement.

4 **39.** *Harlow* cited *Butz* extensively, claiming to apply and refine the *Butz* framework.
5 But the burden allocation in *Harlow* is the opposite of what *Butz* required. *Butz* placed
6 the burden on officials to justify immunity; *Harlow* placed the burden on citizens to
7 overcome immunity. This is not refinement; it is reversal.

8 **C. The Verb "showing" Requires Adjudication**

9 **40.** The textual difference between *Butz* and *Harlow* reveals a deeper structural change:
10 *Butz* guaranteed adjudication; *Harlow* eliminated it. The key is the verb "showing" in
11 *Butz*'s formulation.

12 **41.** *Butz* stated that officials "must bear the burden of **showing** that public policy
13 requires an exemption." *Butz*, 438 U.S. at 506 (emphasis added). The verb "show" is
14 inherently procedural. One cannot "show" something in a vacuum. To show requires:
15 (1) an audience to whom something is shown; (2) a proceeding in which the showing
16 occurs; (3) evidence or argument to present; and (4) a determination by the audience
17 whether the showing is sufficient. In legal context, "showing" means demonstration to
18 a court through an adjudicative process.

19 **42.** *Butz*'s use of "showing" thus guaranteed the plaintiff a right to adjudication. The
20 official's burden could only be discharged through a proceeding—the official had to
21 demonstrate something to a factfinder. This proceeding necessarily involved the
22 plaintiff, who could contest the official's showing. The citizen's claim would be

1 adjudicated; the official's justification for immunity would be evaluated; a
2 determination would be made.

3 **43.** *Harlow* replaced "showing" with passive, self-executing language: officials "are
4 shielded from liability for civil damages insofar as their conduct does not violate
5 clearly established statutory or constitutional rights." *Harlow*, 457 U.S. at 818. Note
6 what is absent: no "showing," no demonstration, no burden the official must actively
7 discharge. The official is "shielded" by default. The only question is whether prior
8 case law exists with substantially similar facts—a question of legal research, not
9 adjudication.

10 **44.** Under *Harlow*, the official demonstrates nothing. The official shows nothing. The
11 official simply invokes immunity, and the court performs a legal research exercise:
12 does matching precedent exist? If not, the case is dismissed. No evidence is taken.
13 No testimony is heard. No factual findings are made. The plaintiff's claim is never
14 adjudicated on the merits.

15 **45.** The grammatical structure encodes the procedural consequence:

<i>Butz</i>	<i>Harlow</i>
"must bear the burden of showing "	" are shielded... insofar as conduct does not violate "
Active voice—official must do something	Passive voice—official need do nothing
Requires proceeding to "show"	Requires only legal research
Adjudication inherent in verb	Adjudication foreclosed by structure
Plaintiff participates in official's "showing"	Plaintiff's participation irrelevant

16 **46.** This is not merely a procedural technicality. The right to adjudication is a
17 component of due process. When a citizen alleges that the government violated their

1 constitutional rights, due process requires that the claim be heard and determined.
2 *Butz's* framework, by requiring the official to "show" justification for immunity,
3 guaranteed the citizen a hearing. *Harlow's* framework, by making immunity self-
4 executing upon the absence of matching precedent, eliminates the hearing entirely.

5 47. A citizen can now suffer a constitutional violation and receive no adjudication
6 whatsoever of whether the violation occurred. The court never determines whether the
7 official's conduct was unconstitutional, whether the plaintiff was injured, whether the
8 official acted in good faith, or whether public policy justifies immunity. The court
9 determines only one thing: has this exact violation been litigated before in this
10 jurisdiction? If the answer is no, the case is dismissed without any adjudication of the
11 plaintiff's claim.

12 48. *Butz* required due process—the official's "showing" could only occur through a
13 proceeding where the plaintiff participated. *Harlow* eliminated due process—the
14 "clearly established" inquiry is purely legal, and the plaintiff's evidence, testimony, and
15 injury are irrelevant to the outcome.

16 **VII. THE SEVENTH AMENDMENT VIOLATION**

17 **A. The Constitutional Guarantee**

18 49. The Seventh Amendment provides: "In Suits at common law, where the value in
19 controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."
20 U.S. Const. amend. VII. Civil rights actions under 42 U.S.C. § 1983 and *Bivens* are
21 suits at common law within the meaning of the Seventh Amendment. Citizens who

bring such suits are constitutionally entitled to have a jury determine the facts of their case.

B. Harlow's Express Purpose: Avoiding Jury Trials

50. The stated purpose of *Harlow* was to enable summary judgment and avoid trial. The Court complained that "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." *Harlow*, 457 U.S. at 815-16. The problem, in the Court's view, was that subjective inquiries required jury resolution: "an official's subjective good faith has been considered to be a question of fact that some courts have regarded as inherently requiring resolution by a jury." *Id.* at 816.

51. The solution the Court adopted was to eliminate factual inquiries that would require jury determination. By making the test "essentially objective," the Court enabled judges to resolve immunity questions on summary judgment without empaneling a jury. This was the explicit goal: "Reliance on the objective reasonableness of an official's conduct... should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment." *Id.* at 818.

C. The Seventh Amendment Problem

52. The Court created a doctrine whose express purpose is to prevent citizens from exercising their Seventh Amendment right to jury trial. The "insubstantial claims" that *Harlow* filters out are claims that would otherwise go to a jury for factual determination. By resolving these claims on summary judgment, *Harlow* substitutes

1 judicial determination for jury determination in precisely the cases where the Seventh
2 Amendment guarantees jury resolution.

3 **53.** The Court offered no Seventh Amendment analysis. The opinion does not mention
4 the Seventh Amendment. It does not explain how a doctrine designed to avoid jury
5 trials is consistent with a constitutional provision guaranteeing jury trials. This silence
6 is telling. The Court could not have addressed the Seventh Amendment problem
7 because the problem is insoluble: a doctrine whose purpose is to avoid jury trials
8 cannot be reconciled with a constitutional provision requiring jury trials.

