The Lost Mandate

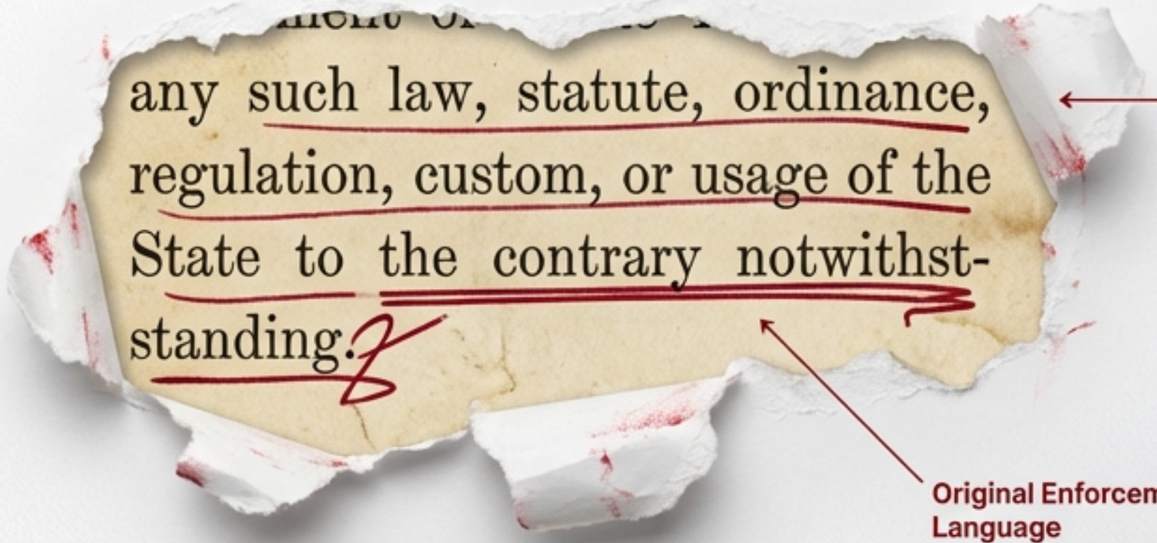
How a clerical error in 1874 erased the statutory text that illegitimizes Qualified Immunity

Legal Authority

Court System

42 U.S.C. § 1983

1874 Revision (The 'Clerical Error')



Missing Statutory Text (1871 Ku Klux Klan Act)

Original Enforcement Language (Removed)

Printing Act

Legal Precedent

We are having the wrong argument

The Distraction: Policy

The current debate treats immunity as a judicial choice, weighing “social costs” against “remedies”.

The Reality: Legality

The central question is not whether Qualified Immunity is good policy, but whether it is lawful. Is the doctrine compatible with the statute Congress actually passed?

1871: A tool forged in crisis

"Sheriffs, having eyes to see, see not; judges, having ears to hear, hear not... all the processes of justice skulk away as if government and justice were crimes."

— Rep. Rainey, 1871

The Civil Rights Act of 1871 was "strong medicine" for a nation in peril. State officials were complicit in a campaign of terror. The law was designed to interpose federal courts between the State and the People.

The Unmistakable Command

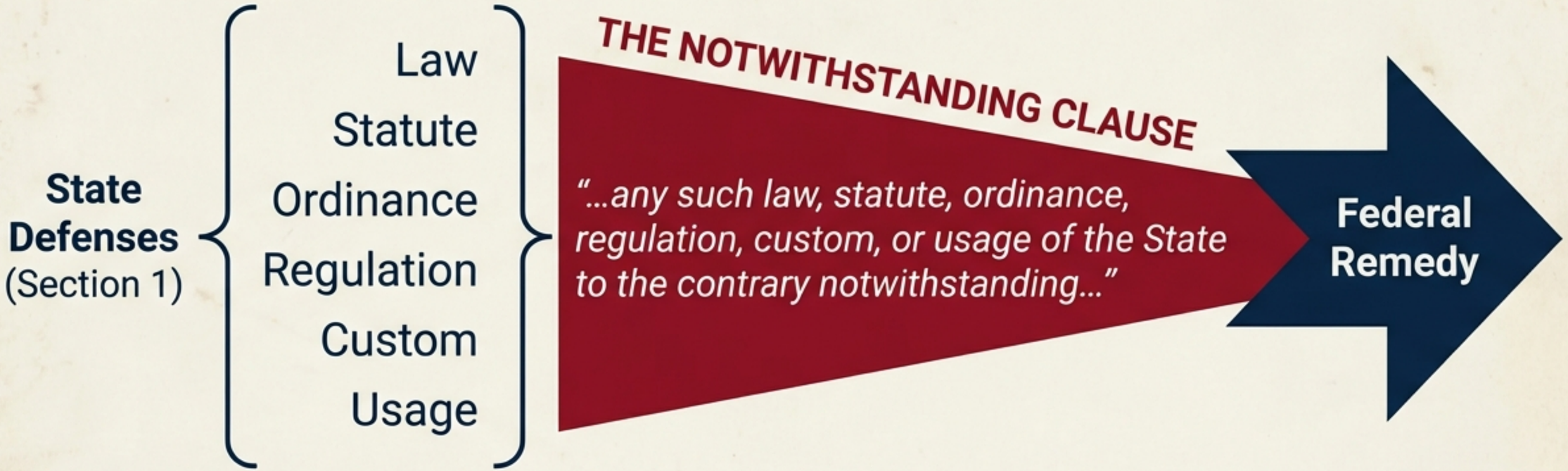
Source: United States Statutes at Large, Vol. 17, Page 13.

