Katherine Mims Crocker

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ACADEMIC APPOINTMENTS

William & Mary Law School

+ *Associate Professor of Law*, 2022–present
+ *Assistant Professor of Law*, 2019–22

Stanford University

+ *Affiliate*, Stanford Constitutional Law Center (Stanford Law School), 2023–24 (future)
+ *Campbell Visiting Fellow*, Hoover Institution, January 2023

Duke Law School ▪ *Olin-Smith Fellow and Postdoctoral Associate*, 2017–19

RESEARCH INTERESTS

Federal Courts; Civil Rights Litigation; Constitutional Law; State and Local Government Law

TEACHING EXPERIENCE

Civil Procedure (starting Fall 2023); Federal Courts; State and Local Government Law; Property; Judicial Decisionmaking (with Maggie Lemos)

EDUCATIONAL BACKGROUND

University of Virginia School of Law ▪ J.D. 2012, Order of the Coif

+ Graduated first in the class
+ Faculty Award for Academic Excellence; Shannon Award; Jackson Walker LLP Award
+ Articles Development Editor, *Virginia Law Review*

Harvard University ▪ A.B. 2009, *cum laude*, History and Science

JUDICIAL CLERKSHIPS

Justice Antonin Scalia, Supreme Court of the United States ▪ 2013–14

Judge J. Harvie Wilkinson III, U.S. Court of Appeals for the Fourth Circuit ▪ 2012–13

LEGAL SCHOLARSHIP

Constitutional Rights, Remedies, and Transsubstantivity ▪ 110 VIRGINIA LAW REVIEW (forthcoming 2024)

+ *Named "Download of the Week" by Larry Solum's Legal Theory Blog*

+ *Profiled by Caprice Roberts in JOTWELL ("a space where legal academics can go to identify, celebrate, and discuss the best new scholarship relevant to the law")*
+ [Summary] *This article is about the extent to which federal courts should provide similar opportunities to obtain relief for discrete constitutional wrongs. It explores how a commitment to generality and neutrality values can translate into a paradigm promoting transsubstantivity for constitutional remedies–and how the Supreme Court has chosen alternative paths. The article proposes a novel framework that shows how nontranssubstantivity can be transparent, translucent, or opaque depending on the clarity of doctrinal inconsistency, and it examines how this framework could help improve judicial approaches to constitutional-remedies law. Among other contributions, by providing innovative tools for centering transsubstantivity as an important–but not absolute–aspect of constitutional-remedies law, this project offers a potential step toward decreasing perceptions of the Court's work as pervasively political and thereby reinforcing its legitimacy at this time of skepticism.*

A Prophylactic Approach to Compact Constitutionality ▪ 98 NOTRE DAME LAW REVIEW 1185 (2023)

[Summary] *State politicians turn to interstate coordination increasingly often to address increasingly controversial topics. The Constitution seeks to control such action, providing that "[n]o State shall . . . enter into any Agreement or Compact with another State" without "the Consent of Congress." But the Supreme Court has interpreted "any Agreement or Compact" so narrowly that "the Consent of Congress" is essentially never needed. This article advocates a prophylactic approach to compact constitutionality by focusing not on what "any Agreement or Compact" means, but on how "the Consent of Congress" works–and specifically by arguing that Congress should establish a system where silence in the face of submission can amount to consent. The article contends that regulatory safe-harbor theory, court and congressional precedent, and gains in efficiency, democracy, and community values all provide this proposal support.*

Qualified Immunity, Sovereign Immunity, and Systemic Reform ▪ 71 DUKE LAW JOURNAL 1701 (2022)