9 **D. Stating The Obvious As If Novel: The Rhetorical Undermining Of Due Process**

10 **54.** The *Harlow* Court justified its doctrinal innovation with a statement of obvious
11 truth presented as if it were a novel problem requiring judicial solution:

12 "At the same time, however, it cannot be disputed seriously that claims
13 frequently run against the innocent, as well as the guilty—at a cost not
14 only to the defendant officials, but to society as a whole."

15 *Harlow*, 457 U.S. at 814. The Court presented this observation as a weighty
16 consideration militating toward immunity. But the observation is not novel; it is the
17 foundational condition of all litigation that the Constitution explicitly addresses
18 through due process and the right to trial by jury.

19 **55.** The entire purpose of due process is to separate the guilty from the innocent. The
20 entire purpose of trial by jury is to have citizens—not judges acting on legal research
21 alone—determine contested facts and render verdicts. The Constitution does not
22 assume that all defendants are guilty; it assumes that guilt and innocence must be
23 determined through adjudication. The Fifth Amendment guarantees that no person

1 shall be deprived of life, liberty, or property "without due process of law." The Seventh
 2 Amendment guarantees trial by jury in civil cases. These provisions exist precisely
 3 because "claims frequently run against the innocent, as well as the guilty."

4 **56.** By stating this obvious truth as if it presented a new problem deserving special
 5 consideration, the Court rhetorically undermined the foundational mechanisms of
 6 American jurisprudence. The Constitution's answer to "innocent people face
 7 accusations" is not immunity from adjudication; it is adjudication itself—the process
 8 by which truth is determined and justice administered. The Court treated the universal
 9 condition that due process was designed to address as a justification for eliminating due
 10 process.

11 **57.** The rhetorical manipulation operates as follows:

Step	Court's Framing	Constitutional Reality
1	"Claims run against the innocent and guilty"	This is why due process exists
2	This imposes "costs" on officials and society	Due process has costs; the Constitution accepts them
3	Officials need protection from this condition	The Constitution provides protection: fair trial
4	Therefore, immunity from adjudication	Non sequitur—eliminates the constitutional solution

12 **58.** The Court's logic, if applied consistently, would eliminate all civil litigation. Every
 13 defendant in every civil case—medical malpractice, contract disputes, personal injury,
 14 employment discrimination—faces the same condition: they may be innocent, and
 15 defending the claim imposes costs. The Constitution's answer is not to immunize
 16 defendants from suit; it is to provide fair process for determining liability. Only for

1 government officials did the Court conclude that the existence of innocent defendants
2 justified eliminating the adjudicative process designed to identify them.

3 **59.** Critically, the Court proposed no objective substitute for due process. Having
4 identified the "problem" of innocent defendants facing claims, the Court's solution was
5 the "clearly established" doctrine—which does not distinguish innocent from guilty
6 defendants at all. Under *Harlow*, both the official who violated constitutional rights
7 and the official who did not receive identical treatment: both are shielded from liability
8 if no prior case with matching facts exists. The doctrine does not separate the innocent
9 from the guilty; it protects both equally by preventing the adjudication that would
10 distinguish them.

11 **60.** A truly objective substitute for due process would need to accomplish what due
12 process accomplishes: determination of contested facts, evaluation of evidence, and
13 reasoned judgment about liability. The "clearly established" test does none of these
14 things. It asks only whether prior case law exists—a question that has no bearing on
15 whether the defendant before the court actually violated constitutional rights. The
16 Court undermined the Constitution's mechanism for separating innocent from guilty
17 without proposing any mechanism that performs that function.

18 **E. The Revolutionary Solution And The Absence Of Alternative**

19 **61.** The Fourth and Seventh Amendments were not procedural conveniences adopted
20 for administrative efficiency. They were the American solution to tyranny—the direct
21 constitutional response to the grievances that necessitated independence. The
22 Declaration of Independence catalogued the Crown's abuses: "depriving us in many

1 cases, of the benefits of Trial by Jury"; "transporting us beyond Seas to be tried for
2 pretended offences"; making "Judges dependent on his Will alone"; and "protecting
3 [soldiers], by a mock Trial, from punishment for any Murders which they should
4 commit on the Inhabitants of these States."

5 **62.** The Fourth Amendment's protection against unreasonable searches and seizures
6 and the Seventh Amendment's guarantee of trial by jury in civil cases were the
7 Founders' answer to these abuses. The Revolutionary generation asked: How do we
8 prevent government agents from violating the rights of citizens with impunity? Their
9 answer was unambiguous: due process of law; trial by jury; citizens sitting in judgment
10 of government conduct. These mechanisms represented the considered solution of the
11 founding generation to the problem of government tyranny within a system of ordered
12 liberty.

13 **63.** The innovation of the Fourth and Seventh Amendments was the American
14 contribution to the ancient problem of restraining government power while maintaining
15 social order. Due process and trial by jury constituted the best solution the Founders
16 could devise—and, critically, the best solution anyone has yet devised—to the problem
17 of government agents violating citizen rights. These amendments are the roots of
18 American democracy, the mechanisms by which the social contract preserves liberty
19 against the state.

20 **64.** *Harlow* implicitly claimed to improve upon this solution. By eliminating the
21 citizen's right to have a jury determine whether government officials violated
22 constitutional rights, the Court suggested that it had devised a superior mechanism for
23 balancing liberty and order. But *Harlow* proposed no alternative mechanism

1 whatsoever. The "clearly established" test does not determine whether a violation
2 occurred. It does not evaluate evidence. It does not permit citizens to judge
3 government conduct. It does not separate the innocent from the guilty. It asks only
4 whether prior litigation exists with substantially similar facts—a question entirely
5 unrelated to the constitutional functions that due process and jury trial perform.

6 **65.** The constitutional challenge to *Harlow* is therefore fundamental: until someone
7 articulates a better mechanism for (1) determining whether government agents violated
8 constitutional rights; (2) separating innocent officials from guilty ones through fair
9 adjudication; (3) allowing citizens to hold government accountable for constitutional
10 violations; and (4) preserving liberty within the social contract—due process and trial
11 by jury remain not merely the best solution, but the only solution consonant with
12 American constitutional democracy.

