

GIVING QUALIFIED IMMUNITY TEETH: A CONGRESSIONAL APPROACH TO FIXING QUALIFIED IMMUNITY

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INTRODUCTION

“You call what he doing okay? You call what he doing okay?”¹ A bystander uttered these haunting words as he witnessed a Minneapolis police officer kneel on George Floyd’s neck for minutes until Floyd became unresponsive.² Immediate protests erupted across the country, some violent.³ These protests address police brutality, police tactics, and systemic racism.⁴ One significant piece of that ongoing conversation has been qualified immunity.⁵ A Google Trends analysis shows that terms such as “qualified immunity” and “police brutality” have concomitantly risen with “George Floyd.”⁶ And the Google Trend peaks for both “qualified immunity” and “police brutality” are higher than they have ever been—a clear indicator that the public is engaged and concerned about this topic.⁷

George Floyd’s death sparked renewed focus on qualified immunity⁸—a doctrine that had already been well-criticized prior to Floyd’s death.⁹

¹ Bystander, ‘Please, Please I Can’t Breathe’: Man Dies After Being Detained by Minneapolis Police, *FBI Investigating*, FOX 9 (May 27, 2020) (video courtesy of Darnella Frazier via Storyful), <https://www.fox7austin.com/news/please-please-i-cant-breathe-man-dies-after-being-detained-by-minneapolis-police-fbi-investigating> [<https://perma.cc/FB4N-22Y9>].

² *Id.*

³ Christine Hauser et al., ‘I Can’t Breathe’: 4 Minneapolis Officers Fired After Black Man Dies in Custody, *N.Y. TIMES* (June 15, 2020), <https://www.nytimes.com/2020/05/26/us/minneapolis-police-man-died.html> [<https://perma.cc/BM34-N9WS>]. As I am writing, protesters have set ablaze a police precinct not far from where George Floyd died. Dom Calicchio, *Minneapolis Third Precinct Police Station Set on Fire After Rioters Break in*, FOX NEWS (May 29, 2020), <https://www.foxnews.com/us/minneapolis-third-precinct-police-station-set-on-fire-after-rioters-break-in> [<https://perma.cc/7ZN8-FQUT>].

⁴ Jamila Michener, *George Floyd’s Killing Was Just the Spark. Here’s What Really Made the Protests Explode.*, WASH. POST (June 11, 2020, 4:00 AM), <https://www.washingtonpost.com/politics/2020/06/11/george-floyds-killing-was-just-spark-heres-what-really-made-protests-explode> [<https://perma.cc/EJN9-BJ5P>].

⁵ Debra Cassens Weiss, *Death of George Floyd Brings Debate on Qualified Immunity for Police Misconduct*, *A.B.A. J.* (June 2, 2020, 11:18 AM), <https://www.abajournal.com/news/article/death-of-george-floyd-brings-debate-on-qualified-immunity> [<https://perma.cc/4DR3-T83Y>].

⁶ GOOGLE TRENDS, trends.google.com (search for “George Floyd,” “qualified immunity,” and “policy brutality” respectively) (last visited Feb. 10, 2021).

⁷ *Id.*

⁸ Weiss, *supra* note 5. George Floyd’s situation may be a poor vehicle for driving qualified immunity reform because prominent cases such as this often result in large settlements. Lawrence Hurley & Andrea Januta, *When Cops Kill, Redress Is Rare - Except in Famous Cases*, *REUTERS* (May 8, 2020, 12:00 PM), <https://www.reuters.com/investigates/special-report/usa-police-immunity-outliers> [<https://perma.cc/Z6LQ-DUDD>]. Courts could also find that the officers violated clearly established law as the Ninth Circuit did long ago in factually analogous circumstances. *E.g.*, *Drummond v. City of Anaheim*, 343 F.3d 1052, 1054–55 (9th Cir. 2003) (holding officers violated a person’s constitutional rights when they placed their weight on his back and neck while the person repeatedly said he could not breathe and became permanently vegetative).

⁹ Amir H. Ali & Emily Clark, *Qualified Immunity: Explained*, *APPEAL* (June 20, 2019), <https://www.appeal.com>.

Commentators have already pointed fingers at the Supreme Court—the institution that created the doctrine—as the responsible party, claiming the doctrine “facilitate[s] a law enforcement culture that tolerates extreme, even sadistic violence against civilians.”¹⁰

Qualified immunity is no stranger to criticism. Academics have criticized the doctrine as both unlawful¹¹ and ineffective.¹² Media organizations have criticized the doctrine.¹³ A major think-tank has created an entire website dedicated to abolishing qualified immunity.¹⁴ Public opinion data shows widespread support for abolishing qualified immunity.¹⁵

And these criticisms are bipartisan. Congressional Democrats and Republicans have signed on to a bill to abolish qualified immunity.¹⁶ Ideologically opposite media organizations have criticized the doctrine.¹⁷ Even traditionally

[//theappeal.org/qualified-immunity-explained](https://theappeal.org/qualified-immunity-explained) [<https://perma.cc/RCE5-FF6X>]; Jay Schweikert, *Two Recent En Banc Decisions Exemplify the Injustice, Impracticality, and Persistent Confusion Inherent to Qualified Immunity*, CATO INST.: CATO AT LIBERTY (Aug. 22, 2019, 2:35 PM), <https://www.cato.org/blog/two-recent-en-banc-decisions-exemplify-injustice-impracticality-persistent-confusion-inherent> [<https://perma.cc/U2J9-WB7E>].

¹⁰ Mark Joseph Stern, *The Supreme Court Broke Police Accountability. Now It Has the Chance to Fix It*, SLATE (May 27, 2020, 5:54 PM), <https://slate.com/news-and-politics/2020/05/george-floyd-supreme-court-police-qualified-immunity.html> [<https://perma.cc/T339-46B9>]; C.J. Ciaramella, *The Supreme Court Has a Chance to End Qualified Immunity and Prevent Cases Like George Floyd’s*, REASON (May 29, 2020, 5:30 PM), <https://reason.com/2020/05/29/the-supreme-court-has-a-chance-to-end-qualified-immunity-and-prevent-cases-like-george-floyds> [<https://perma.cc/JFA5-MVUC>]; Jay Schweikert, *In the Wake of George Floyd’s Death, All Eyes Turn to SCOTUS*, CATO INST.: CATO AT LIBERTY (May 30, 2020, 5:36 PM), <https://www.cato.org/blog/wake-george-floyds-death-all-eyes-turn-scotus> [<https://perma.cc/L5J4-UZEW>] (“Mr. Floyd was ‘the latest victim of our near-zero-accountability policy for law enforcement.’” (quoting colleague Clark Neily)). .

¹¹ See William Baude, *Is Qualified Immunity Unlawful?*, 106 CAL. L. REV. 45, 46, 88 (2018) (arguing that instead of reinforcing qualified immunity, the Court should be “beating a retreat”).

¹² Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 9 (2017) (finding that qualified immunity as a policy tool rarely does the job for which it is intended: ending civil rights litigation against government officials).

¹³ Schweikert, *supra* note 10 (noting how ideological opposites—Fox News and the New York Times—both agree on this topic).

¹⁴ UNLAWFUL SHIELD, <https://www.unlawfulshield.com> [<https://perma.cc/HPT9-777X>].

¹⁵ *Majority of Public Favors Giving Civilians the Power to Sue Police Officers for Misconduct*, PEW RSCH. CTR. (July 9, 2020), <https://www.pewresearch.org/politics/2020/07/09/majority-of-public-favors-giving-civilians-the-power-to-sue-police-officers-for-misconduct> [<https://perma.cc/T2VV-L3GW>]; Emily Ekins, *Poll: 63% of Americans Favor Eliminating Qualified Immunity for Police*, CATO INST. (July 16, 2020), <https://www.cato.org/publications/survey-reports/poll-63-americans-favor-eliminating-qualified-immunity-police> [<https://perma.cc/N8ZV-GSH6>].

¹⁶ Eric Schnurer, *Congress Is Going to Have to Repeal Qualified Immunity*, THE ATLANTIC (June 17, 2020), <https://www.theatlantic.com/ideas/archive/2020/06/congress-going-have-repeal-qualified-immunity/613123> [<https://perma.cc/DBD6-KV4X>].

¹⁷ Schweikert, *supra* note 10.

ideologically opposite Supreme Court justices—Justices Sotomayor and Thomas—have criticized the doctrine.¹⁸

Yet even in a climate where abolishing qualified immunity has significant support, the Supreme Court has doubled down on its creation. In its last term, the Supreme Court had thirteen opportunities to address qualified immunity, some of which asked the Court to abolish qualified immunity entirely.¹⁹ But the Court declined to take up the qualified immunity question in any of the cases.²⁰ And in recent years, the Court has only shown a willingness to strengthen the doctrine, not limit it.²¹

Lost in the midst of the appropriately sensational civil rights cases is the costs of those civil rights cases. In all cases, qualified immunity is a defense for state actors in their private capacity. But because governments almost always indemnify their employees,²² the costs of civil rights litigation shift to the state, and, by implication, the taxpayers who fund the state. Since § 1983 was enacted, civil rights cases have increased dramatically.²³

These costs are not insignificant.²⁴ As civil rights cases increase, government attorneys must spend more time addressing those cases and less time on other valuable projects. Or governments must hire more staff to handle the increased caseload, which requires less expenditures in another area or an increase in funding. Often, governments may choose to contract these cases out to other

¹⁸ Weiss, *supra* note 5.

¹⁹ Jay Schweikert, *Supreme Court Will Soon Decide Whether to Reconsider Qualified Immunity*, CATO INST.: CATO AT LIBERTY (Apr. 28, 2020, 4:26 PM), <https://www.cato.org/blog/may-15th-supreme-court-will-finally-decide-whether-hear-cases-calling-abolition-qualified> [<https://perma.cc/2M3P-HVPY>].

²⁰ Jordan S. Rubin, *Justices Turn down Trio of Qualified Immunity Doctrine Cases (2)*, BLOOMBERG L. (May 18, 2020, 2:29 PM), <https://news.bloomberglaw.com/us-law-week/justices-wont-hear-trio-of-cases-on-qualified-immunity-doctrine> [<https://perma.cc/NP8M-4TQM>]; John Kruzel, *Supreme Court Sidesteps New Cases on Gun Rights, Police Protections*, THE HILL (June 15, 2020, 9:45 AM), <https://thehill.com/regulation/court-battles/502721-supreme-court-sidesteps-new-cases-on-gun-rights-police-protections> [<https://perma.cc/6V5H-UX2F>] (noting the court denied eight separate qualified immunity cases).

²¹ See Brent Kendall & Jess Bravin, *Supreme Court Turns down Cases Challenging Immunity Protections for Police*, WALL ST. J. (June 15, 2020, 5:40 PM), <https://www.wsj.com/articles/supreme-court-turns-down-cases-challenging-immunity-protections-for-police-11592257204> [<https://perma.cc/E2PB-FFNZ>].

²² Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 890 (2014) (noting that officers between 2006 and 2011 only paid .02 percent of \$730 million in civil suits because the municipality usually indemnifies them).

²³ *Over Two Decades, Civil Rights Cases Rise 27 Percent*, U.S. COURTS (June 9, 2014), <https://www.uscourts.gov/news/2014/06/09/over-two-decades-civil-rights-cases-rise-27-percent> [<https://perma.cc/UVZ6-3V2Q>] (noting that the number of cases is fifty times the number filed since 1964 and an increase of 27 percent in the last two decades).

²⁴ As Justice Scalia puts it, “as civil-rights claims increase, the cost of civil-rights insurance increases.” *Richardson v. McKnight*, 521 U.S. 399, 419 n.3 (1997) (Scalia, J., dissenting).

attorneys,²⁵ freeing up their own staff yet incurring significant additional costs. Regardless, taxpayers must, in some way, bear these costs.

Of course, compensating worthy litigants is desirable. After all, injured parties deserve some redress. However, many civil rights litigants are not ultimately successful,²⁶ which adds costs to a government that need not have been borne. This is perhaps why, at least in the prisoner civil rights context, Congress has already enacted some statutory reform to reduce frivolous litigation,²⁷ for example, which concomitantly reduces government costs.

Qualified immunity seeks to balance the benefit of compensating worthy litigants against the danger of imposing resource costs on government officials when doing so could be deleterious to the public.²⁸ In light of recent scholarship criticizing the doctrine's effectiveness in reaching its desired goals, however, it is worth reexamining the doctrine and asking if there might be a better way to balance these interests.

The goal of this Note is to provide that solution. Part I will provide a historical overview of qualified immunity. Part II will address some of qualified immunity's most pernicious problems and present a congressional reform package designed to cure those maladies. While this Note primarily addresses qualified immunity and § 1983 in the context of executive branch officials because it affects them most,²⁹ it is important to remember that qualified immunity affects all government officials in various types of cases.³⁰

²⁵ See Kent J. Bullard, *Filarsky v. Delia: An Unqualified Win for Qualified Immunity*, W. CITY (Dec. 1, 2012), <https://www.westerncity.com/article/filarsky-v-delia-unqualified-win-qualified-immunity> [https://perma.cc/3SAM-8SA4].

²⁶ See Theodore Eisenberg, *Four Decades of Federal Civil Rights Litigation*, 12 J. EMPIRICAL LEGAL STUD. 4, 11–12 (2015) (demonstrating that for constitutional torts, defendants prevail far more often at trial than plaintiffs, and the number of terminations in federal district court over time has increased). Cf. MATTHEW J. HICKMAN, U.S. DEP'T OF JUST., *CITIZEN COMPLAINTS ABOUT POLICE USE OF FORCE 3* (2006) (noting that out of all complaints with a disposition, only 8 percent of the complaints were sustained).

²⁷ Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1559–60 (2003).

²⁸ See *Harlow v. Fitzgerald*, 457 U.S. 800, 813–16 (1982).

²⁹ Alan K. Chen, *The Facts About Qualified Immunity*, 55 EMORY L.J. 229, 235 (2006).

³⁰ The thirteen cases the Court could have chosen to hear, but did not, provide a good sampling of the different types of cases qualified immunity touches. For example, *Ermold v. Davis*, 855 F.3d 715 (6th Cir. 2017) dealt with Kim Davis, the county clerk who refused to issue a marriage license to a homosexual couple. *Id.* at 716–17. And *Zadeh v. Robinson*, 928 F.3d 457, 462 (5th Cir. 2019) dealt with a case where state investigators barged into an office and reviewed medical files without notice or warrant. *Id.* at 470. These cases serve as helpful reminders that not all § 1983 cases deal with police officers and excessive force; therefore, any changes to qualified immunity should avoid narrowly looking at problems in the police context and recognize the larger implications. As Shakespeare's Friar Lawrence said, "Wisely and slow. They stumble that run fast." WILLIAM SHAKESPEARE, *ROMEO AND JULIET* act 2, sc. 3, l. 1129.

I. HISTORICAL OVERVIEW

Qualified immunity did not originate with *Scheuer v. Rhodes*, 416 U.S. 32 (1974)³¹ nor *Pierson v. Ray*, 386 U.S. 547 (1967), as many scholars believe, though those Supreme Court cases are important reference points.³² Instead, qualified immunity really begins with 42 U.S.C. § 1983 itself. After all, no government official would need an affirmative defense without a statute permitting liability in the first place. Consequently, understanding § 1983's text, purpose, legislative history, and social context will be helpful in examining just how far qualified immunity should extend.

A. *The Beginning: 42 U.S.C. § 1983*

Congress crafted § 1983 within a specific cultural context: post-Civil War and mid-Reconstruction.³³ Even though passing the Thirteenth and Fourteenth Amendments helped create a national vision of a more racially equal America,³⁴ it came as no surprise that those amendments did not self-execute.³⁵ Though constitutionally prohibited from denying individuals the “equal protection of the laws,”³⁶ states continued to enact laws intent on accomplishing that very purpose.³⁷ These Jim Crow laws and Black Codes limited individual liberty and freedoms.³⁸ Beyond these institutionalized laws, the Ku Klux Klan used violence and local government actors to enforce a vision contrary to the Second Founding.³⁹ Because of this violence, President Ulysses S. Grant sent Congress a message imploring Congress to use its legislative power to provide additional protection for liberty and property.⁴⁰

Thereafter, Congress introduced legislation to “enforce the provisions of the fourteenth amendment [sic] to the Constitution of the United States” that, though hotly debated, passed as the Civil Rights Act of 1871.⁴¹ Now codified as 42 U.S.C. § 1983, the act provides, in pertinent part, that any person deprived “of any rights, privileges, or immunities secured by the Constitution and laws” by

³¹ John C. Williams, *Qualifying Qualified Immunity*, 65 VAND. L. REV. 1295, 1299 (2012).

³² Kit Kinports, *Qualified Immunity in Section 1983 Cases: The Unanswered Questions*, 23 GA. L. REV. 597, 601–02 (1989).

³³ Susanah M. Mead, *42 U.S.C. § 1983 Municipal Liability: The Monell Sketch Becomes a Distorted Picture*, 65 N.C. L. REV. 517, 517–18 (1987).

³⁴ *Id.* at 518.

³⁵ *But see* Steven A. Engel, *The McCulloch Theory of the Fourteenth Amendment: City of Boerne v. Flores and the Original Understanding of Section 5*, 109 YALE L.J. 115, 124–25 (1999) (arguing that the original intention of Section 5 of the Fourteenth Amendment meant the amendment to be self-executing).

³⁶ U.S. CONST. amend. XIV, § 1.

³⁷ Mead, *supra* note 33, at 518.

³⁸ PHILLIP S. PALUDAN, A COVENANT WITH DEATH 51, 215 (1975).

³⁹ Mead, *supra* note 33, at 518 n.6.

⁴⁰ *Id.*

⁴¹ *Id.* (quoting CONG. GLOBE, 42d Cong., 1st Sess. 244, at XXIII (1871)).

any person acting “under [the] color of [state law]” can bring a private civil suit for monetary damages.⁴² Even though § 1983’s language appears clear on its face, courts have consistently struggled to apply it over time, constantly disagreeing over how to interpret the statute, the breadth of its scope, and to whom it applies.⁴³ These disagreements, contradictory rulings, and interpretations muddy the water for courts seeking to interpret the statute today.⁴⁴

That being said, at least one broad, central theme from § 1983 emerges from judicial rulings: its idealistic purpose. As one court has stated, the “purpose of Section 1983, according to its legislative history, is to redress violations of ‘human liberty and human rights’ committed by the States, state officials, or under color of state law.”⁴⁵ The Supreme Court has authoritatively declared:

Th[e] legislative history [of § 1983] makes evident that Congress clearly conceived that it was altering the relationship between the States and the Nation with respect to the protection of federally created rights; it was concerned that state instrumentalities could not protect those rights; it realized that state officers might, in fact, be antipathetic to the vindication of those rights; and it believed that these failings extended to the state courts. . . . The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people’s federal rights—to protect the people from unconstitutional action under color of state law.⁴⁶

Yet another justice has declared that § 1983 really effects a trifold purpose: override some state laws, provide federal remedies when the state provides none, and provide a federal remedy where the state remedy is practically inadequate.⁴⁷

Regardless of the expression, § 1983’s overarching purpose is transparent; Congress intended to prevent individual state actors from using their authority to subvert constitutional rights in the racial context. And when state actors do violate constitutional rights, victims should be compensated and the actor punished. That basic goal has remained clear. Yet the Supreme Court has struggled to interpret § 1983’s breadth, which means that at times its pronouncements have strengthened § 1983’s power, such as the rulings that helped foster the Civil Rights movement; but at other times, the Court has seemingly restricted its power and reach.⁴⁸

While the Supreme Court has exercised significant power in determining § 1983’s reach, Congress—§ 1983’s creator—has remained in the background of this conversation, unwilling to touch or clarify the doctrine. Congress has the power to amend § 1983 to its liking based on the policy concerns prevalent today

⁴² 42 U.S.C. § 1983.

⁴³ Mead, *supra* note 33, at 519–20.

⁴⁴ *Id.*

⁴⁵ *Thompson v. New York*, 487 F. Supp. 212, 226 (N.D.N.Y. 1979).

⁴⁶ *Mitchum v. Foster*, 407 U.S. 225, 242 (1972).

⁴⁷ Sheldon H. Nahmod, *Section 1983 and the “Background” of Tort Liability*, 50 IND. L.J. 5, 7 (1974) (citing *Monroe v. Pape*, 365 U.S. 167, 173–74 (1961)).

⁴⁸ Mead, *supra* note 33, at 519–20 (discussing the various cases that have restricted § 1983’s influence and cases, such as *Monroe v. Pape*, that have made § 1983 more available).

but has chosen not to. If others see § 1983 today as failing its purpose, then, just as President Grant called to action that Congress because of the then-perceived societal ills, those who see § 1983's failings should call upon Congress to amend § 1983 in a way that clarifies its scope and purpose for today. But when Congress enacted § 1983, it chose a policy of favoring potential litigants. It has since stood by that stance through inaction, witnessing the doctrine's impact upon the courts.⁴⁹ With this clear purpose in mind, it begs the question: Why would the Supreme Court articulate a doctrine that seemingly undercuts a clear congressional purpose?