+ *Profiled by Howard M. Wasserman in JOTWELL ("a space where legal academics can go to identify, celebrate, and discuss the best new scholarship relevant to the law")*
+ [Summary] *Qualified immunity has become a central target of the movement for police reform and racial justice. And rightly so. In critical respects, though, qualified immunity has become too much a focus of the conversation about constitutional-enforcement reform. This article argues that the legal community should reconsider other aspects of the constitutional-tort system too–especially sovereign immunity, which interacts with qualified immunity in complex doctrinal and functional ways. The article contends that Congress should remove qualified immunity and allow entity liability at all levels of government for Fourth Amendment excessive-force claims while paving the way for further-reaching changes. Increasing accountability here should help provide equal justice under law while showing that peeling away unwarranted defenses will not wreak havoc on individual or government finances, the judicial system, or substantive rights.*

The Supreme Court's Reticent Qualified Immunity Retreat ▪ 71 DUKE LAW JOURNAL ONLINE 1 (2021) (essay)

[Summary] *The outcry against qualified immunity has been deafening. But when the Supreme Court recently invalidated grants of the defense based on reasoning at the heart of the doctrine for the first time since 2004, the response was muted. This essay argues that the Court's reticent qualified-immunity retreat deserves more attention than it has received and traces idealistic, pessimistic, and optimistic impressions. The essay argues that the optimistic view probably gets things right in that the Court has sought to preclude some of the doctrine's most extreme consequences. The essay then contends that this modest move nevertheless shows why reformers should focus not on the courts, but on the other branches of government–and not on one doctrine, but on constitutional-tort law as a whole.*

Reconsidering Section 1983's Nonabrogation of Sovereign Immunity ▪ 73 FLORIDA LAW REVIEW 523 (2021)

+ *Profiled by Howard M. Wasserman in JOTWELL ("a space where legal academics can go to identify, celebrate, and discuss the best new scholarship relevant to the law")*
+ [Summary] *Motivated by civil unrest and police violence, Americans have embarked on a major reexamination of how constitutional enforcement works. One important component is 42 U.S.C. § 1983, which allows civil suits against any*

"person" who violates federal rights. This article reconsiders the Supreme Court's longstanding holding that "person" excludes states. The article first argues that this case law offends democratic values and rests on inappropriate historical assumptions. It then explores Section 1983's semantic meaning and expected applications, uncovering evidence that some parties originally understood the statute to reach states and that congresspeople inadvertently amended the default definition of "person" in 1874. The upshot is that the best reading of Section 1983 may make states suable. The article closes by discussing implications for reforming constitutional-tort law.

A Scapegoat Theory of *Bivens* ▪ 96 NOTRE DAME LAW REVIEW 1943 (2021) (essay)

+ *Invited contribution to annual symposium and Federal Courts, Practice & Procedure Issue*
+ [Summary] *Scapegoating allows in-groups to sidestep social problems by casting blame onto out-groups. This essay explores two ways in which this phenomenon may intersect with* Bivens *caselaw, the focus of this symposium. The essay explores the possibility that the* Bivens *regime's rise, which allowed plaintiffs to seek damages from federal officials for some constitutional violations, countered various exercises in scapegoating–and that the* Bivens *regime's retrenchment itself constitutes an exercise in scapegoating. The essay closes by contending that legislative intervention could break the scapegoating cycle and by discussing some steps the legal community could take to advance that aim.*

An Organizational Account of State Standing ▪ 94 NOTRE DAME LAW REVIEW 2057 (2019) (essay)

+ *Invited contribution to annual Federal Courts, Practice & Procedure Issue*
+ [Summary] *This essay contends that because state plaintiffs are more like organizational plaintiffs than the literature has generally recognized, state standing in federal courts should not produce the controversy and confusion evident in many high-profile challenges to federal-government action. The essay argues that one can see state standing and organizational standing as fitting side by side (in the sense that the doctrines run in parallel) or hand in glove (in the sense that state standing is a subtype of organizational standing). After conducting a preliminary comparison of states' and organizations' capacities to serve as representational plaintiffs, the essay concludes that the legal community should be relatively comfortable with the broad scope of state standing.*