13 **66.** *Harlow* offered no alternative. It simply exempted government officials from the
14 constitutional solution while providing nothing in its place. The Court treated the
15 Founders' carefully constructed mechanism for restraining government tyranny as an
16 inconvenience to be circumvented rather than a constitutional commitment to be
17 honored. In doing so, it returned American jurisprudence to the condition the Fourth
18 and Seventh Amendments were designed to prevent: government agents shielded from
19 accountability for violations of citizen rights, with no mechanism by which citizens can
20 obtain redress.

21 **67.** The burden should fall on those who would displace due process and jury trial to
22 articulate a superior alternative. *Harlow* assumed this burden and failed to discharge it.
23 Until a better solution is proposed—one that actually performs the constitutional

functions of determining truth, separating innocent from guilty, and enabling citizens to hold government accountable—the Fourth and Seventh Amendments remain the law, and doctrines that circumvent them lack constitutional legitimacy.

F. The Court's Constitutional Confession

68. Buried within *Harlow*'s reasoning is a constitutional confession. The Court acknowledged the very constitutional requirements it proceeded to circumvent:

"Qualified or 'good faith' immunity is an affirmative defense that must be pleaded by a defendant official. *Gomez v. Toledo*, 446 U.S. 635, 640 (1980). Decisions of this Court have established that the 'good faith' defense has both an 'objective' and a 'subjective' aspect. The objective element involves a presumptive knowledge of and respect for 'basic, unquestioned constitutional rights.' *Wood v. Strickland*, 420 U.S. 308, 322 (1975). The subjective component refers to 'permissible intentions.'"

Harlow, 457 U.S. at 815. The Court then acknowledged the constitutional implications of the subjective component:

"Rule 56 of the Federal Rules of Civil Procedure provides that disputed questions of fact ordinarily may not be decided on motions for summary judgment. And an official's subjective good faith has been considered to be a question of fact that some courts have regarded as **inherently requiring resolution by a jury.**"

Id. at 816 (emphasis added).

69. The Court's own reasoning thus establishes three propositions: (1) subjective good faith is a question of fact; (2) questions of fact ordinarily cannot be decided on summary judgment under Rule 56; and (3) subjective good faith has been regarded as "inherently requiring resolution by a jury." This third acknowledgment is dispositive. The Seventh Amendment guarantees the right to jury trial in civil cases. If subjective

1 good faith "inherently requires resolution by a jury," then eliminating the subjective
2 inquiry eliminates a constitutionally required jury determination.

3 **70.** The Court's solution was not to honor the constitutional requirement but to
4 circumvent it. Having acknowledged that the subjective prong requires jury resolution,
5 the Court eliminated the subjective prong—thereby eliminating the jury's constitutional
6 role. This is constitutional reasoning inverted. The Constitution dictates procedure;
7 procedure does not dictate the Constitution. If a factual question "inherently requires
8 resolution by a jury," the constitutional answer is to empanel a jury—not to eliminate
9 the factual question so that no jury is required.

10 **71.** The "permissible intentions" component further illustrates this problem. The
11 subjective element asked whether an official's intentions were "permissible." But to
12 determine whether intentions are permissible requires adjudication—someone must
13 evaluate the evidence and grant or deny the characterization of "permissible." Under
14 *Harlow*, that adjudication never occurs. The official's intentions are not evaluated and
15 found permissible; they are declared irrelevant. The question is eliminated, not
16 answered.

17 **72.** The Court framed the subjective element as "incompatible" with efficient case
18 management: "The subjective element of the good faith defense frequently has proved
19 incompatible with our admonition in *Butz* that insubstantial claims should not proceed
20 to trial." *Id.* at 815-16. But the incompatibility is not with efficiency—it is with the
21 Court's desire to eliminate jury trial. The subjective element is not incompatible with
22 the Constitution; it is required by the Constitution. What the Court found
23 "incompatible" was the Seventh Amendment itself.

1 **73.** The constitutional requirement is clear: all courts are bound to submit factual
2 questions to juries as the Seventh Amendment commands. This requirement persists
3 until either (1) a constitutionally adequate substitute mechanism is adopted, which
4 would require (2) a constitutional amendment ratified according to Article V. The
5 judiciary cannot amend the Seventh Amendment by declaring jury trial inconvenient.
6 The Court's own acknowledgment—that subjective good faith "inherently requires
7 resolution by a jury"—is a confession that eliminating the subjective prong violates the
8 constitutional guarantee it purported to honor.

9 **74.** *Harlow* did not solve the problem of jury trial; it evaded the Constitution's
10 command. The Court identified a constitutional requirement, found it burdensome, and
11 eliminated it—not through constitutional amendment, but through judicial doctrine.
12 This is not interpretation; it is nullification.

13 **VIII. THE COMMON LAW FICTION**

14 **A. The Claimed Common Law Foundation**

15 **75.** *Harlow* and its predecessor cases claim that qualified immunity derives from the
16 common law. "As we reiterated today in *Nixon v. Fitzgerald*," the Court wrote, "our
17 decisions consistently have held that government officials are entitled to some form of
18 immunity from suits for damages. As recognized at common law, public officers
19 require this protection to shield them from undue interference with their duties and
20 from potentially disabling threats of liability." *Harlow*, 457 U.S. at 806.

B. The Historical Reality

76. This claim is historically false. At common law, government officials were liable for torts they committed. The defense available to officials was lawful authority—a claim that their actions were legally authorized. If the official acted within legal authority, no tort occurred; if the official exceeded legal authority, the official was liable as any private tortfeasor would be. There was no general immunity from suit for government officials at common law.

77. More fundamentally, there could not have been qualified immunity for constitutional violations at common law because the Constitution did not exist at common law. The common law of England, from which American common law derives, had no concept of constitutional rights enforceable against government officials. The notion that common law provides a foundation for immunity from constitutional tort suits is an anachronism—attributing to the common law a doctrine that could not have existed within it.

C. The Judicial Creation

78. Qualified immunity as articulated in *Harlow* is not an application of common law principles; it is judicial creation of new doctrine. The "clearly established" requirement has no common law analog. The elimination of subjective malice as a basis for liability has no common law analog. The burden-shifting that places the onus on plaintiffs to identify specific precedent has no common law analog. *Harlow* did not find qualified immunity in the common law; it invented qualified immunity and claimed, falsely, that it derived from the common law.