B. Creating a Defense: The Many Faces of Qualified Immunity over the Years

While the Supreme Court did back away from a very restrictive reading of § 1983 and embrace an expansive reading,⁵⁰ the Court has since then found ways to mitigate those effects through creating (or adopting) a § 1983 defense and constantly improving it.⁵¹ This defense—qualified immunity—has grown so powerful that many call it an “obstacle” to civil rights claims⁵² and potentially unconstitutional.⁵³ The Supreme Court itself has recently declared that qualified immunity “protects ‘all but the plainly incompetent.’”⁵⁴

Importantly, when Congress adopted § 1983, it included no explicit provision creating such a defense,⁵⁵ nor does the legislative history infer a defense would exist.⁵⁶ In fact, a plain reading of the statute's broad, sweeping language could be seen as evidence that such a defense *should not* exist at all.⁵⁷ Yet it does, much to the chagrin of civil rights scholars.⁵⁸

Because of its controversial nature and the enormous amounts of civil rights litigation today, qualified immunity is constantly litigated, or, at the least, in the

⁴⁹ See Eric H. Zagrans, “*Under Color of*” What Law: A Reconstructed Model of Section 1983 Liability, 71 VA. L. REV. 499, 595 (1985) (noting that *Monroe v. Pape* unleashed the “flood-gates of litigation”).

⁵⁰ Mead, *supra* note 33, at 520.

⁵¹ Stephanie E. Balcerzak, *Qualified Immunity for Government Officials: The Problem of Unconstitutional Purpose in Civil Rights Litigation*, 95 YALE L.J. 126, 126 (1985) (noting that the Supreme Court adopted a new objective standard in *Harlow v. Fitzgerald*).

⁵² Rob Yale, Note, *Searching for the Consequences of Police Brutality*, 70 S. CAL. L. REV. 1841, 1850 (1997).

⁵³ George Leef, *Qualified Immunity -- A Rootless Doctrine the Court Should Jettison*, FORBES (Mar. 21, 2018, 9:53 AM), <https://www.forbes.com/sites/georgeleef/2018/03/21/qualified-immunity-a-rootless-doctrine-the-court-should-jettison> [<https://perma.cc/J2FE-E5XU>].

⁵⁴ *White v. Pauly*, 137 S. Ct. 548, 551 (2017) (quoting *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015)).

⁵⁵ David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. PA. L. REV. 23, 36 (1989).

⁵⁶ *Id.* at 30.

⁵⁷ 42 U.S.C. § 1983.

⁵⁸ See Baude, *supra* note 11.

background of the litigation.⁵⁹ “Just like its muddied approach to interpreting § 1983, the Supreme Court has adopted various standards and interpretive methods over time that have yielded conflicting views about the nature and scope of the doctrine of qualified immunity.”⁶⁰ It is likely that these competing visions depend upon the specific cultural context in which they are spawned but also reflect each justice’s views about the proper scope of § 1983 itself and the degree to which individual state actors should be liable within the course of their duties.

Recently, the Court has embraced qualified immunity as a potent defense that aggressively sifts out potential litigants.⁶¹ Indeed, one author views these changes to the doctrine as a process whereby the Supreme Court seeks to (a) transform qualified immunity into an absolute immunity and (b) shift the fact-finding power from the jury to the judge.⁶² However, the Court has not *always* embraced such an expansive vision. Over time, the Court has adopted various standards that embrace different notions of qualified immunity’s purpose, and without fail, each of these standards has generated considerable controversy. And each standard has been announced and practiced without any explicit congressional endorsement.

Evaluating each of the Court’s various standards helps explain the Court’s consistent policy justifications, and it helps reaffirm that this policy is malleable and can and should be tweaked to better serve its real policy goals. The foregoing Section hopes to illustrate just a few of the monumental cases that have shaped the Court’s jurisprudence on qualified immunity.

1. *Pierson v. Ray*

In *Pierson v. Ray*, white and black clergymen attempted to promote racial integration through a “prayer pilgrimage” by trying to use a segregated bus terminal waiting room.⁶³ Mississippi code at the time made it a misdemeanor to congregate with others in public so as to breach the peace and then refuse to move when so ordered by police.⁶⁴ Municipal police officers arrested the clergymen under this ordinance, and a municipal police justice convicted them.⁶⁵ The clergymen then brought a suit against the officers and police justice in federal court for violating federal rights pursuant to § 1983.⁶⁶

⁵⁹ Jack M. Beermann, *The Unhappy History of Civil Rights Legislation, Fifty Years Later*, 34 CONN. L. REV. 981, 1003 (2002) (finding an “explosion” of civil rights legislation is due to *Monroe v. Pape*).

⁶⁰ Schweikert, *supra* note 9.

⁶¹ See *White v. Pauly*, 137 S. Ct. 548, 551 (2017) (noting that qualified immunity protects “all but the plainly incompetent” (quoting *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015))).

⁶² Chen, *supra* note 29, at 231–33.

⁶³ *Pierson v. Ray*, 386 U.S. 547, 549, 552 (1967).

⁶⁴ *Id.* at 549.

⁶⁵ *Id.*

⁶⁶ *Id.* at 550.

In the district court, the clergymen lost. But on appeal, the court of appeals held the police officers liable under § 1983 because the Mississippi law the officers used to arrest the clergyman had been declared unconstitutional.⁶⁷ For the parallel state claim, however, the court of appeals found that the common law shielded officers from liability so long as they had “probable cause to believe the statute has been violated because Mississippi law does not require police officers to predict at their peril which state laws are constitutional and which are not.”⁶⁸

The Supreme Court eventually took the case to resolve whether the police officers could assert a “good faith and probable cause” defense to an action arising under § 1983.⁶⁹ Relying on traditional defenses to tort law, the Supreme Court ruled that since police officers are generally not liable under tort law for false arrest when they arrest someone who is later proven innocent, they should not be liable for enforcing an unconstitutional statute—facially or as applied—if they “reasonably believed” the statute was valid.⁷⁰ The Court reaffirmed earlier precedent, stating that § 1983 “‘should be read against the background of tort liability’ . . . Part of [that] background . . . is the defense of good faith and probable cause.”⁷¹

Pierson’s legacy, in effect, imports state common-law defenses and common-law notions of sovereign immunity into § 1983 litigation and interpretation.⁷² As the Court noted, the official standard for this “limited” immunity for police officers was “good faith and probable cause.”⁷³ However, in dicta, the Court used a few phrases that would hang around for decades to come and foreshadow the eventual shift in the qualified immunity standard. Indeed, in a hypothetical, the Court remarked that not only must the standard be a “good faith” standard, but the officers must “reasonably believe[.]” the statute was constitutional.⁷⁴ Furthermore, the Court made one sentiment that, to some degree, sums up the common sentiment used to justify qualified immunity today: “We agree that a police officer is not charged with predicting the future course of constitutional law.”⁷⁵ In other words, police officers are entitled to *judgment deference* when the law is not particularly clear.

In his dissent, Justice William O. Douglas criticized the nature of this immunity as well as its rationale. While he mainly criticized the Court’s holding in granting unqualified immunity to the police justice, Justice Douglas’s rationale stands as poignant criticism of the doctrine generally.⁷⁶ First, he argued that the

⁶⁷ *Id.*

⁶⁸ *Id.* at 551.

⁶⁹ *Id.* at 551–52.

⁷⁰ *Id.* at 555.

⁷¹ *Id.* at 556–57 (quoting *Monroe v. Pape*, 365 U.S. 167, 187 (1967)).

⁷² *See id.* at 557.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *See id.* at 559 (Douglas, J., dissenting).

very idea of these “exception[s]”—whether legislative, judicial, or executive—undermines the core of § 1983.⁷⁷ Second, he argued that the question of immunity is nothing more than a statutory interpretation issue, and Congress made clear that “every person” under § 1983 meant every person acting under color of state law.⁷⁸

Third, while the majority focused on statutory interpretation with a background in tort law,⁷⁹ Justice Douglas argued that the interpretative background should instead be the historical civil rights violations which prompted § 1983 in the first place.⁸⁰ Indeed, § 1983 is a remedial measure; relying on common law to interpret this statute in a way that weakens its remedial power just does not make sense.⁸¹ Finally, and perhaps most imperatively, Justice Douglas attacked one of qualified immunity supporters’ major policy positions: “The argument that the actions of public officials must not be subjected to judicial scrutiny because to do so would have an inhibiting effect on their work, is but a more sophisticated manner of saying ‘The King can do no wrong.’”⁸² Justice Douglas thought the likelihood that these notions of suit would actually interfere with another’s work was at best minimal.⁸³

2. Harlow v. Fitzgerald

The more modern conception of the qualified immunity standard, however, begins with *Harlow v. Fitzgerald*.⁸⁴ In *Harlow*, the petitioner contended that two of President Richard Nixon’s senior aides engaged in a conspiracy to violate his constitutional and statutory rights and that they completed this conspiracy when they ultimately fired him from his position.⁸⁵ In pre-trial litigation, the aides made several immunity arguments: (1) they were entitled to absolute immunity as an “incident of their offices as Presidential aides,”⁸⁶ (2) “derivative” immunity,⁸⁷ (3) a “special functions” immunity,⁸⁸ and (4) qualified immunity.⁸⁹ While the Court summarily dismissed most of the immunity arguments,⁹⁰ the Court

⁷⁷ *Id.*

⁷⁸ *Id.* at 559, 565.

⁷⁹ *Id.* at 556–57 (majority opinion).

⁸⁰ *Id.* at 560 (Douglas, J., dissenting).

⁸¹ *Id.* at 561.

⁸² *Id.* at 565.

⁸³ *Id.* 565–66.

⁸⁴ Michael M. Rosen, Comment, *A Qualified Defense: In Support of the Doctrine of Qualified Immunity in Excessive Force Cases, with Some Suggestions for Its Improvement*, 35 GOLDEN GATE U. L. REV. 139, 142 (2005).

⁸⁵ *Harlow v. Fitzgerald*, 457 U.S. 800, 802–03 (1982).

⁸⁶ *Id.* at 808–09.

⁸⁷ *Id.* at 810.

⁸⁸ *Id.* at 811–12.

⁸⁹ *Id.* at 813.

⁹⁰ *Id.* at 808–13.

focused its inquiry on qualified immunity, reviewing its flaws and then providing an “adjustment” to the standard to fix those perceived problems.⁹¹

First, the Court reiterated that executive officials may qualify for two types of immunity—absolute and qualified—but that most executive officials qualify only for qualified immunity.⁹² Second, the Court repeated prior justifications for qualified immunity. Qualified immunity shields officers from “disabling threats of liability” and “undue interference” with the public officer’s duties.⁹³ Presumably, protecting against “undue interference” meant encouraging executive officials who must “exercise their discretion” to “vigorous[ly] exercise . . . official authority” by eliminating barriers that would discourage prompt execution: the public ire.⁹⁴ Additionally, the Court emphasized that qualified immunity protects society from collective costs.⁹⁵ This purpose recognized that “the people” pay completely for government services; therefore, “social costs”—litigation expenses, diverted resources and energy for more pressing matters, and deterring others from becoming a public official—harm the collective.⁹⁶ Balancing the need for compensating innocent victims and deterring unlawful state conduct against the need to shield the collective from disabling legislation and encourage vigilant execution of laws forms qualified immunity’s primary purpose.