That any 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... to the deprivation of any rights... shall be liable to the party injured...

Absolute Imperative. No "good faith" exceptions. A strict liability tort.

Term of Inclusion. Congress debated exempting judges and police but voted NO.

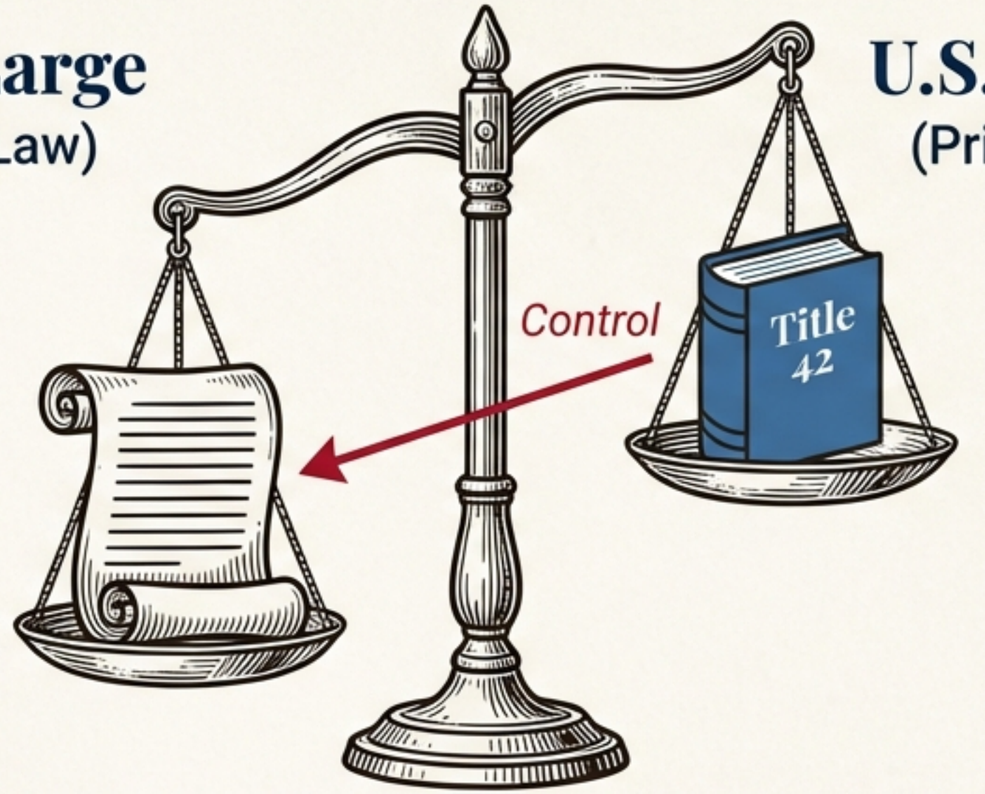
The Textual Bomb: The 'Notwithstanding' Clause



The **"Reflexive Liability Loop":** Congress listed state authorities (like *Custom*) specifically to nullify them. "**Custom**" was the legal term for common-law immunities. This clause was a preemptive strike against the defenses the **Supreme Court later invented**.