1 **IX. FOOTNOTE 34: THE LIMITATION TO DAMAGES ACTIONS**

2 **A. The Text Of Footnote 34**

3 79. Footnote 34 of *Harlow* states: "We emphasize that our decision applies only to suits
4 for civil damages arising from actions within the scope of an official's duties and in
5 'objective' good faith. We express no view as to the conditions in which injunctive or
6 declaratory relief might be available." *Harlow*, 457 U.S. at 819 n.34.

7 **B. The Significance**

8 80. This footnote is remarkable for what it reserves. The Court explicitly declined to
9 extend qualified immunity to suits for equitable relief. The entire doctrinal framework
10 of *Harlow*—the elimination of the subjective prong, the "clearly established"
11 requirement, the burden on plaintiffs—was developed in the context of damages
12 actions. The Court expressed "no view" on whether these doctrines would apply to
13 injunctions or declaratory judgments.

14 81. This reservation reflects the different purposes served by different remedies.
15 Damages are retrospective; they compensate for past harm. The concern about
16 "chilling" official action is most acute when officials face personal financial liability
17 for past decisions. Injunctions and declaratory judgments are prospective; they govern
18 future conduct. The "chill" concern is diminished when the remedy is simply a judicial
19 statement that certain conduct is unconstitutional going forward.

C. The Lower Court Extension

82. Despite Footnote 34's explicit reservation, lower courts have extended qualified immunity to equitable relief actions. This extension lacks foundation in *Harlow* itself. When a plaintiff seeks only declaratory and injunctive relief—asking the court to declare that certain conduct violates the Constitution and to enjoin that conduct going forward—*Harlow* by its own terms does not apply.

X. The Self-dealing Problem

A. Judges Enjoy Greater Immunity

83. Chief Justice Burger's dissent observed: "We judges—collectively—have held that the common law provides us with absolute immunity for ourselves with respect to judicial acts, however erroneous or ill-advised." *Harlow*, 457 U.S. at 827 (Burger, C.J., dissenting). Judges have absolute immunity for judicial acts. *See Stump v. Sparkman*, 435 U.S. 349, 356-57 (1978). Prosecutors have absolute immunity for prosecutorial acts. *See Imbler v. Pachtman*, 424 U.S. 409, 427-31 (1976). Legislators have absolute immunity for legislative acts. *See* U.S. Const. art. I, § 6, cl. 1.

84. These absolute immunities were created or recognized by judges—the same judges who benefit from judicial immunity, who work alongside prosecutors who benefit from prosecutorial immunity, and who review actions of legislators who benefit from legislative immunity. The qualified immunity doctrine was also created by judges. At every step, the judiciary has expanded immunity protections for government officials while narrowing the remedies available to citizens.

B. The Structural Conflict

85. This pattern reveals a structural conflict of interest. Judges deciding immunity cases are government officials deciding how much protection government officials should receive from suit. The predictable result is doctrinal expansion of immunity: absolute immunity for judges and prosecutors, qualified immunity for executive officials, legislative immunity for legislators. Citizens lack representation in this process; they appear as plaintiffs in individual cases, but they have no institutional voice in the development of immunity doctrine.

86. Chief Justice Burger framed the conflict starkly: "Are the lowest ranking of 27,000 or more judges, thousands of prosecutors, and thousands of congressional aides—an aggregate of not less than 75,000 in all—entitled to greater protection than two senior aides of a President?" *Harlow*, 457 U.S. at 827-28 (Burger, C.J., dissenting). The question answers itself. The immunity doctrines developed by courts protect judges and their allied government officials while leaving citizens without meaningful remedies for constitutional violations.

C. Jurisdictional Bootstrapping: How Harlow Reached The Court

87. The procedural history of *Harlow* reveals an additional dimension of judicial self-dealing: the Court manufactured the jurisdiction necessary to hear the case. Footnote 11 of the opinion acknowledges that jurisdiction was challenged "on the basis that the District Court's order denying petitioners' claim of absolute immunity was not an appealable final order and that the Court of Appeals' dismissal of petitioners' appeal

1 establishes that this case was never 'in' the Court of Appeals within the meaning of 28
2 U.S.C. § 1254." *Harlow*, 457 U.S. at 807 n.11.

3 **88.** The Court of Appeals correctly applied the final judgment rule: a denial of
4 immunity is an interlocutory order, not a final judgment, and therefore not appealable
5 under 28 U.S.C. § 1291. The Court of Appeals dismissed the appeal for lack of
6 jurisdiction. Under established law, the case was over—petitioners would need to wait
7 for final judgment to appeal.

8 **89.** The Supreme Court granted certiorari anyway—not to review a decision of the
9 Court of Appeals on the merits, but to review the Court of Appeals' jurisdictional
10 dismissal. In the companion case, *Nixon v. Fitzgerald*, 457 U.S. 731, 742-43 (1982),
11 decided the same day, the Supreme Court created the "collateral order doctrine" for
12 immunity denials, holding that such denials are immediately appealable despite not
13 being final judgments. The Court then applied this newly-created doctrine
14 retroactively to *Harlow*, manufacturing the appellate jurisdiction that did not exist
15 when the appeal was filed or when the Court of Appeals dismissed it.

16 **90.** This is jurisdictional bootstrapping: the Supreme Court used certiorari to review a
17 correct dismissal for lack of jurisdiction, created a new doctrine in a companion case
18 establishing that jurisdiction should have existed, applied that doctrine retroactively to
19 the case at bar, and then exercised the jurisdiction it had just created for itself. The
20 Court did not find jurisdiction in existing statute; it created jurisdiction through
21 doctrinal innovation and then used that manufactured jurisdiction to decide *Harlow*.

22 **91.** This pattern—claiming jurisdiction through precedent and doctrinal innovation
23 rather than statutory grant—is documented extensively in **MEMO I: Supreme Court**

1 **Shadow Docket Ultra Vires Practice**, which establishes that the Court has
 2 systematically exercised jurisdiction beyond statutory authorization. *See* MEMO I,
 3 Section II (establishing that federal courts possess only jurisdiction authorized by
 4 statute, not precedent); Section III (documenting Congress's deliberate denial of
 5 interlocutory stay power the Court now exercises). The *Harlow* jurisdictional
 6 manipulation is an early instance of the same ultra vires pattern that would become
 7 systematized in the emergency docket: create doctrine, claim it grants jurisdiction,
 8 exercise that jurisdiction, build precedent network on the manufactured foundation.