Third, the Court recognized an important problem in its prior analysis and subsequently changed the qualified immunity analysis in a way that still affects the analysis today. Prior to *Harlow*, the Court analyzed qualified immunity as a good faith affirmative defense.⁹⁷ This “good faith immunity,” however, required both an objective and subjective component.⁹⁸ While the objective component imposed a “presumptive knowledge” of “basic, unquestioned constitutional rights,” the subjective component focused on whether the defendant official “knew or reasonably should have known” that he was violating those rights.⁹⁹ Naturally, while the objective component could be assessed by looking to the outward legal landscape, the subjective component required detailed analysis of the mind of the official.¹⁰⁰

The crux of the issue for the Court was that its prior standard ran afoul of two ideas: (1) that insubstantial claims should not go to trial, but (2) the federal rules all but prohibited dismissing qualified immunity claims early on because the subjective element required fact-sensitive inquiries, and those fact-sensitive inquiries likely cannot be dismissed even at the motion for summary judgment

⁹¹ *See id.* at 813–15.

⁹² *Id.* at 807.

⁹³ *Id.* at 806.

⁹⁴ *Id.* at 806–07.

⁹⁵ *Id.* at 814.

⁹⁶ *Id.*

⁹⁷ *Id.* at 815.

⁹⁸ *Id.*

⁹⁹ *Id.* (quoting *Wood v. Strickland*, 420 U.S. 308, 322 (1975)).

¹⁰⁰ *Id.*

stage.¹⁰¹ The end product of this regime resulted in defendants being subjected to broad and probing discovery that could potentially disrupt efficient governance.¹⁰²

To fix this problem, the Court issued the modern (mostly) standard for qualified immunity. Defendant officials qualify for qualified immunity when “their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”¹⁰³ Furthermore, the Court emphasized that courts could, at the summary judgment stage, determine both currently available law as well as clearly established law at the time the conduct occurred.¹⁰⁴ The Court reasoned that this process could be done through solely objective factors, so no extensive discovery would be necessary.¹⁰⁵

Interestingly, not one of the *Harlow* justices seriously dissented. Three of the concurring justices agreed whole-heartedly with the Court’s newly announced substantive standard.¹⁰⁶ Four justices joined a concurring opinion that also agreed with the Court’s standard but disagreed with *Nixon v. Fitzgerald*, decided the same day.¹⁰⁷ Justice Warren E. Burger’s lone dissent only criticized the Court for not going far enough, arguing that the Court should have granted the aides absolute derivative immunity.¹⁰⁸ Thus, as a whole, the Court recognized two things: qualified immunity should exist, and the Court’s newly announced fix represented a good balance between the two different competing interests discussed in the majority opinion.

3. *Post-Harlow Case Law*

Post-*Harlow*, but pre-2015, the Court made a few adjustments to the qualified immunity standard that are worth discussing briefly. In 1987, the Court addressed the “clearly established law” aspect of qualified immunity.¹⁰⁹ In *Anderson v. Creighton*, an FBI agent sought qualified immunity for a warrantless search of a home he believed a bank robber had used to hide.¹¹⁰ When sued, the agent asserted qualified immunity, but the Eighth Circuit rejected his summary judgment motion on qualified immunity because the right to be secure in one’s home from warrantless searches absent some exception was clearly established.¹¹¹

¹⁰¹ *Id.* at 815–16.

¹⁰² *Id.* at 817–18.

¹⁰³ *Id.* at 818.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 819.

¹⁰⁶ *Id.* at 820–21 (Brennan, Marshall & Blackmun, JJ., concurring).

¹⁰⁷ *Id.* at 821–22 (Brennan, White, Marshall & Blackmun, JJ., concurring).

¹⁰⁸ *Id.* at 822 (Burger, J., dissenting).

¹⁰⁹ *Anderson v. Creighton*, 483 U.S. 635, 639 (1987).

¹¹⁰ *Id.* at 637.

¹¹¹ *Id.* at 638.

The Supreme Court then tweaked the qualified immunity standard in an important way. It recognized that “clearly established law” should not be analyzed generally, but more specifically.¹¹² The Court acknowledged that this approach implied a fact-specific inquiry but maintained that this still required legal objectivity.¹¹³ In other words, comprehending clearly established law requires understanding the objective legal landscape and applying it to the facts of the case as the officer confronted them.¹¹⁴ Thus, in *Anderson*, the ultimate question was whether the “contours of the right [were] sufficiently clear that a reasonable official would understand that what he is doing violates that right.”¹¹⁵ While defining law so specifically does not necessarily guarantee protection, “in the light of pre-existing law the unlawfulness must be apparent.”¹¹⁶

Interestingly, whereas the *Harlow* standard received virtual unanimity, three justices sharply dissented from the *Anderson* addition even though two of them had agreed whole-heartedly with the *Harlow* standard.¹¹⁷ The *Anderson* dissent focused on two important reasons for disagreeing with the majority. First, the dissent argued that the majority viewed *Harlow* as creating an “extraordinary circumstances” exception whereby an officer would be immunized when he could not have known the legal standard even though clearly established law does exist.¹¹⁸ Second, the dissent criticized the majority for creating a “double standard of reasonableness” that perhaps created perverse incentives for officers to violate the Fourth Amendment because of their “two layers of insulation from liability.”¹¹⁹ Implicit in the dissent’s discussion is the notion that qualified immunity may be appropriate for “high government officials,” but perhaps it should not be applied to law enforcement officers in the way it had been applied in other contexts.¹²⁰

In 2001, the Court again tweaked the qualified immunity standard when it decided *Saucier v. Katz*, an excessive force case where a military police officer shoved a potential protestor into a van at a speech delivered by Vice President Al Gore.¹²¹ In *Saucier*, the Court established a procedural mechanism for analyzing qualified immunity by requiring courts to first address whether the defendant violated a constitutional right.¹²² Only if answered in the affirmative would courts then address whether the law was clearly established at the time of the

¹¹² *Id.* at 639.

¹¹³ *Id.*

¹¹⁴ *See id.*

¹¹⁵ *Id.* at 640.

¹¹⁶ *Id.*

¹¹⁷ *Compare id.* at 647 (Stevens, Brennan & Marshall, JJ., dissenting), with *Harlow v. Fitzgerald*, 457 U.S. 800, 820–21 (1982) (Brennan, Marshall & Blackmun, JJ., concurring). Justices William J. Brennan, Jr. and Thurgood Marshall provided the dissenting votes.

¹¹⁸ *Anderson*, 483 U.S. at 648 (Stevens, J., dissenting).

¹¹⁹ *Id.* at 659.

¹²⁰ *See id.* at 654–55.

¹²¹ *Saucier v. Katz*, 533 U.S. 194, 198 (2001).

¹²² *Id.* at 201.

conduct.¹²³ This *Saucier* analysis rested upon the idea that deciding legal questions out of order undermines *stare decisis* because a court could essentially skip addressing constitutionality altogether, which effectively eliminates precedential possibility in qualified immunity cases.¹²⁴

However, like in *Harlow*, this two-step procedural change sparked criticism from the concurring opinion.¹²⁵ And like in *Harlow*, that criticism rested upon the Court duplicating the objective reasonableness analysis in both Fourth Amendment cases and in qualified immunity.¹²⁶ Ultimately, the *Saucier* concurring opinion seems to critique the new addition because it creates confusion and does not serve judicial economy by duplicating the analysis.¹²⁷

4. *The Current Qualified Immunity Landscape*

As the law now stands, “[q]ualified immunity attaches when an official’s conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”¹²⁸ In short, qualified immunity recognizes that “[a]n officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances.”¹²⁹ Courts have discretion in deciding both the order of the elements (the linear *Saucier* approach or out-of-turn) and whether to address one of the elements or both.¹³⁰ For qualified immunity to attach, clearly established law must be defined with specificity, especially in the Fourth Amendment context.¹³¹ The defense is so potent that not only does it “protect[] all but the plainly incompetent,”¹³² it is meant to be not just a defense against liability but an immunity from suit in the first place.¹³³

Overcoming a successful qualified immunity defense requires the plaintiff to point to case law where the facts and the holding specifically control the

¹²³ *Id.*

¹²⁴ *Id.* (“This is the process for the law’s elaboration from case to case, and it is one reason for our insisting upon turning to the existence or nonexistence of a constitutional right as the first inquiry. The law might be deprived of this explanation were a court simply to skip ahead . . .”).

¹²⁵ *Id.* at 210 (Ginsburg, Stevens, & Breyer, JJ., concurring).

¹²⁶ *Id.* at 212–16.

¹²⁷ *Id.* at 210.

¹²⁸ *City of Escondido v. Emmons*, 139 S. Ct. 500, 503 (2019) (quoting *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018)).

¹²⁹ *Saucier*, 533 U.S. at 205.

¹³⁰ *Pearson v. Callahan*, 555 U.S. 223, 236 (2009) (rejecting the *Saucier* sequence).

¹³¹ *Emmons*, 139 S. Ct. at 503.

¹³² *Taylor v. Barkes*, 135 S. Ct. 2042, 2044 (2015) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011)).

¹³³ *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (holding qualified immunity decisions are immediately appealable because “[t]he entitlement is an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial”).

outcome of the case because of how closely analogous the case law is to the present case.¹³⁴ Furthermore, the Supreme Court has provided unclear guidance as to which courts can clearly establish law, how many cases could clearly establish law, or even how factually similar the prior case law needs to be.¹³⁵

II. QUALIFIED IMMUNITY'S PROBLEMS AND SUGGESTED SOLUTIONS¹³⁶

As this historical look at qualified immunity has shown, qualified immunity is not a static doctrine and has undergone many substantive and procedural changes. To some degree, this long history of consistent and drastic change may be a problem itself because “unsettled” law may make it difficult for potential litigants to consistently grasp what is required. The virtue to this topsy-turvy history is that a direct and clear pronouncement from Congress could finally solidify this unsettled area and provide the Supreme Court solid guidance.

However, the Supreme Court's recent pronouncements have shifted how qualified immunity operates, and the effects of these changes have created problems for litigants. Some of these problems stem from Congress's failure to intervene;¹³⁷ some of these problems are byproducts of complex, competing historical revisions;¹³⁸ some of these problems stem from the inherent tension between a judicially created affirmative defense and a statute with language that does not provide for any immunities;¹³⁹ and some of these problems are procedural.¹⁴⁰

¹³⁴ Timothy T. Coates, *Covering the Bases: Litigating Qualified Immunity on Summary Judgment*, 60 MUN. LAW. 6, 10 (2019).

¹³⁵ See *Emmons*, 139 S. Ct. at 503 (“Assuming without deciding that a court of appeals decision may constitute clearly established law for purposes of qualified immunity . . .” (citing *City of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1776 (2015))).