Qualified Immunity and Constitutional Structure ▪ 117 MICHIGAN LAW REVIEW 1405 (2019)

[Summary] *Qualified immunity has received criticism from wide-ranging sources, but the Supreme Court has repeatedly reinforced it. This article contends that an account rooted in constitutional structure can likely help explain why the doctrine has proved so resilient. The article argues that qualified immunity acts as a "compensating adjustment" to the separation-of-powers error ostensibly underlying the Court's decision to allow suits against federal officials without congressional approval. The article also argues that qualified immunity addresses federalism concerns by leveling the field for constitutional enforcement against state and federal defendants. The article contends, however, that these justifications cannot vindicate the doctrine. Combined with previous commentary, this analysis renders qualified immunity ripe for rejection or replacement with a more rights-protective alternative.*

A Prudential Take on a Prudential Takings Doctrine ▪ 117 MICHIGAN LAW REVIEW ONLINE 39 (2018) (essay)

[Summary] *A "ripeness" requirement articulated by the Supreme Court in the* Williamson County *case forced plaintiffs who wanted to raise federal takings claims to seek state remedies first. This essay argues that the Court should reject the requirement in a then-upcoming decision (as it ultimately did). The essay advocates discarding the doctrine not because it was a "prudential" rule belonging to a class that recent decisions had viewed with skepticism, but because it was a poorly considered prudential rule for several reasons. The essay's enduring contention is that the Court should take a careful approach to evaluating purportedly prudential jurisdictional limitations, for treating such rules as illegitimate across the board would undermine a host of doctrines with obscure foundations.*

Justifying a Prudential Solution to the *Williamson County* Ripeness Puzzle ▪ 49 GEORGIA LAW REVIEW 163 (2014)

+ *Cited in* Arrigoni Enterprises, LLC v. Town of Durham, *136 S. Ct. 1409 (2016) (dissent from denial of certiorari)*

+ [Summary] *This article argues that treating the* Williamson County *ripeness requirement as constitutional in character (as the Supreme Court sometimes did) created serious problems for litigants and the judicial system. So, the article contends, courts should have instead consistently viewed the rule as a "prudential" preference for giving state courts precedence over federal courts in deciding property-related issues. This argument had substantial real-world relevance because the rule seems often to have prevented takings plaintiffs from obtaining federal review and may (paradoxically) have precluded state review too. Justifying a prudential classification opened the door to exceptions where the rule's potential harms outweighed its supposed benefits.*

Securing Sovereign State Standing ▪ 97 VIRGINIA LAW REVIEW 2051 (2011) (note)

+ *Roger and Madeleine Traynor Prize (one of two best written works in graduating class)*
+ *Second Place, Brown Award for Excellence in Legal Writing (national law-student writing contest)*
+ [Summary] *This note argues that a jurisdictional bar to states bringing certain suits against the federal government should apply to claims premised on "quasi-sovereign" interests (which are representational of citizens' concerns) and not "sovereign" interests (which relate to states' core governing abilities). On a theoretical level, the note outlines and applies a general framework for understanding state standing in federal courts. And on a practical level, it bears relevance to issues that have arisen in several recent high-profile cases, including challenges to the Affordable Care Act's individual mandate and the Trump administration's travel bans.*

AMICUS BRIEF

Dyer v. Smith **(with Brandon Hasbrouck)** ▪ No. 3:19-cv-921-JAG, 2021 WL 694811 (E.D. Va. Feb. 23, 2021)

[Summary] *This amicus brief provided support for the court's rejection of the defendant Transportation Security Administration agents'* Bivens *and qualified-immunity arguments and for the opinion's emphasis on the racial-justice implications of the right to video-record government officials performing public duties.*

MEDIA COMMENTARY

Policing, Stories, Problems, and Solutions ▪ Balkinization Blog, Mar. 6, 2023 (invited symposium review of JOANNA SCHWARTZ, SHIELDED: HOW THE POLICE BECAME UNTOUCHABLE (2023))