9 **92.** The collateral order doctrine for immunity denials has no statutory foundation.
 10 Congress established the final judgment rule in 28 U.S.C. § 1291 and created specific
 11 exceptions in § 1292 for certain interlocutory appeals. Congress did not create an
 12 exception for immunity denials. The Supreme Court created that exception itself,
 13 through judicial doctrine, and used it to manufacture jurisdiction in the very case that
 14 would establish modern qualified immunity. The doctrine that eliminated citizens'
 15 constitutional remedies was decided in a case the Court had no statutory authority to
 16 hear.

17 **XI. THE CONSTITUTIONAL ILLEGITIMACY OF JUDGE-MADE** 18 **IMMUNITY**

19 **A. Legislative Immunity As Justiciability Constraint**

20 **93.** The Constitution provides explicit immunity for only one category of government
 21 official: legislators. Article I, Section 6, Clause 1 states that "for any Speech or Debate

in either House, they shall not be questioned in any other Place." U.S. Const. art. I, § 6, cl. 1. This provision is not a privilege granted to legislators as a policy matter; it is a logical necessity arising from the inherent structure of legislative action.

94. Legislation is structurally collective. A law comes into existence through committee action, floor debate, majority vote in one or both chambers, and presidential signature or veto override. No single legislator "causes" a law to exist. The act of legislation is distributed across dozens or hundreds of actors, none of whom individually produces the outcome.

95. This collective structure creates an insurmountable justiciability problem. If a law injures a citizen, who should be sued?

Potential Defendant	Causation Problem
The bill's sponsor	Did not pass it alone
Committee members	Merely processed the bill
All who voted yes	Hundreds of defendants for one law
The "swing vote"	Impossible to identify with certainty

The causation required for civil liability—that defendant's act caused plaintiff's injury—cannot be established when the act is inherently collective.

96. The Speech or Debate Clause recognizes this logical necessity. Individual liability for collective acts is conceptually incoherent. You cannot sue a legislator for legislation because no individual legislator legislates. Legislative immunity is not a policy choice to protect legislators from harassment; it is a justiciability constraint inherent in the nature of collective action.

97. Judicial, prosecutorial, and executive acts are categorically different. In each case, an identifiable individual performs the act that causes injury:

Actor	Nature of Act	Causation
Legislator	Collective (vote is one of many)	Cannot trace to individual
Judge	Individual (single judge signs order)	Clear individual causation
Prosecutor	Individual (single prosecutor charges, argues)	Clear individual causation
Police officer	Individual (single officer arrests, shoots, searches)	Clear individual causation
President	Individual (single person signs order)	Clear individual causation

1 **98.** For judges, prosecutors, and executive officials, the justiciability constraint that
2 necessitates legislative immunity does not exist. The individual whose act caused
3 injury can be identified. The causation element of civil liability can be established.
4 The logical foundation for immunity—impossibility of tracing collective action to
5 individuals—is absent.

6 **99.** This distinction is dispositive. Legislative immunity exists because individual
7 liability for collective acts is logically impossible. Judge-made immunity for officials
8 who act individually is not a logical necessity—it is a policy choice. And policy
9 choices that change the constitutional structure require constitutional amendment.

10 **B. The Article V Requirement**

11 **100.** The Constitution establishes the exclusive mechanism for constitutional change:
12 Article V amendment. Amendments must be proposed by two-thirds of both Houses of
13 Congress or by a convention called by two-thirds of state legislatures, and ratified by
14 three-fourths of state legislatures or state conventions. U.S. Const. art. V. This

1 supermajority requirement ensures that constitutional changes reflect broad national
2 consensus, not the preferences of narrow majorities or individual branches.

3 **101.** The Framers knew how to write immunity provisions. They did so for legislators
4 in Article I, Section 6. This was a deliberate choice reflecting the justiciability analysis
5 above: legislative immunity was logically necessary and therefore constitutionally
6 codified.

7 **102.** The Framers did not write immunity provisions for judges, prosecutors, or
8 executive officials. This omission was equally deliberate. The Framers were aware of
9 judicial power, prosecutorial power, and executive power. They created an entire
10 article for each branch. They specified immunities where logically necessary
11 (legislators) and declined to specify immunities where not logically necessary (other
12 officials). The Constitution's silence on judicial, prosecutorial, and executive immunity
13 is not an oversight—it is a choice.

14 **103.** Extending immunity to officials the Constitution does not protect changes the
15 constitutional structure. It alters the relationship between citizen and state by
16 eliminating remedies the Constitution otherwise provides. Such structural changes
17 require Article V amendment—proposal by supermajority, ratification by
18 supermajority. Nine justices (or five, in a majority) cannot accomplish what requires
19 broad national consensus.

20 **104.** Yet every immunity beyond the Speech or Debate Clause was created by judges,
21 not by constitutional amendment:

Immunity	Constitutional Requirement	Actual Process
Legislative (Speech or	Art. I, § 6 ratified 1788	Constitutional text

Debate)		
Judicial absolute	Article V amendment	<i>Stump v. Sparkman</i> (1978)—judges decided
Prosecutorial absolute	Article V amendment	<i>Imbler v. Pachtman</i> (1976)—judges decided
Presidential absolute	Article V amendment	<i>Nixon v. Fitzgerald</i> (1982)—judges decided
Executive qualified	Article V amendment	<i>Harlow v. Fitzgerald</i> (1982)—judges decided

1 **105.** In each case, judges accomplished through doctrine what the Constitution requires
2 amendment to achieve. This is not interpretation; it is amendment without Article V.
3 The judiciary expanded its own immunity, expanded immunity for prosecutors with
4 whom judges work daily, expanded immunity for the President whose nominations
5 determine judicial appointments, and expanded immunity for executive officials who
6 appear before courts. At no point did the people, through their representatives, ratify
7 these changes. The constitutional structure was altered by the branch that benefits from
8 the alteration.