¹³⁶ One creative, proposed solution to qualified immunity is to create constitutional small-claims courts that state and local governments operate but provide that qualified immunity cannot operate within these small claims courts. Ilya Somin, *The Case for Creating “Constitutional Small Claims Courts”*, REASON: THE VOLOKH CONSPIRACY (Dec. 23, 2019, 8:17 PM), <https://reason.com/2019/12/23/the-case-for-creating-constitutional-small-claims-courts> [<https://perma.cc/7U74-QSHG>]. Another worthwhile suggestion to fixing qualified immunity comes from Colorado. Colorado passed bipartisan legislation that creates a “state analogue” for § 1983 by permitting individuals to sue state officers in their individual capacity for violations of the state constitution and prohibits qualified immunity on these strictly state law claims. Jay Schweikert, *Colorado Passes Historic, Bipartisan Policing Reforms to Eliminate Qualified Immunity*, CATO INST.: CATO AT LIBERTY (June 22, 2020, 11:31 AM), <https://www.cato.org/blog/colorado-passes-historic-bipartisan-policing-reforms-eliminate-qualified-immunity> [<https://perma.cc/QK8T-6XWS>]. But this proposal has its limits. For example, it permits civil liability based on a state constitution, not the federal constitution, and the two are not coterminous. This may limit potential causes of action and does not help develop a greater body of federal case law.

¹³⁷ *Infra* Section II.A.

¹³⁸ See *supra* Section I.B (discussing the various standards the Supreme Court has espoused over time and how there have been inconsistent standards and opinions).

¹³⁹ *Infra* Section II.A.

¹⁴⁰ *Infra* Sections II.C & II.D (discussing the sequencing problem as well as allocation of the burden of proof).

Because qualified immunity deals with compensating civil rights victims for constitutional violations, understanding how the doctrine practically operates can help us understand the gravity of its effects.

Additionally, because of a widespread chorus growing around abolishing qualified immunity,¹⁴¹ understanding qualified immunity's problems is more important than ever. At the outset, I hope to be a limited apologist for the doctrine at an unpopular time. As such, I recognize that qualified immunity—as currently practiced—may negatively affect individual civil rights while only marginally serving its espoused goals. However, at its core, qualified immunity's policy justifications remain important.¹⁴² The question I seek to answer, therefore, is how might we salvage the unpopular doctrine to limit the vices while retaining its virtues?

To salvage qualified immunity, I propose that Congress must step in to provide the Supreme Court with proper guidance. In doing so, Congress must clarify the qualified immunity standard, specify the breadth of its scope, and stamp its seal of approval on it. The remainder of this Note will identify qualified immunity's most pernicious problems, present proposals as part of a Congressional package to fix the doctrine, and then point out some of the more likely criticisms these suggested revisions will encounter.

A. *The Legitimacy Problem*

The first problem with qualified immunity is its legitimacy. As one critic of qualified immunity observed, “[t]he Constitution . . . provides no basis for qualified immunity, and, on its face, the language of § 1983 ‘admits of no immunities.’”¹⁴³ Indeed, the doctrine has been criticized as nothing more than a mere “invention” of the judiciary to protect government officials from a very broadly

¹⁴¹ *Supra* note 5 and accompanying text. One new voice to the mix is a member of Congress—Justin Amash—who announced that he would present legislation which would abolish qualified immunity. Justin Amash (@justinamash), TWITTER (May 31, 2020, 6:30 PM), <https://twitter.com/justinamash/status/1267267244029083648> [<https://perma.cc/9VQL-F4N7>]. In his letter, Rep. Amash justifies abolishing qualified immunity for many of the reasons I will discuss as issues in this Note: permitting repeated constitutional violations by skipping part of the question, a judicially created doctrine that flies in the face of § 1983, and a disincentive to file suit. *Id.* While Congress—or at least one member of it—stepping in is desirable, the hope is that Congress can find a better way of striking the balance between tensions rather than stripping away the immunity entirely. One also wonders if this call for congressional abolishment of the judicially created doctrine affected the Supreme Court's decision to deny certiorari in the many cases presented to it in its conferencing.

¹⁴² *But see* Jay Schweikert, *The Most Common Defenses of Qualified Immunity, and Why They're Wrong*, CATO INST.: CATO AT LIBERTY (June 19, 2020, 2:17 PM), <https://www.cato.org/blog/most-common-defenses-qualified-immunity-why-theyre-wrong> [<https://perma.cc/LX X4-26WE>] (arguing that the *Graham* standard for assessing an officer's conduct sufficiently insulates officers from liability). However, as discussed *supra* Section I.B.3, while qualified immunity may often operate with police officers in the excessive force context, qualified immunity also applies outside that context as well where the *Graham* factors are not at play.

¹⁴³ Rudovsky, *supra* note 55 (quoting *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976)).

written law that would seem to impose strict scrutiny on government officials when they violate constitutional rights.¹⁴⁴ Justice Thomas himself takes the view that qualified immunity, as a judicially created doctrine, strays from the statutory text to which it is moored.¹⁴⁵ Other scholars have similarly criticized qualified immunity by questioning its lawfulness¹⁴⁶ and its efficacy,¹⁴⁷ while the public itself has recently expressed strong disagreement over the doctrine.¹⁴⁸

The rub of the matter is that if the Constitution does not explicitly or implicitly provide a basis for this doctrine, and if § 1983 truly does not intend for any immunities, a judicially-created doctrine seems to fly in the face of what the rule-makers have decided. Indeed, while qualified immunity may have been borne out of some limited common-law immunity doctrines, qualified immunity's eventual justification has rested in the Supreme Court's public policy considerations.¹⁴⁹ And when the Court justifies its extension of a common-law defense to a statute entirely for public policy reasons, the judicial power looks awfully close to the legislative power. This naturally vexes some people because the judiciary appears to legislate from the bench.¹⁵⁰ When the judiciary creates or applies an affirmative defense to a statute that never intended for such defenses, the practical effect is that this act amends the law.¹⁵¹ And because amending law is legislative in nature, the constitutional balance of powers could be upset as one branch appears to be undertaking the job of another.

This balance of powers issue is certainly not unique to qualified immunity because common-law doctrines are otherwise well-accepted in the legal community. But it is a more striking issue in this context. Most likely, this point of contention stems from the fact that the judicially created doctrine here denies victims compensation when the "big bad government" is the actor. Additionally, to some, qualified immunity has ended up resembling an "unqualified" immunity because of the sheer improbability of succeeding against the government on such claims.¹⁵² Finally, the doctrine affirmatively "vitiates the very statute that was

¹⁴⁴ Leef, *supra* note 53.

¹⁴⁵ *Baxter v. Bracey*, 140 S. Ct. 1862, 1862 (2020) (mem.) (Thomas, J., dissenting) ("Because our § 1983 qualified immunity doctrine appears to stray from the statutory text, I would grant this petition.").

¹⁴⁶ Baude, *supra* note 11, at 88 (stating that qualified immunity may be unlawful because it "lacks legal justification").

¹⁴⁷ Schwartz, *supra* note 12 (showing qualified immunity in practice fails to do its intended job).

¹⁴⁸ *Majority of Public Favors Giving Civilians the Power to Sue Police Officers for Misconduct*, *supra* note 15; Ekins, *supra* note 15.

¹⁴⁹ Rudovsky, *supra* note 55, at 38.

¹⁵⁰ Jason Pye, *How the Supreme Court Legislated from the Bench to Create Qualified Immunity for Government Officials*, FREEDOMWORKS (June 2, 2020), <https://www.freedomworks.org/content/how-supreme-court-legislated-bench-create-qualified-immunity-government-officials> [<https://perma.cc/ETH2-34ZV>].

¹⁵¹ Leef, *supra* note 53.

¹⁵² Baude, *supra* note 11, at 48.

intended to protect all persons . . . in their rights.”¹⁵³ These common convergent criticisms strike at the core of the doctrine’s legitimacy and therefore need to be addressed more than common-law immunities in other areas of the law. These criticisms perhaps strike even more intensely now. In potential cases of racially motivated excessive force, § 1983, which is a remedial measure for racial injustice, appears to be subverted when police officers receive immunity for the very actions § 1983 was enacted to prevent.¹⁵⁴

1. *The Legitimacy Fix*

Illegitimacy is a serious problem because people are more or less likely to accept laws and even court decisions when the public perceives them as being legitimate.¹⁵⁵ Legitimacy takes on added importance on divisive issues.¹⁵⁶ Qualified immunity’s legitimacy has been largely questioned on grounds that it lacks any constitutional or statutory basis and is contrary to § 1983’s original intent.¹⁵⁷ Any proposal to cure qualified immunity’s legitimacy must consider two questions: which branch is best suited to legitimize qualified immunity, and through which legal or procedural mechanisms should that branch legitimize qualified immunity?

a. *Which Branch Should Legitimize Qualified Immunity?*

Both the Supreme Court and Congress could act to legitimize qualified immunity. It is not hard to find compelling reasons to let the Supreme Court handle qualified immunity. After all, the Supreme Court is the branch who created, or rather applied, this doctrine to § 1983.¹⁵⁸ Indeed, Justice Alito has made the case that because the Supreme Court created the doctrine, Congress should not intervene and should let the Supreme Court self-correct, at least with respect to *Saucier v. Katz* sequencing.¹⁵⁹ This argument carries force with at least one scholar who claims that the Supreme Court, not Congress, should amend the doctrine

¹⁵³ Leef, *supra* note 53 (citing Brief of the Cato Institute as Amicus Curiae Supporting Petitioners, *White v. Pauly*, 137 S. Ct. 548 (2017) (No. 17-1078)).

¹⁵⁴ The major purpose for § 1983 was to provide private litigants a remedy against state actors for constitutional violations, largely due to the Ku Klux Klan’s aggressions viewed as “domestic terrorism.” Michael D. White et al., *Federal Civil Litigation as an Instrument of Police Reform: A Natural Experiment Exploring the Effects of the Floyd Ruling on Stop-and-Frisk Activities in New York City*, 14 OHIO ST. J. CRIM. L. 9, 38 (2016).

¹⁵⁵ Tom R. Tyler & Gregory Mitchell, *Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights*, 43 DUKE L.J. 703, 708 (1994) (“The maintenance of such legitimacy is crucial because legitimacy is deemed necessary to the voluntary acceptance of Court decisions, voluntary acceptance being the only type of public acceptance of the decision on which the Court formally can rely.”).

¹⁵⁶ *Id.* at 709.

¹⁵⁷ Baude, *supra* note 11, at 50.

¹⁵⁸ *Pearson v. Callahan*, 555 U.S. 223, 233–34 (2009).

¹⁵⁹ *Id.*

precisely because it has taken such invested ownership in it.¹⁶⁰ Likewise, the Supreme Court's history of constant revisions shows there has been at least some implicit acceptance of the Supreme Court's legitimacy to rule on the issue. Finally, some may find a controversial doctrine, even while policy based, is best settled through the Supreme Court, which could be perceived as the most legitimate institution.¹⁶¹

However, these thoughts are misplaced in the qualified immunity context. Congress is in the best position to legitimize qualified immunity because Congress enacted § 1983, and qualified immunity only operates as a defense to § 1983. In other words, Congress is in the best position as the authors of § 1983 to determine whether any defense to § 1983 should exist.