Codification is Not Repeal

Statutes at Large
(The Enacted Law)

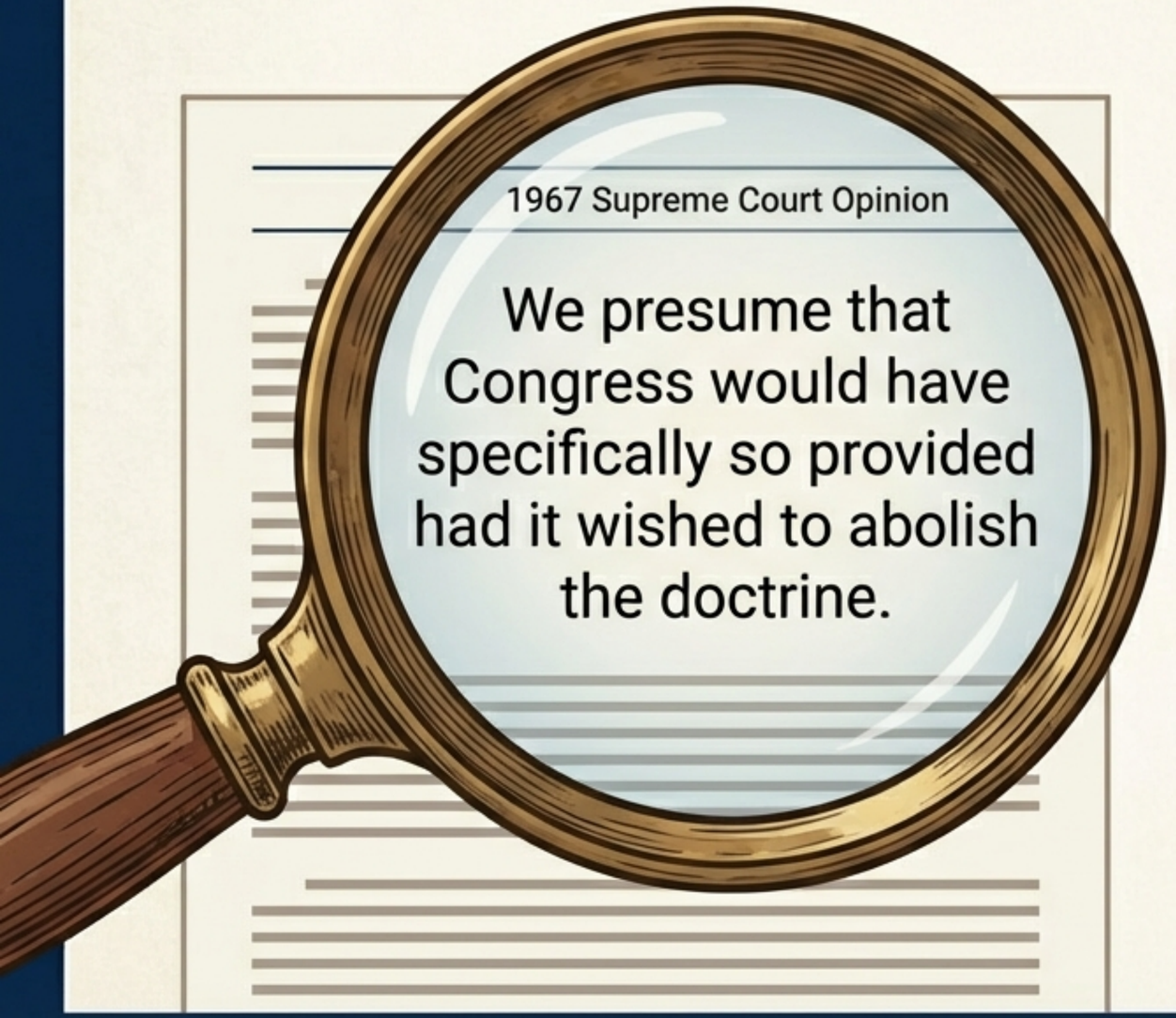


U.S. Code (Title 42)
(Prima Facie Evidence)

Title 42 has never been enacted as "Positive Law." Therefore, in any conflict, the Statutes at Large control.

Legally, the "Notwithstanding Clause" is still in effect. It is a "ghost" that courts ignore.

The False Premise: *Pierson v. Ray* (1967)



1871 Statute

any custom to the contrary notwithstanding

- The Court looked at the shortened code.
- They saw “silence” regarding immunities.
- **The Reality:** Congress DID specifically provide. The Court just didn’t check the Statutes at Large.