The Clerkship–Academia Continuum ▪ JUDICATURE (Bolch Institute, Duke Law School), Summer 2021 (invited essay)

Taylor v. Riojas ▪ POST-DECISION SCOTUSCAST (Federalist Society), Dec. 7, 2020 (invited podcast episode)

As She Lies in State, a Tribute to Justice Ginsburg ▪ RICHMOND TIMES-DISPATCH, Sept. 25, 2020 (op-ed)

Justice Scalia: The Man I Knew ▪ RICHMOND TIMES-DISPATCH, Feb. 28, 2016 (op-ed)

LITIGATION PRACTICE

McGuireWoods LLP, Richmond, VA ▪ *Counsel*, 2017–19 ▪ *Associate*, 2014–17

PROFESSIONAL AFFILIATIONS

Virginia State Bar ▪ *Board of Governors*, Education of Lawyers Section

Virginia Bar Association

American Inns of Court

+ *Member*, John Marshall Inn of Court
+ *Recipient*, Temple Bar Scholarship

ACADEMIC SERVICE

AALS Section on Federal Courts

+ *Co-Secretary*, 2021–present
+ *Executive Committee*, 2020–present

William & Mary Law School

+ *Judicial Clerkship Committee*, 2023–present
+ *Enrichment Committee*, 2019–present
+ *Dean's Advisory Committee*, 2022–23
+ *John Marshall Federal Courts Program Liaison*, 2020–present
+ *Faculty Secretary*, 2020–21
+ *Plaintiff's Law Society Faculty Advisor*, 2023–present
+ *Directed Research Faculty Advisor*, 2023
+ *Independent Legal Writing Faculty Advisor*, 2021 (two students)
+ *Student Bar Association Group Mentorship Program Faculty Mentor*, 2020
+ *Summer Writing Project Program Faculty Supervisor*, 2020

SELECTED PRESENTATIONS

Junior Faculty Forum, University of Richmond School of Law ▪ May 24, 2023

Constitutional Rights, Remedies, and Transsubstantivity

National Conference of Constitutional Law Scholars, University of Arizona Rogers College of Law ▪ Mar. 25, 2023

Constitutional Rights, Remedies, and Transsubstantivity (selected)

Campbell Visiting Fellows Program, Hoover Institution at Stanford University ▪ Jan. 10, 2023

Constitutional Rights, Remedies, and Transsubstantivity

Emerging Scholars in Legislation & Law of the Political Process, AALS Annual Meeting ▪ Jan. 4, 2023

A Prophylactic Approach to Compact Constitutionality (selected)

Judicial Administration/Judicial Process Roundtable, Duke Law School ▪ Dec. 8, 2022

Constitutional Rights, Remedies, and Transsubstantivity

Southeastern Junior/Senior Conference, Florida State University College of Law ▪ Dec. 3, 2022

Constitutional Rights, Remedies, and Transsubstantivity

12th Annual Junior Faculty Federal Courts Workshop, University of Florida Levin College of Law ▪ Dec. 2, 2022

Constitutional Rights, Remedies, and Transsubstantivity (selected for a plenary session)

Faculty Workshop, Washington and Lee University School of Law ▪ Nov. 7, 2022

Constitutional Rights, Remedies, and Transsubstantivity

Tenth Circuit Bench & Bar Conference, U.S. Courts for the Tenth Circuit ▪ Sept. 8, 2022

Supreme Court Review

Horvitz Program in Constitutional and Public Law, Duke Law School ▪ Aug. 22, 2022

The Supreme Court October 2021 Term

Conference on State Constitutional Law, Emory University School of Law ▪ July 28, 2022

Commentary on Fred O. Smith Jr.'s Draft Paper Decentralizing Immunity

132nd Summer Meeting, Virginia Bar Association ▪ July 22, 2022

Knick: *A New Landscape for Takings Law*

Roundtable on Federalism, the Courts, and the Constitution, William & Mary Law School ▪ July 8, 2022