This rationale is only strengthened when looking at the commonly accepted rules of statutory construction: plain meaning and congressional intent. Section 1983 has no explicit reference to any defenses; it "admits of no immunities."¹⁶² Furthermore, Congress had a well-documented and specific goal in enacting § 1983.¹⁶³ Congress enacted § 1983 to provide a private cause of action against government officials for violating an individual's constitutional rights.¹⁶⁴ Congress enacted this statute to prevent government officials from using their authority to violate individual rights, especially when the rights deprivation was motivated by race.¹⁶⁵ Congress's statutory enactment of a qualified immunity defense would create a legislative history and a trail of legislative intent that would aid the Court in determining the scope of a government official's liability.¹⁶⁶ In light of these indicators, a strong defense that deprives plaintiffs of that cause of action seems to cut against what Congress originally intended. At the very least, it limits § 1983's efficacy.

In addition, Congress is also best suited to address qualified immunity because they are the branch responsible for making law, and Congress is in the best position to make critical policy judgments that affect the laws they pass. Congress's role as representatives of the people put them in the prime position to gauge the values of the people and to craft law and policy that reflects those

¹⁶⁰ Scott Michelman, *The Branch Best Qualified to Abolish Immunity*, 93 NOTRE DAME L. REV. 1999, 2007–09 (2018).

¹⁶¹ Compare generally Or Bassok, *The Supreme Court's New Source of Legitimacy*, 16 U. PA. J. CONST. L. 153 (2013) (describing how the Court has acquired legitimacy through public opinion polls), with Joseph Carroll, *Slim Majority of Americans Approve of the Supreme Court*, GALLUP (Sept. 26, 2007), <https://news.gallup.com/poll/28798/slim-majority-americans-approve-supreme-court.aspx> [<https://perma.cc/4N37-WX4D>] (comparing public approval and trust/confidence in the three different branches of government and finding that the Supreme Court is often perceived with greater approval and with greater trust/confidence compared to the other two branches).

¹⁶² Rudovsky, *supra* note 55 (quoting *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976)).

¹⁶³ *Supra* Section I.A.

¹⁶⁴ 42 U.S.C. § 1983.

¹⁶⁵ Mead, *supra* note 33, at 518 n.6.

¹⁶⁶ See *infra* Section II.A.1.b (discussing how enacting a bill creates a statutory interpretation aid).

values. Importantly, Congress should step in because qualified immunity does reflect important policy judgments—beyond simple judicial economy—that the courts themselves recognize.¹⁶⁷ These policy judgments are even more critical now as qualified immunity is criticized as permitting the very actions that § 1983 was enacted to address.¹⁶⁸ In fact, because of the highly politicized race issues attending qualified immunity right now, some see the Supreme Court’s failure to intervene when it had the chance as an abdication of their role in the qualified immunity context and an implicit endorsement of congressional intervention.¹⁶⁹ Therefore, Congress should be the branch to make essential policy judgments regarding when immunity should apply, as states have done so in generally waiving and retaining their sovereign immunity.¹⁷⁰

Finally, another compelling reason for Congress to legitimize the doctrine is that they can address all of qualified immunity’s issues at once; they can start on a clean slate with a consistent intent and provide greater uniformity. The Supreme Court, however, is limited by legal doctrines, such as *stare decisis*,¹⁷¹ and it can address issues only as they are presented to the Court. Unfortunately, sometimes it can be difficult to find the right procedural case to address the proper issues, and the Court may not be able to get one case that would sufficiently present each issue needing address. What could result is a time-consuming, patchwork-style doctrine. Indeed, history has already shown that the Supreme Court has created inconsistent standards over time, and there has been a substantial shift in the Court’s function.¹⁷² While passing meaningful qualified immunity

¹⁶⁷ The Supreme Court recognizes that while judicial economy is a recognized public policy consideration, qualified immunity is borne out of other concerns also: “deterrence of able citizens from acceptance of public office” and “the danger that fear of being sued will ‘dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.’” *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982) (alteration in original) (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949)). These rationales go beyond mere judicial economy and enter the realm of public policy considerations Congress should be making. This is because these public policy justifications go beyond court administration; they substantively affect access to a statutory cause of action.

¹⁶⁸ Compare Hailey Fuchs, *Qualified Immunity Protection for Police Emerges as Flash Point Amid Protests*, N.Y. TIMES (July 20, 2020), <https://nyti.ms/3esDevA> [<https://perma.cc/8JFG-32Q6>] (discussing how qualified immunity is at the center of systemic racism debates), with Mead, *supra* note 33, at 518 n.6.

¹⁶⁹ Debra Cassens Weiss, *Supreme Court Rejects Cases on Qualified Immunity Used to Shield Police Officers*, A.B.A. J. (June 16, 2020, 10:30 AM), <https://www.abajournal.com/news/article/supreme-court-rejects-cases-on-qualified-immunity-used-to-shield-police-officers> [<https://perma.cc/7F7G-SPXX>] (“The Supreme Court’s deeply disappointing decision today to punt on the critical issue of official immunity, in this time of national reckoning over police violence, places the ball squarely in Congress’ court.” (quoting David Cole, Legal Dir., ACLU)).

¹⁷⁰ *Infra* note 190.

¹⁷¹ Aaron L. Nielsen & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 NOTRE DAME L. REV. 1853, 1856–63 (2018) (discussing how the Court is unlikely to make any changes to qualified immunity because it likely qualifies for treatment under “superpowered” statutory *stare decisis* principles).

¹⁷² *Id.* at 1859–60 (describing the Court’s standard as “zigzagging”).

legislation through Congress may take time, Congress has at least expressed its interest in wading into this policy controversy.¹⁷³

b. But Through What Approach Should Congress Formalize the Doctrine?

While Congress may be the best branch to legitimize the qualified immunity doctrine, there are different approaches to do so. As one approach, Congress could pass some form of resolution, which have varying purposes and legal effects.¹⁷⁴ Simple resolutions, for example, are “[o]ccasionally . . . employed to express the body’s view on some public question” even though they ordinarily deal with internal procedures.¹⁷⁵ Qualified immunity is certainly a public question, but a simple resolution lacks the force of law,¹⁷⁶ so any pronouncement would be all bark and no bite. While this type of resolution may act as a tool to generate meaningful conversation,¹⁷⁷ more than a conversation is needed here.

Concurrent resolutions are perhaps stronger pronouncements than simple resolutions because they express the sentiments of both House and Senate.¹⁷⁸ These resolutions are “generally used to express facts, principles, opinions, or the legislative will.”¹⁷⁹ These resolutions have been used in the past to influence judicial interpretation and inform others of the legislative intent behind a passed bill.¹⁸⁰ However, because these pronouncements lack the force of law, courts can use them as aids but are not obligated to respect the resolution’s findings.¹⁸¹ In the qualified immunity context, while a simple resolution may be nothing more than a conversation starter, concurrent resolutions go one step further because courts can use them to aid in interpreting § 1983’s intent. However, these resolutions will still fail to provide meaningful reform¹⁸² because courts are not required to respect Congress’s findings, and they likely would not under *stare*

¹⁷³ See End Qualified Immunity Act, H.R. 7085, 116th Cong. (2020).

¹⁷⁴ See generally Denys P. Myers, *Joint Resolutions Are Laws*, 28 A.B.A. J. 33 (1942). While there are three different types of resolutions, they are all still considered less formal and less authoritative than bills. Rankin M. Gibson, *Congressional Concurrent Resolutions: An Aid Statutory Interpretation?*, 37 A.B.A. J. 421, 422–23 (1951).

¹⁷⁵ Myers, *supra* note 174, at 35.

¹⁷⁶ *Id.* (“[S]imple’ resolutions—have no legislative value beyond the precincts of Congress . . .”).

¹⁷⁷ *Id.* (describing how legislators use this tool deceptively and describing it as “shadow boxing in front of public opinion”).

¹⁷⁸ Gibson, *supra* note 174, at 424.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 479–80.

¹⁸¹ *Id.* at 424, 480.

¹⁸² But just because I argue they lack meaningful reform, which I define as the inability to create legally binding guidance or precedent, does not mean they otherwise lack value or importance, even in this context. See Robert Longley, *What Is a ‘Sense of Congress’ Resolution?*, THOUGHTCO. (Feb. 21, 2018), <https://www.thoughtco.com/sense-of-congress-resolutions-3322308> [<https://perma.cc/7L2T-5QM4>] (describing simple and concurrent resolutions as “‘sense of’ resolution[s]” and describing ways they are used).

decisis principles¹⁸³ or other principles that would diminish the concurrent resolution's efficacy.¹⁸⁴

Joint resolutions differ from the prior two resolutions because joint resolutions carry the force and weight of law.¹⁸⁵ This types of legislation is often used “as supplementary legislation to enunciate an attitude, delineate a policy, [or] touch upon extra-legislative matters.”¹⁸⁶ In essence, these joint resolutions seem to perform the same functions as the other resolutions—creating dialogue and signifying support—but perhaps with more authority since they carry the weight of law.¹⁸⁷ However, the downside to this approach—or any of the resolution approaches—is that they are unlikely to create meaningful reform, either because they cannot by themselves or because they just have not been used in that way. Ultimately, even the strongest resolution tool—the joint resolution—likely is not the proper approach because both joint resolutions and actual bills require the same procedures to become law. If both approaches require the same procedure, and really have the same effect, why not expend political capital to send the strongest message through an actual bill?

Another approach Congress could take to legitimize qualified immunity is to formally create or endorse the doctrine through statute. This approach is better than any of the resolutions because it is Congress's most powerful and formal tool and thus arguably sends the strongest message while retaining all the virtues of any of the resolution approaches. For example, this approach dispenses with any criticism that the doctrine would be unlawful because Congress would essentially be amending § 1983 in enacting a statutory qualified immunity doctrine.¹⁸⁸ Additionally, for the same reasons, no separation of powers concerns

¹⁸³ Nielson & Walker, *supra* note 171, at 1855–63 (discussing how the Court is unlikely to make any changes to qualified immunity because it likely qualifies for treatment under “superpowered” statutory *stare decisis* principles).

¹⁸⁴ At least in the state court context, the time between original passage of the bill and the concurrent resolution will determine its weight. Gibson, *supra* note 174, at 480. Because the span between when § 1983 was enacted and today is over 100 years, any concurrent resolution would likely not be accorded much weight, especially in light of the Court's own longstanding acceptance of qualified immunity.

¹⁸⁵ Myers, *supra* note 174, at 36–37.

¹⁸⁶ *Id.* at 37.

¹⁸⁷ See, e.g., H.R.J. Res. 78, 116th Cong. (2019) (expressing support for freedom of conscience principles under the First Amendment); see also Scott R. Anderson & Margaret Taylor, *The Long Road Ahead for the Congressional Resolutions on Iran*, LAWFARE (Jan. 9, 2020, 10:04 AM), <https://www.lawfareblog.com/long-road-ahead-congressional-resolutions-iran> [<https://perma.cc/XR2A-VPA9>] (discussing the legal effect of joint and concurrent resolutions). Regardless of their varying legal effects, they all could serve to engage in a dialogue with the public and with the Supreme Court. These pressures may foster greater change, and, at the very least, if not increase its legitimacy, prevent the public from immediately seeking to de-legitimize the doctrine through prohibition.

