AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 12: The Contemporary Era – Criminal Justice/Search and Seizure

**Baxter v. Bracey, 140 S. Ct. 1862** (2020)

*Alexander Baxter’s effort to flee a burglary failed when a canine unit discovered his hiding place. Baxter claimed he was bitten by one of the dogs after he surrendered to police. Officer Brad Bracey claimed that the dog was released before Baxter surrendered. Baxter then sued Bracey under 42 U.S.C. § 1983. He claimed that the police office used excessive force in violation of the Fourth Amendment as incorporated by the due process clause of the Fourteenth Amendment. Both the lower federal court and the Court of Appeals for the Sixth Circuit dismissed the suit on the ground that Bracey’s use of the dog did not violate clearly established constitutional rights. Baxter appealed to the Supreme Court of the United States.*

*The Supreme Court of the United States denied certiorari. Justice Clarence Thomas claimed the justices should have decided the case on the merits and reconsidered past precedents on qualified immunity. Those precedents held that police officers could not be sued, even when the evidence demonstrated they had violated the Constitution, when past precedents had not clearly established the relevant constitutional rule. What is the justification for qualified immunity? Why dies Justice Thomas believe past precedents on qualified immunity mistaken. Many participants in the Black Lives Matter movement also object to qualified immunity because they believe that doctrine too often sanctions official misconduct. Should the court reconsider qualified immunity? What doctrine might best replace qualified immunity?*

The petition for a writ of certiorari is denied.

Justice [THOMAS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=Ibc7d6c05831111ea80afece799150095&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Ibc7d6c05831111ea80afece799150095), dissenting from the denial of certiorari.

Petitioner Alexander Baxter was caught in the act of burgling a house. It is undisputed that police officers released a dog to apprehend him and that the dog bit him. Petitioner alleged that he had already surrendered when the dog was released. He sought damages from two officers under [42 U. S. C. § 1983](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=42USCAS1983&originatingDoc=Ibc7d6c05831111ea80afece799150095&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), alleging excessive force and failure to intervene, in violation of the Fourth Amendment. Applying our qualified immunity precedents, the Sixth Circuit held that even if the officers’ conduct violated the Constitution, they were not liable because their conduct did not violate a clearly established right. Petitioner asked this Court to reconsider the precedents that the Sixth Circuit applied.

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The text of [§ 1983](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=42USCAS1983&originatingDoc=Ibc7d6c05831111ea80afece799150095&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) “ma[kes] no mention of defenses or immunities.”  Instead, it applies categorically to the deprivation of constitutional rights under color of state law.

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There likely is no basis for the objective inquiry into clearly established law that our modern cases prescribe. Leading treatises from the second half of the 19th century and case law until the 1980s contain no support for this “clearly established law” test. Indeed, the Court adopted the test not because of “ ‘general principles of tort immunities and defenses,’ ” but because of a “balancing of competing values” about litigation costs and efficiency.

There also may be no justification for a one-size-fits-all, subjective immunity based on good faith. Nineteenth-century officials sometimes avoided liability because they exercised their discretion in good faith. But officials were not *always* immune from liability for their good-faith conduct. Although I express no definitive view on this question, the defense for good-faith official conduct appears to have been limited to authorized actions within the officer's jurisdiction. An officer who acts unconstitutionally might therefore fall within the exception to a common-law good-faith defense.

Regardless of what the outcome would be, we at least ought to return to the approach of asking whether immunity “was ‘historically accorded the relevant official’ in an analogous situation ‘at common law.’ ”  The Court has continued to conduct this inquiry in absolute immunity cases, even after the sea change in qualified immunity doctrine. We should do so in qualified immunity cases as well.