From Mistake to Policy: *Harlow v. Fitzgerald* (1982)

1871

The Statute

Strict Liability

1967

Pierson v. Ray

Good Faith (Subjective)

1982

Harlow v. Fitzgerald

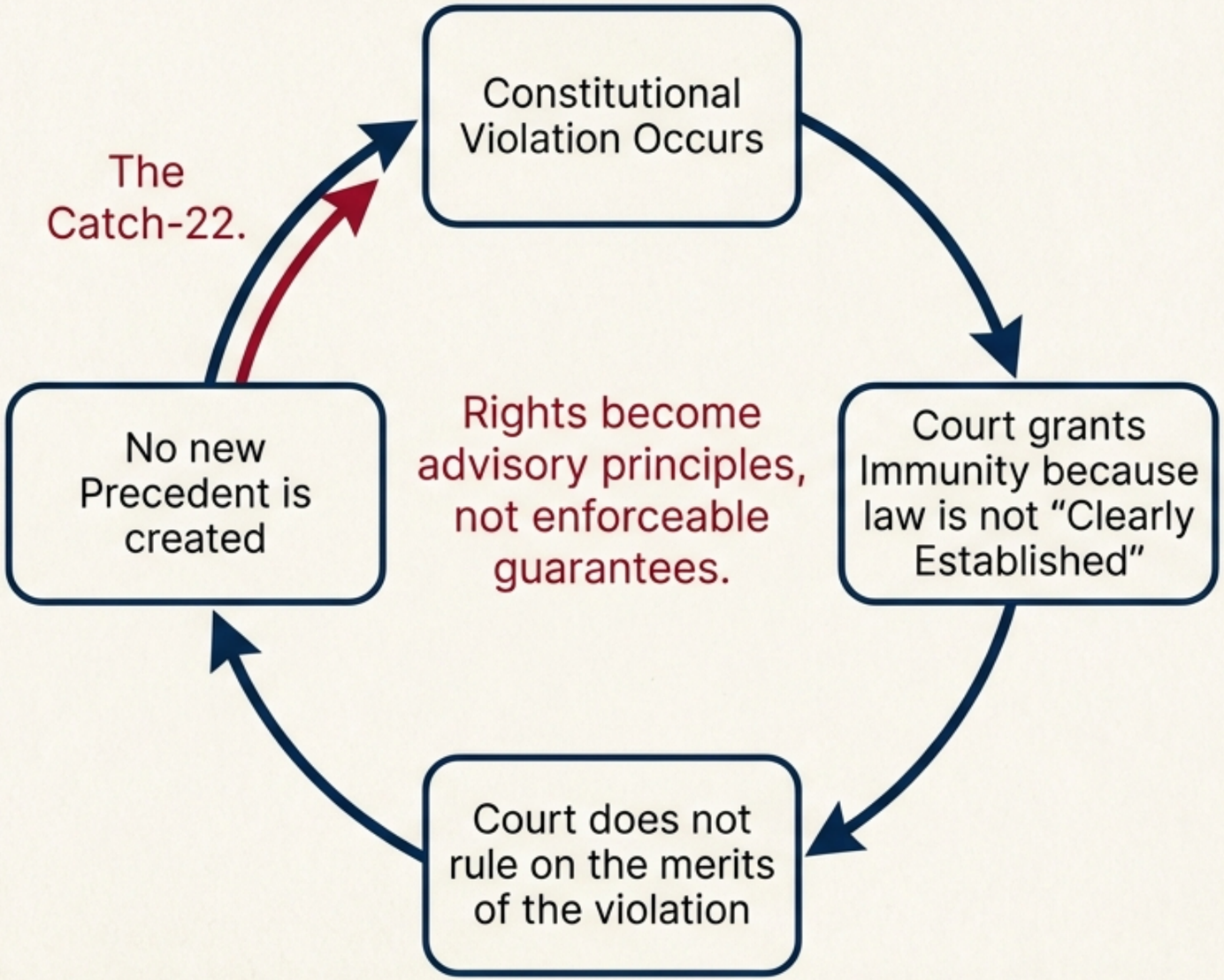
Clearly Established (Objective)

The Shift: The Court abandoned interpretation for "social costs":

1. Expense of litigation.
2. Diversion of official energy.
3. Deterrence from public office.

Result: The "Clearly Established Law" standard—a **complete judicial invention**.