¹⁸⁸ This type of dialogue between the Court and Congress—where Congress enacts a bill after Court rulings—is Congress essentially capitalizing on its role to ensure the Court interprets its laws correctly, and this has already occurred in the civil rights context. See Michelman, *supra* note 160, at 2019.

would exist because the legislative power would simply be doing its constitutionally prescribed function: making law.¹⁸⁹

Moreover, statutorily legitimizing the doctrine represents the best approach because Congress would bind the Supreme Court when analyzing § 1983 claims. Rather than rely on the several differing doctrinal interpretations from the circuit courts on major issues, Congress could sweepingly enact new, explicit, and clear guidance for the Court. Because courts often look to legislative history to determine the scope of a statute, Congress could use the legislative history to send clear messages about its intent, the scope of the new qualified immunity, and how vigorously courts should construe the statute. This would help fix one of qualified immunity's most pernicious problems: a lack of uniformity.

Finally, this approach provides great value because a statute would facilitate extensive public debate and an accompanying public record. Because of the public interest regarding qualified immunity, an opportunity to have open, public debate where legislators' votes are recorded will be an incredibly valuable tool for the public to hold their representatives accountable. Indeed, this would also allow Congress to engage meaningfully with their constituency to determine which values or public policies they want to infuse into the new law—just as states have done when waiving their sovereign immunity.¹⁹⁰ While sovereign immunity and qualified immunity are different, the reasoning for deliberating when to waive—or bestow—an immunity is the same: they are driven by public policy, and the legislative branch is best seated to gauge public policy. And these public policy distinctions are truly important because they showcase the precise values each state—or country—esteems.¹⁹¹ In a world post-George Floyd—with riots,

¹⁸⁹ One scholar in favor of judicial oversight on qualified immunity argues that there are less separation of powers concerns in the § 1983 context because Congress has the authority to simply rewrite the law the way it sees fit. *Id.* at 2018–19. My proposal takes this seriously by arguing that Congress should do just that, not by rewriting § 1983 per se, but explicitly referencing § 1983 in delineating qualified immunity's reach.

¹⁹⁰ *See, e.g.*, NEV. REV. STAT. § 41.031 (providing that Nevada waives its sovereign immunity, though with some exceptions). Indeed, one critical factor driving qualified immunity is its relation to sovereign immunity. Because the United States operates under a dual sovereign system, both the states and America have their own system for asserting immunity for tortious acts. Thus, each state—like Nevada—can waive their common-law sovereign immunity. *See* Louis E. Wolcher, *Sovereign Immunity and the Supremacy Clause: Damages Against States in Their Own Courts for Constitutional Violations*, 69 CAL. L. REV. 189, 195 (1981) (“[N]o state can be sued in its own courts without its consent, regardless of the nature of the claim.”). But, like Nevada, each state had the opportunity to retain sovereign immunity for certain situations, and each state legislature had the opportunity to deliberate on the policy reasons surrounding each of them. However, qualified immunity is a federal law defense, and § 1983 is a jurisdictional hook solely for federal law claims. 42 U.S.C. § 1983. Importantly, § 1983 claims are against private individuals—though it is conduct from their official government capacity that works—so a qualified immunity defense is more like a cousin to sovereign immunity than a descendant. Regardless, the principle is similar in that, like the state legislatures, Congress should concretely deliberate and decide—based upon prevailing public policy reasons—when to bestow an immunity rather than waiving one, like in the sovereign immunity context.

¹⁹¹ *E.g.*, NEV. REV. STAT. § 41.033 (providing immunity for a failure to discover even if a duty to inspect exists); NEV. REV. STAT. § 41.0332 (granting immunity for acts and omissions of

protests, and fires blazing, and a national dialogue on this issue developing—it may be more important now than ever for public representatives in Congress to engage meaningfully and openly regarding when and under what circumstances we should grant officers immunity when they violate constitutional rights.

Finally, as an alternative but hopefully an addition, Congress could work with the Supreme Court to amend the Federal Rules of Civil Procedure to incorporate specific pleading standards when dealing with qualified immunity claims.¹⁹² There are several virtues to this approach. First, as in other cases, this reduces legitimacy concerns as Congress would be legislatively ratifying a defense to its own legislatively created law.¹⁹³ Second, because the Supreme Court and Congress can simultaneously amend the federal rules,¹⁹⁴ Congress would not only legitimize the doctrine but could engage in meaningful dialogue with the Supreme Court regarding the Court's jurisprudence on Congress's statute and sending the Court a strong message. Third, this would give Congress the opportunity to address on-the-ground issues with qualified immunity, such as its efficacy, by striking what it sees as the best balance between the doctrine's competing policy considerations through a new pleading standard.¹⁹⁵ Finally, in addition to adopting a new pleading standard for qualified immunity, Congress could provide more detailed guidance to the courts on how to *implement* that qualified

volunteer school crossing guards). These immunities have important public policy considerations—like encouraging volunteerism—which, without, would interfere with state goals. Congress has the opportunity now to promote certain values, and it should capitalize on this opportunity, or, at the very least, enact legislation that would permit each state the policy decision to allow, disallow, or modify its own qualified immunity for state and local officials. Perhaps this decentralized approach would better allow government officials to engage meaningfully with their community and create a community coalition.

¹⁹² See FED. R. CIV. P. 9(b) (adopting a different pleading standard for particular torts—fraud). Later in this paper, I propose that Congress adopt a specific pleading standard for qualified immunity. *Infra* Section II.D.1. While it may not be a common practice to adopt specific pleading standards for specific torts, that Congress has already singled out certain torts for this treatment provides some basis for adopting specific pleading standards for other torts in other contexts, such as in qualified immunity.

¹⁹³ See generally Ronald C. Moe & Steven C. Teel, *Congress as Policy-Maker: A Necessary Reappraisal*, 85 POL. SCI. Q. 443 (1970) (discussing how Congress has become weaker as it is perceived less as a policy-originator); Paul Gewirtz, *The Courts, Congress, and Executive Policy-Making: Notes on Three Doctrines*, 40 LAW & CONTEMP. PROBS. 46, 46–48 (1976) (discussing how Congress should be the main policymaker in making value-based judgments). While these two articles really primarily discuss how Congress should push back against the Executive Branch in order to reclaim its role as policymaker, the same should remain true with the relationship between Congress and the Court: Congress should push back when the Court makes impermissible policy judgments.

¹⁹⁴ 28 U.S.C. §§ 2072–74; FED. R. CIV. P. hist. n., VII (2019). See generally Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099 (2002) (discussing the rulemaking process regarding the Federal Rules of Civil Procedure).

¹⁹⁵ See *infra* Section II.D for an examination of how qualified immunity is undermined through its execution and how a different pleading mechanism would strike a better balance.

immunity standard through the notes section.¹⁹⁶ Such an approach may help ensure greater uniformity¹⁹⁷ between courts, as the lack thereof has been a particularly troubling aspect of qualified immunity jurisprudence.¹⁹⁸

In the end, I propose that Congress officially enshrine the doctrine of qualified immunity through statute because it is likely their strongest vehicle to publicly convey the doctrine. However, ideally, Congress would also adopt a new pleading standard through the Federal Rules of Civil Procedure for qualified immunity cases for reasons discussed *infra* Section II.D.1.

B. The Uniformity Problem

The second problem with current qualified immunity jurisprudence is the rampant discord and lack of uniformity between circuit courts on several fundamental questions, most importantly: What counts as clearly established law?¹⁹⁹ Relatedly, this lack of uniformity has also created *intra*-circuit problems that could create inequitable results for plaintiffs.²⁰⁰

The Supreme Court itself has had varying policies over time and has posited different standards²⁰¹ that have given insufficient guidance to circuit courts. For example, the Court has emphasized that even *intra*-circuit disagreement does not guarantee qualified immunity,²⁰² especially if it is a single case.²⁰³ Likewise, while the Court has sometimes argued that a “consensus of cases of persuasive authority” may suffice as clearly established law in the absence of controlling

¹⁹⁶ See, e.g., MODEL RULE OF PRO. CONDUCT r. 1.6 cmt. 6 (AM. BAR ASS’N 2020) (using a specific example to illustrate how the rule would work in practice); see also Struve, *supra* note 194, at 1158 (discussing some of the functions the notes can serve). See generally FED. R. CIV. P. Advisory Notes (2020) (showing how each “note” provides additional guidance to courts on how to interpret or implement the rule itself). Of importance, we know that the Supreme Court itself often holds the notes in high regards and some justices have often resorted to using the notes to interpret the rules. Struve, *supra* note 194, at 1161.

¹⁹⁷ But see Struve, *supra* note 194, at 1152–58 (discussing interpretation problems regarding the Advisory Notes and how some see them as nonbinding).

¹⁹⁸ *Infra* Section II.B. But see generally Adam N. Steinman, *The End of an Era? Federal Civil Procedure After the 2015 Amendments*, 66 EMORY L.J. 1 (2016) (discussing how the rule amendment process may not ever lead to consequential change from Congress to the pleading standards). While the 2015 amendments may not have resulted in meaningful change to pleading standards, such changes in the future are not impossible.

¹⁹⁹ Schwartz, *supra* note 12, at 19; Charles R. Wilson, “Location, Location, Location”: Recent Developments in the Qualified Immunity Defense, 57 N.Y.U. ANN. SURV. AM. L. 445, 447–48 (2000) (describing different circuit approaches).

²⁰⁰ One fundamental question—mandatory *Saucier* sequencing—I address later, but it is another significant area where courts are not uniform, leaving some judges to focus on one portion of the analysis at the expense of others. Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1, 42–46 (2015).

²⁰¹ Nielson & Walker, *supra* note 171, at 1859–60 (describing the Court’s standard as “zig-zagging”).

²⁰² *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 378 (2009).

²⁰³ *Ashcroft v. al-Kidd*, 563 U.S. 731, 741–42 (2011).

cases,²⁰⁴ the Court has made recent indications that perhaps not even a case from a controlling authority may clearly establish law.²⁰⁵

No wonder, then, that the circuit courts likewise maintain very different standards in meaningful ways. For example, both the Ninth and Eighth Circuits take a very broad-based approach in defining clearly established law.²⁰⁶ In both circuits, the law can be clearly established through binding authority, any available decisional law (including from other circuits and state courts), and even from cases that are not “on point” but leave just one logical conclusion.²⁰⁷ Such a broad standard benefits plaintiffs because a plaintiff can pull accepted arguments from a greater body of law to argue that the defendant had fair notice they violated constitutional rights. Similarly, this standard also imposes a greater burden on defendants for the same reason: defendants must be aware of the continuing case law in other jurisdictions.