9 **C. Amendment XIV Violations**

10 **106.** The Fourteenth Amendment provides: "No State shall... deprive any person of life,
11 liberty, or property, without due process of law; nor deny to any person within its
12 jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Judge-
13 made immunity violates both guarantees.

14 **107. Due Process Violation.** Due process requires, at minimum, an opportunity to be
15 heard before deprivation of a protected interest. Citizens who suffer constitutional
16 violations possess a protected interest in legal redress—the right to seek remedy for

1 government wrongs. Judge-made immunity deprives citizens of this interest without
2 any process at all.

3 **108.** Under *Harlow*, a citizen's claim is dismissed without adjudication of whether a
4 constitutional violation occurred. The court does not determine whether the official's
5 conduct was unconstitutional. The court does not evaluate the evidence. The court
6 does not hear testimony. The court determines only whether prior case law exists with
7 substantially similar facts. If not, the claim is dismissed. The citizen receives no
8 hearing on the merits of their constitutional claim—they are deprived of their right to
9 redress without the process that would determine whether that right was violated.

10 **109. Equal Protection Violation.** Equal protection requires that similarly situated
11 persons be treated alike. Judge-made immunity creates a classification that treats
12 government officials differently from ordinary citizens for identical conduct.

13 **110.** Consider identical acts: Person A unlawfully detains Person B, causing injury. If
14 Person A is an ordinary citizen, Person A faces full civil liability. If Person A is a
15 government official, Person A may claim immunity and escape liability entirely—even
16 if the conduct was unconstitutional, even if the injury was severe, even if the official
17 knew the conduct was wrong.

Actor	Identical Unlawful Act	Legal Consequence
Ordinary citizen	Unlawful detention	Full civil liability
Government official	Unlawful detention	Qualified immunity defense

18 **111.** This classification has no rational basis in the constitutional structure. The
19 Constitution does not provide that government officials may violate constitutional
20 rights without consequence while ordinary citizens face full liability for identical

conduct. Judge-made immunity creates a privileged class—government officials—who receive legal protection unavailable to ordinary citizens. This is the opposite of equal protection; it is special protection for agents of the state.

D. Article IV Violations

112. Article IV, Section 2 provides: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const. art. IV, § 2. This Privileges and Immunities Clause guarantees that citizens possess uniform rights regardless of geographic location.

113. The "clearly established" requirement creates geographic inequality in constitutional rights. Whether a right is "clearly established" depends on precedent in the relevant jurisdiction—typically the circuit in which the case arises. The same constitutional violation may be "clearly established" in one circuit and not in another.

114. This circuit-split problem produces absurd results:

Constitutional Violation	9th Circuit	5th Circuit	Result
Specific use of force X	Clearly established	Not clearly established	Citizen in California has remedy; citizen in Texas does not
Specific search method Y	Not clearly established	Clearly established	Citizen in Texas has remedy; citizen in California does not

115. Federal constitutional rights—rights guaranteed by the United States Constitution to all persons—become geographically contingent. A citizen's ability to obtain redress

1 for an identical constitutional violation depends on which state they happen to be in
2 when the violation occurs. This is precisely the inequality the Privileges and
3 Immunities Clause was designed to prevent.

4 **116.** The Constitution does not say: "The right of the people to be secure against
5 unreasonable searches and seizures shall not be violated, except in circuits where such
6 violation has not been previously litigated." The Fourth Amendment applies uniformly.
7 The *Harlow* doctrine makes its enforcement geographically variable, creating the state-
8 by-state inequality in fundamental rights that Article IV prohibits.

9 **E. The Ninth Amendment: Declaring Law Versus Creating Law**

10 **117.** The Ninth Amendment provides: "The enumeration in the Constitution, of certain
11 rights, shall not be construed to deny or disparage others retained by the people." U.S.
12 Const. amend. IX. This provision is not merely a reservation of rights—it is the
13 textual boundary between the judicial function (declaring law) and the legislative
14 function (creating law). Judge-made immunity crosses this boundary.

15 **118.** *Marbury v. Madison* established the judicial role: "It is emphatically the province
16 and duty of the judicial department to say what the law is." 5 U.S. (1 Cranch) 137, 177
17 (1803). The operative phrase is "what the law is"—not what the law should be, not
18 what policy requires, not what efficiency demands. Courts declare existing law; they
19 do not create new law. The latter is the legislative function assigned to Congress under
20 Article I.

21 **119.** The Ninth Amendment marks where declaration ends and creation begins. Rights
22 "retained by the people" **pre-exist** government. This is foundational to American

constitutional theory: the Declaration of Independence states that rights are "unalienable," endowed by the Creator, not granted by the state. Government is instituted to "secure these rights"—not to create them. When courts recognize unenumerated rights retained by the people, they declare what already exists:

Pre-existing right (retained by people) → Court recognizes → Declaration of law

120. Government immunities, by contrast, cannot pre-exist government. They are not natural rights. They are not retained by anyone. They must be **created**—and creation of law is a legislative function. When courts manufacture immunities for government officials, they create what did not exist:

No pre-existing immunity → Court invents → Creation of law (legislation)

121. This distinction explains why some derivative doctrines are constitutionally permissible while others are not. Courts have derived numerous doctrines not explicitly stated in constitutional text. The Ninth Amendment provides the filter for determining which derivations constitute legitimate judicial function and which constitute illegitimate judicial legislation:

Derivative Doctrine	Beneficiary	Pre-Existence	9th Amendment	Judicial Function
Right to privacy	The people	Rights pre-exist, are "retained"	Compliant	Declaring law
Freedom of association	The people	Rights pre-exist, are "retained"	Compliant	Declaring law
Right to travel	The people	Rights pre-exist, are "retained"	Compliant	Declaring law