A Prophylactic Approach to Compact Constitutionality

Annual Meeting, Attorney General Alliance ▪ June 14, 2022

The Ginsburg-Scalia Initiative

Campbell Law Review Symposium, Campbell University School of Law ▪ Mar. 25, 2022

Qualified Immunity, Sovereign Immunity, and Systemic Reform

Civil Rights Enforcement Colloquium, Duke Law School ▪ Mar. 3, 2022

Qualified Immunity, Sovereign Immunity, and Systemic Reform

Faculty Colloquium, University of Alabama School of Law ▪ Feb. 28, 2022

A Prophylactic Approach to Compact Constitutionality

National Conference of Constitutional Law Scholars, University of Arizona Rogers College of Law ▪ Feb. 19, 2022

Qualified Immunity, Sovereign Immunity, and Systemic Reform (selected)

Faculty Colloquium, UC College of the Law, San Francisco ▪ Feb. 15, 2022

A Prophylactic Approach to Compact Constitutionality

Judicial Administration/Judicial Process Roundtable, Duke Law School ▪ Dec. 10, 2021

A Prophylactic Approach to Compact Constitutionality

Faculty Workshop, William & Mary Law School ▪ Oct. 7, 2021

A Prophylactic Approach to Compact Constitutionality

Current Trends in Public Law Scholarship Seminar, University of Chicago Law School ▪ Sept. 28, 2021

Qualified Immunity, Sovereign Immunity, and Systemic Reform

Junior Faculty Forum, University of Richmond School of Law ▪ Sept. 25, 2021

A Prophylactic Approach to Compact Constitutionality

Faculty Workshop, Wake Forest School of Law ▪ Sept. 2, 2021

Qualified Immunity, Sovereign Immunity, and Systemic Reform

Women in Law Teaching Works-in-Progress Workshop, University of Minnesota Law School ▪ July 8, 2021

Qualified Immunity, Sovereign Immunity, and Systemic Reform

Notre Dame Law Review Symposium, Notre Dame Law School ▪ Jan. 15, 2021

A Scapegoat Theory of Bivens

New Voices in Administrative Law and Legislation, AALS Annual Meeting ▪ Jan. 9, 2021

Reconsidering Section 1983's Nonabrogation of Sovereign Immunity (selected)

Young Legal Scholars Paper Competition Winners, Federalist Society Annual Faculty Conference ▪ Jan. 7, 2021

Reconsidering Section 1983's Nonabrogation of Sovereign Immunity (selected)

Civil Procedure Workshop, Northwestern University Pritzker School of Law ▪ Oct. 23, 2020

Qualified Immunity, Sovereign Immunity, and Systemic Reform (combined)

Reconsidering Section 1983's Nonabrogation of Sovereign Immunity (combined)

Roundtable on Administration in Crisis, George Mason University Antonin Scalia Law School ▪ Oct. 2, 2020

A Prophylactic Approach to Compact Constitutionality (selected)

Summer Course on Power in the American Constitutional System, Appalachian School of Law ▪ Aug. 18, 2020

Federal Constitutional Liability and Immunity

Judicial Administration/Judicial Process Roundtable, Duke Law School ▪ Dec. 12, 2019

Successive Cert at the Supreme Court

Junior Faculty Forum, University of Richmond School of Law ▪ May 21, 2019

An Organizational Account of State Standing

Women in Law Teaching Works-in-Progress Workshop, University of Minnesota Law School ▪ July 25, 2018

Qualified Immunity and Constitutional Structure

Workshop on Preparing for the Legal Academy, Notre Dame Law School ▪ Mar. 26, 2018

Qualified Immunity and Constitutional Structure (selected)

Faculty Workshop, Duke Law School ▪ Jan. 29, 2018

Qualified Immunity and Constitutional Structure