The Feedback Loop of Stagnation



Statutory Fidelity vs. Judicial Invention

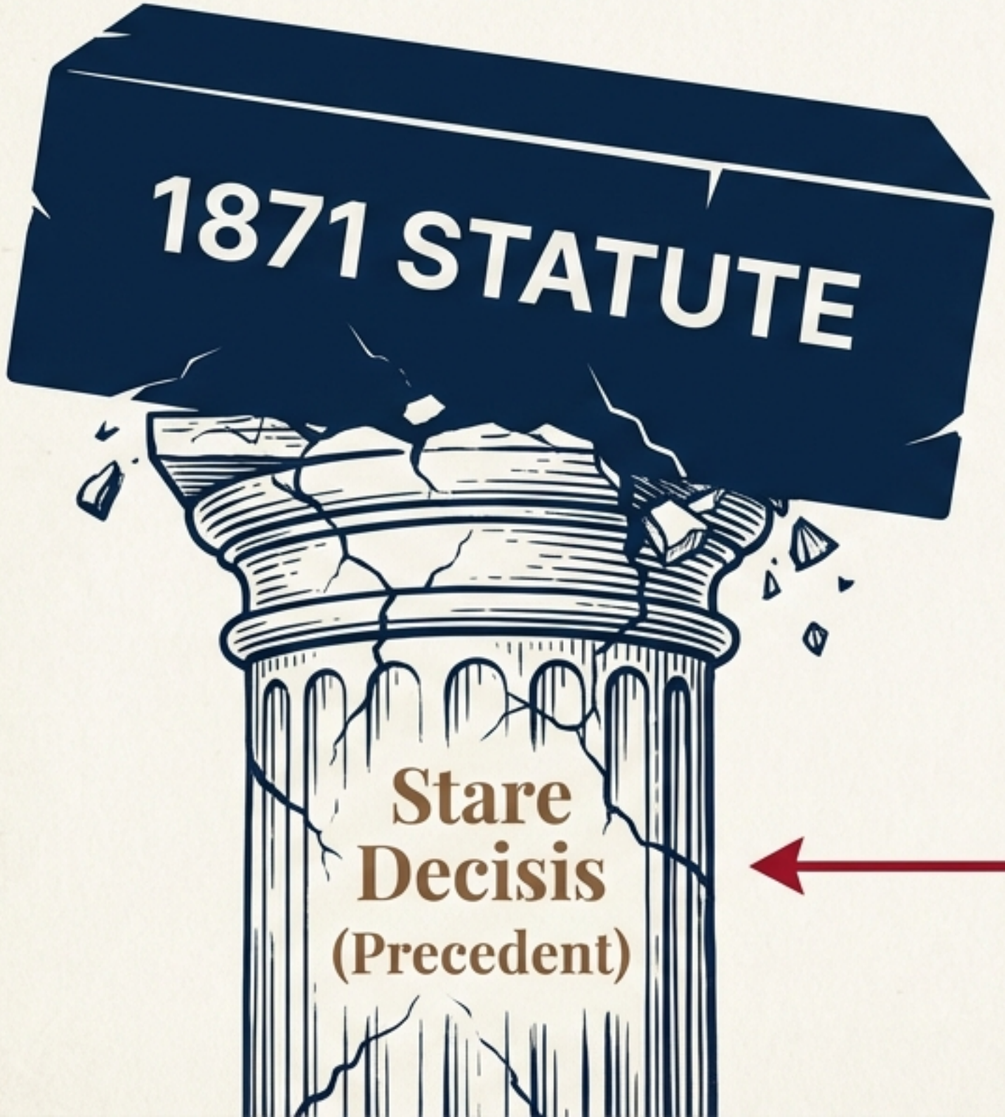
1871 Mandate (The Law)	Modern Doctrine (The Fiction)
Source: Statutes at Large (Text)	**Source:** Judge-made Common Law (Policy)
Trigger: Deprivation of Right	**Trigger:** Violation of 'Clearly Established' Law
Defense: None (Overridden)	**Defense:** Reasonableness / Custom
Goal: Remedy & Accountability	**Goal:** Shielding Officials / Efficiency

Strict Liability

Judicial Redline / Bar to Suit

Policy Exception

“You Cannot Acquiesce to an Error”



1. Stare Decisis is not a suicide pact. It cannot validate a doctrine built on a historical falsehood.
2. Congress never amended § 1983 to add immunity. The “silence” is judicial, not legislative.
3. Separation of Powers: The Judiciary cannot amend statutes to fix “social costs.” That is Congress’s job.

Restoration, Not Reform

The solution is not to “reform” Qualified Immunity. The solution is Abolition.

Abolition is simply an act of Statutory Fidelity.

The Mandate: Courts must return to the Statutes at Large.
They must enforce the law Congress enacted 150 years ago.

The Promise of 1871

1871

17 Stat. 13

The law to abolish Qualified Immunity has been on the books for over 150 years. The courts simply need to enforce it.