Personal liberty (substantive due process)	The people	Rights pre-exist, are "retained"	Compliant	Declaring law
Miranda warnings	The people	Protects pre-existing 5th Amendment right	Compliant	Declaring law
Exclusionary rule	The people	Protects pre-existing 4th Amendment right	Compliant	Declaring law
Incorporation doctrine	The people	Extends pre-existing rights against states	Compliant	Declaring law
<i>Bivens</i> actions	The people	Provides remedy for pre-existing rights	Compliant	Declaring law
Judicial absolute immunity	Government	Cannot pre-exist; must be created	Non-compliant	Creating law
Prosecutorial absolute immunity	Government	Cannot pre-exist; must be created	Non-compliant	Creating law
Presidential absolute immunity	Government	Cannot pre-exist; must be created	Non-compliant	Creating law
Qualified immunity	Government	Cannot pre-exist; must be created	Non-compliant	Creating law
Executive privilege	Government	Cannot pre-exist; must be created	Non-compliant	Creating law
State sovereign immunity (extended)	Government	Cannot pre-exist; must be created	Non-compliant	Creating law

1 **122.** The pattern is categorical. Every derivative doctrine that expands rights for the
2 people is Ninth Amendment compliant—courts recognize pre-existing rights retained
3 by the people. Every derivative doctrine that creates protections for government
4 against the people is Ninth Amendment non-compliant—courts manufacture what did
5 not exist, exercising legislative power through judicial procedure.

6 **123.** The Ninth Amendment's text compels this conclusion. It speaks of rights
7 "retained by **the people**"—not retained by government, not retained by officials, not
8 created for the state. Unenumerated protections, under the Ninth Amendment, belong
9 to the people. When courts derive rights for citizens, they act consistently with this
10 textual command. When courts derive immunities for government, they contradict it:
11 they create unenumerated protections for the state that diminish the people's retained
12 right to seek redress.

13 **124.** The people's right to seek redress for government wrongs is itself a retained right.
14 It pre-exists the Constitution, grounded in natural law and common law traditions.
15 When government officials violate constitutional rights, citizens possess a pre-existing
16 right to remedy. Courts that recognize this right declare existing law. Courts that
17 create immunity to block this right do not declare law—they create a new legal
18 protection for government that did not exist, that cannot be "retained," and that
19 operates against the very people the Ninth Amendment protects.

20 **125.** This analysis reveals why judge-made immunity is categorically different from
21 other derivative doctrines. Critics of judicial derivation might question *Griswold's*
22 penumbras or substantive due process generally. But even if such doctrines stretch
23 judicial interpretation, they at least operate in the direction the Ninth Amendment

authorizes: recognizing rights retained by the people. Judge-made immunity operates in the opposite direction: creating protections for government against the people. It is not merely aggressive interpretation; it is interpretation pointed the wrong way—toward government benefit rather than toward the people's retained rights.

126. The constitutional architecture confirms this reading:

Constitutional Provision	Direction of Protection
Bill of Rights (Amendments I-VIII)	People against government
Ninth Amendment	Unenumerated rights retained by people
Tenth Amendment	Powers reserved to states or people
Fourteenth Amendment	People against state governments

Every rights-protecting provision in the Constitution protects the people against government—not government against the people. Judge-made immunity inverts this entire structure, creating protections that flow in the constitutionally unauthorized direction: from courts to government officials, against citizens.

127. Ninth Amendment compliance is therefore the categorical distinction between legitimate judicial function and illegitimate judicial legislation. Courts may derive protections for the people because such rights are "retained" and pre-exist—courts merely recognize them. Courts may not derive protections for government because such immunities are not retained, do not pre-exist, and must be created—and creation is not a judicial function.

128. This reading aligns precisely with the original understanding. James Madison, drafting what became the Ninth Amendment, addressed the concern that enumerating rights might imply that unenumerated matters belonged to the government:

"It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights

which were not placed in that enumeration; and it might follow by implication, that those rights which were not singled out, **were intended to be assigned into the hands of the General Government**, and were consequently insecure."

1 Annals of Cong. 439 (1789) (statement of Rep. Madison) (emphasis added).

Madison called this "one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system; but, I conceive, that it may be guarded against. I have attempted it, as gentlemen may see by turning to the last clause of the fourth resolution." *Id.*

129. Madison's original proposed language was even more explicit:

"The exceptions here or elsewhere in the Constitution, made in favor of particular rights, **shall not be so construed as to diminish the just importance of other rights retained by the people**; or as to enlarge the powers delegated by the constitution."

Id. (emphasis added). The critical verb—"construed"—identifies the audience: the judiciary. Courts construe the Constitution. The Ninth Amendment is a direct command to courts about how to perform their interpretive function: do not construe the Constitution in a way that assigns unenumerated matters to the government or diminishes rights retained by the people.

130. Madison's stated purpose could not be clearer. The Ninth Amendment was designed **specifically** to prevent unenumerated matters from being "assigned into the hands of the General Government." Judge-made immunity does exactly what Madison drafted the Ninth Amendment to prohibit:

Madison's Fear	What Immunity Doctrine Does
Unenumerated rights "assigned into the hands of the General Government"	Unenumerated immunity assigned to government officials

Enumeration would "disparage" unenumerated rights	Immunity disparages people's retained right to redress
Unenumerated rights would be "insecure"	People's right to remedy is completely insecure
Constitution would "enlarge the powers delegated"	Immunity enlarges government's power to violate rights without consequence

1 **131.** The Ninth Amendment has been called the "forgotten amendment"—ignored for
2 174 years before *Griswold v. Connecticut* (1965) first invoked it substantively. Robert
3 Bork famously dismissed it as an "inkblot" too vague to interpret. But this criticism
4 misunderstands why the amendment lay dormant. The Ninth Amendment was not
5 ignored because it was unclear; it was unnecessary to invoke because the occasion for
6 its violation had not yet arisen.

7 **132.** The constitutional structure before the Fourteenth Amendment (1868) limited the
8 Ninth Amendment's practical application:

Era	Constitutional Structure	Why 9th Amendment Not Invoked
1791-1868	Bill of Rights applied only to federal government	Federal government small; rarely interacted with citizens; states did most governing but were not bound by federal Bill of Rights
Pre-1868	"Persons" with constitutional rights narrowly defined	Enslaved people excluded from constitutional protections entirely

9 The Ninth Amendment could not be violated in practice because there was little
10 occasion for federal officials to violate constitutional rights—they simply had
11 insufficient contact with ordinary citizens.

133. The Fourteenth Amendment (1868) transformed this structure. Ratified to protect freed slaves from state oppression, it extended due process and equal protection against state governments for the first time. The Civil Rights Act of 1871 (now 42 U.S.C. § 1983) created a cause of action for citizens to sue state officials for constitutional violations. "Persons" with enforceable constitutional rights now included formerly enslaved people and their descendants.

134. This transformation created the accountability that would eventually trigger immunity doctrine. For the first time:

- State officials could be sued for constitutional violations
- The volume of potential civil rights claims increased dramatically
- Officials—particularly in states that had maintained slavery and continued to oppress Black citizens—faced widespread potential liability

135. The immunity doctrine emerged as the judicial response to civil rights accountability:

Year	Case	Context
1961	<i>Monroe v. Pape</i>	Revived § 1983 as civil rights vehicle
1967	<i>Pierson v. Ray</i>	First qualified immunity—civil rights workers arrested in Mississippi
1976	<i>Imbler v. Pachtman</i>	Prosecutorial absolute immunity
1978	<i>Butz v. Economou</i>	Federal official qualified immunity
1982	<i>Harlow v. Fitzgerald</i>	Modern qualified immunity doctrine

The pattern is unmistakable: immunity doctrine expanded in direct response to civil rights litigation.

136. The Ninth Amendment was not violated for 174 years because there was no need to violate it—until civil rights demanded constitutional accountability from government officials. The judiciary's response was to create immunity doctrines that:

- Assign unenumerated protections "into the hands of the General Government" (exactly what Madison prohibited)
- Disparage the people's retained right to seek redress (exactly what Madison prohibited)
- Disproportionately deny remedies to the very communities the Fourteenth Amendment was designed to protect

137. The amendment Madison designed to protect against government overreach was violated precisely when its protection was most needed: when formerly enslaved people and their descendants sought constitutional accountability from the state officials who had oppressed them and continued to violate their rights. The Ninth Amendment's 174-year dormancy was not evidence of its irrelevance; it was evidence that constitutional accountability had not yet expanded to trigger the government's interest in evading it.

F. The Comprehensive Constitutional Indictment

138. Judge-made immunity does not violate a single constitutional provision; it violates multiple provisions simultaneously. The comprehensive indictment demonstrates that immunity doctrine is not merely questionable policy but systematic constitutional subversion:

Constitutional Provision	Guarantee	How Judge-Made Immunity Violates
Article I, § 6	Immunity for legislators (only)	Silence on other officials is meaningful; extending immunity elsewhere requires amendment
Article III	Judicial power to declare law	Courts created law (immunity) rather than declared it—exercising legislative function
Article IV, § 2	Privileges and Immunities uniform across states	Circuit splits create geographic inequality in constitutional remedies

Article V	Constitutional change requires supermajority amendment	Judges changed constitutional structure through doctrine without ratification
Amendment VII	Right to jury trial in civil cases	Court eliminated jury trials for constitutional tort claims
Amendment IX	Rights not enumerated retained by people	Creates protections for government rather than recognizing rights retained by the people; crosses boundary from declaring law to creating law
Amendment XIV, § 1	Due process; equal protection	Claims dismissed without hearing; officials receive protection citizens do not

139. The pattern is unmistakable. Judge-made immunity:

- Extends constitutional protection (immunity) beyond what the Constitution provides (Article I, § 6)
- Exercises legislative power through judicial procedure, violating separation of powers (Article III)
- Creates geographic inequality in federal rights (Article IV)
- Amends the Constitution without Article V process (Article V)
- Eliminates jury trials the Constitution guarantees (Amendment VII)
- Creates law rather than declares it, manufacturing protections for government that are not "retained by the people" (Amendment IX)
- Denies due process and equal protection (Amendment XIV)

140. This is not one constitutional violation but seven. The doctrine that purports to "balance" government efficiency against citizen rights in fact nullifies citizen rights across multiple constitutional provisions while claiming legitimacy it does not possess. Judge-made immunity is unconstitutional—not as a matter of policy preference, but as a matter of textual analysis. The Constitution does not authorize it, multiple provisions prohibit it, and the process by which it was created (judicial decree) is the one process the Constitution excludes from constitutional amendment.

XII. CONCLUSION

1
2 **141.** *Harlow v. Fitzgerald* is a deeply flawed decision that has produced a deeply
3 flawed doctrine. The logical contradictions embedded in the decision—an "essentially
4 objective" standard, the elimination of malice as a basis for liability, the Catch-22 of
5 "clearly established" rights—are not minor imperfections. They are fundamental errors
6 that undermine the constitutional order.

7 **142.** The Constitution establishes rights. When those rights are violated, citizens are
8 entitled to remedies. *Harlow* interposes between the right and the remedy a judicially-
9 created barrier that, in practice, proves insurmountable in the vast majority of cases.
10 This is not "balancing" competing interests; it is nullification of constitutional
11 guarantees through procedural doctrine.

12 **143.** The remedy for *Harlow's* failures is not minor doctrinal adjustment. The decision
13 rests on premises that are logically incoherent, historically false, and constitutionally
14 unsound. The appropriate response is to recognize that qualified immunity as
15 articulated in *Harlow* lacks foundation in constitutional text, common law tradition, or
16 sound judicial reasoning—and to restore to citizens the remedies the Constitution
17 guarantees.

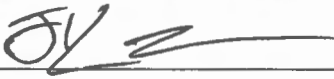
18 **144.** Where citizens seek equitable relief—declaratory judgment and injunction—
19 *Harlow* by its own terms does not apply. Footnote 34 explicitly reserved the question
20 of immunity in equitable actions. Courts should honor that reservation and recognize
21 that the "clearly established" requirement, developed to protect officials from personal
22 damages liability, has no application to suits seeking prospective relief against ongoing
23 constitutional violations.

XIII. CERTIFICATE OF COMPLIANCE

I, Joseph D. Kirchner, certify that this memorandum complies with the word limits of LR 7.1(f) and the type-size requirements of LR 7.1(h).

This memorandum contains approximately 11645 words, as determined by word-count function, applied to include all text including headings, footnotes, and quotations, excluding Table of Contents and Table of Authorities.

Dated: January 27, 2026



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