The Sixth and Tenth Circuits, however, have a narrower approach to qualified immunity than either the Ninth or Eighth Circuits.²⁰⁸ While the Ninth Circuit looks to all decisional law, the Sixth Circuit rejects the idea that one case from another circuit suffices to establish the law for qualified immunity purposes.²⁰⁹ Similarly, the Tenth Circuit permits looking to circuit splits, but circuit splits alone, without some controlling authority within the circuit, will be insufficient.²¹⁰ In these circuits, it is more difficult for plaintiffs to prevail past qualified immunity because the body of law they can appeal to is more limited than in the Ninth Circuit. Similarly, the burden to defendants is lighter because the body of case law that can put them on notice is limited.

This disuniformity between circuits also exists with respect to allocating the burdens of proof and persuasion. Currently, the Fifth, Sixth, Seventh, Tenth, and

²⁰⁴ *Wilson v. Layne*, 526 U.S. 603, 617 (1999); *see also Plumhoff v. Rickard*, 572 U.S. 765, 779–80 (2014) (“To defeat immunity here, then, respondent must show at a minimum either (1) that the officers’ conduct in this case was materially different from the conduct in *Brosseau* or (2) that between February 21, 1999, and July 18, 2004, there emerged either ‘controlling authority’ or a ‘robust consensus of cases of persuasive authority.’” (quoting *Ashcroft*, 563 U.S. at 741–42)).

²⁰⁵ *District of Columbia v. Wesby*, 138 S. Ct. 577, 591 n.8 (2018) (“We have not yet decided what precedents—other than our own—qualify as controlling authority for purposes of qualified immunity.”); *City of Escondido v. Emmons*, 139 S. Ct. 500, 503 (2019); *City of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1776 (2015) (“But even if ‘a controlling circuit precedent could constitute clearly established federal law in these circumstances,’” (quoting *Carroll v. Carman*, 574 U.S. 13, 17 (2014))).

²⁰⁶ *See Coates*, *supra* note 134, at 9–10.

²⁰⁷ *Id.* at 9–10 (quoting *Tekle v. United States*, 511 F.3d 839, 847 (9th Cir. 2007)); *Buckley v. Rogerson*, 133 F.3d 1125, 1129 (8th Cir. 1998); *Drummond v. City of Anaheim*, 343 F.3d 1052, 1060 (9th Cir. 2003) (stating that without controlling authority, courts can look to state courts, other circuits, district courts, and even unpublished district court cases for clearly established law).

²⁰⁸ *Coates*, *supra* note 134.

²⁰⁹ *Id.*

²¹⁰ *See id.*

Eleventh Circuits allocate the burden of persuasion to the plaintiff.²¹¹ The First, Second, Third, Ninth, and D.C. circuits allocate the burden of persuasion to the defendant.²¹² Two circuits, the Fourth and Eighth, split the burdens between the defendant and plaintiff and even allocate them differently.²¹³ And how the circuits allocate the burden of proof is just as messy and contradictory.²¹⁴

But does this matter? Are disagreements between circuits on qualified immunity all that important? After all, the nature of the court system permits this kind of disagreement on many issues. The answer is unequivocally yes, for two reasons.

First, qualified immunity is a creature of federal law. Though it applies equally to federal officers and state officers, it is manifestly unfair to hold some officers more accountable than others based on nothing more than their geographic location. Since § 1983 is a federal statute meant to apply equally to all state actors, state actors should accordingly be held to the same rough standards across the nation. This is especially true where federal officers must enforce federal law that crosses borders. Depending on where officers commit an alleged constitutional violation, they may be held to different standards of conduct. There is nothing fair about fair notice when courts can simply impose different standards of conduct under the same federal statutory hook. This leads to inequitable applications: the immunity will either act as a shield for federal officials (they had no fair notice, so they cannot be liable) or as an unfair sword (they had no fair notice, but they should be liable anyway).

Second, the real problem lies with the inequitable results for plaintiffs. In some circuits, there is a higher bar to receive compensation for injuries than in other circuits.²¹⁵ And these discrepancies are real and affect the degree to which people receive compensation. For example, one study showed that as many as 9.2 percent and 6.7 percent of cases in two district courts were dismissed on qualified immunity grounds compared to only 2.3 percent, 1.2 percent, and 1.0

²¹¹ Kenneth Duvall, *Burdens of Proof and Qualified Immunity*, 37 S. ILL. U. L.J. 135, 143–44 (2012).

²¹² *Id.* at 144–45.

²¹³ *Id.* at 145 (“[T]he Fourth Circuit plac[es] the burden of establishing that the law was clearly established on the defendant and that the defendant did not violate a constitutional right on the plaintiff, and the Eighth Circuit do[es] just the opposite.”).

²¹⁴ *Id.* at 146–48. This author contends that there are actually four steps to qualified immunity, and that the defendant bears the burden on two—establishing entitlement to qualified immunity or proving exceptional circumstances as an exception to objective reasonableness—and the plaintiff bears the burden on the other two. *Id.* at 157.

²¹⁵ This Note discusses at length the proposition that different circuits have different standards and mechanisms regarding qualified immunity, which dis-uniformity of necessity creates higher or lower bars to compensation, since some plaintiffs may have to look to limited case law versus others who have the whole expanse of case law at their disposal, and some courts tend to vigorously dismiss litigation at earlier stages than others. *See supra* notes 130, 134–35, 199–200, 206–14 and accompanying text; *see also infra* notes 216, 225–29 and accompanying text.

percent in three other district courts.²¹⁶ To some degree, this gives credence to the notion that constitutional rights matter more in some circuits than in others. No wonder the Supreme Court takes circuit splits seriously when determining whether to grant cert petitions. Additionally, this may be the reason qualified immunity questions often appear on the Court's docket.

1. *The Uniformity Fix*

Once again, both Congress and the Supreme Court have the power to create greater uniformity. On one hand, the Supreme Court may seem the ideal body to clarify qualified immunity's standards because it created the defense,²¹⁷ and it could possibly offer clarification more quickly than Congress due to the number of cases it could choose to see each term. In practical terms, the Supreme Court has nine individuals while Congress has 435. This may result in less lock-jam, especially since justices from both sides of the political aisle have signaled their opposition to qualified immunity.²¹⁸

However, Congress is best suited to make this determination for several reasons. First, though the Supreme Court has had many opportunities to clarify qualified immunity—and has taken several cracks at it—they have consistently failed to meaningfully clarify the standard and may have harmed it.²¹⁹ Second, as previously discussed, Congress is best suited to address qualified immunity's policy goals.²²⁰ Furthermore, qualified immunity is not a common-law immunity from common-law crimes but a judicially-created immunity from a statutory enactment that “admits of no immunities.”²²¹ Since the judiciary carved out an immunity to a statutory right of action, Congress should “speak” to the judiciary and specifically carve out the immunities it sees fit to the statutes that it enacts.

While Congress may be the best branch to clarify qualified immunity, Congress's rubber stamp on current jurisprudence will do little to unify law between circuits or clarify what is required for both victims and defense practitioners. Therefore, to fix qualified immunity's lack of uniformity, I propose that

²¹⁶ Joanna C. Schwartz, *Qualified Immunity's Selection Effects*, 114 NW. UNIV. L. REV. 1101, 1125–26 (2020).

²¹⁷ Justice Alito expressly stated that the Supreme Court is the best branch to amend at least some qualified immunity aspects because it is judge-made law. *Pearson v. Callahan*, 555 U.S. 223, 233–34 (2009).

²¹⁸ Robert Barnes & Ann E. Marimow, *Supreme Court Refuses to Reconsider Immunity that Shields Police Accused of Brutality*, WASH. POST (June 15, 2020, 8:58 AM), https://www.washingtonpost.com/politics/courts_law/supreme-court-refuses-to-reconsider-immunity-that-shields-police-accused-of-brutality/2020/06/15/1cfc444c-ae7f-11ea-8f56-63f38c990077_story.html [<https://perma.cc/H6VN-42TG>] (discussing how Justices Thomas and Sotomayor are ideologically opposites and how Justice Sotomayor often dissents from her colleagues when qualified immunity has been granted).

²¹⁹ See *supra* notes 153–58 and accompanying text.

²²⁰ *Supra* Section II.A.1.

²²¹ *Rudovsky*, *supra* note 55 (quoting *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976)).

Congress should adopt the qualified immunity doctrine via statute,²²² and, at the same time, adopt new standards to govern its practice that will clarify some of the problems that have created dis-uniformity in the courts of appeals. Specifically, in legalizing qualified immunity by statute, Congress must clarify (1) which court(s) can clearly establish the law, (2) which level of factual similarity is required to clearly establish the law, (3) when exceptions to qualified immunity should apply, and (4) when officers should not be indemnified even if they have been found liable. Because qualified immunity does have value, refraining from abolishing the doctrine when it could be practically reformed to avoid today's errors is desirable.

a. Which Courts Can Clearly Establish the Law?

Congress, in adopting qualified immunity by statute, must clarify which courts can clearly establish the law.²²³ I propose that Congress should affirm that the Supreme Court can clearly establish the law. Outside the Supreme Court, I propose that only circuit court decisions in which the suit is brought should be able to clearly establish the law. This proposal rejects the Ninth Circuit approach of looking to any available decision law.²²⁴

One major virtue to this approach is that it creates greater uniformity by limiting the number of courts and judges who will create binding qualified immunity precedent. This means there will be less total binding case law, and litigants will have less case law from which to pull arguments. Indeed, for these very reasons, it is proper to dispense with letting state courts create any precedent on qualified immunity.²²⁵ And because the only courts who can create binding precedent are appeals courts, the law will be more slow-moving.²²⁶ Slower-moving, more uniform rules are desirable because they ensure plaintiffs and defendants in different circuits are treated equally under the same federal law.²²⁷ And uniformity also

²²² *Supra* Section II.A.1 (discussing why I believe Congress should adopt qualified immunity via statute rather than through other mechanisms and why Congress is better suited than the Supreme Court to fix qualified immunity).

²²³ Coates, *supra* note 134, at 8 (discussing how the Court has not yet provided clarity regarding this subject).

²²⁴ *Tekle v. United States*, 511 F.3d 839, 847 (9th Cir. 2007).

²²⁵ AM. L. INST., *STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS* 164–68 (1969) (discussing how federal courts are better positioned because of their expertise to hear questions on federal matters and that uniformity is necessary on federal questions).

²²⁶ Although circuit courts often create circuit splits (which undermine uniformity), they are also “generally hesitant to depart from precedent set in other jurisdictions, despite being under no obligation to adhere to decisions by sister circuits.” Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1578 (2008). Additionally, uniformity has often been seen by the courts themselves as necessary—or at least desirable—when interpreting federal law, and limiting the courts who can interpret the federal law serves that purpose. *Id.* at 1580 n.34.

²²⁷ Eric Stein, *Uniformity and Diversity in a Divided-Power System: The United States' Experience*, 61 WASH. L. REV. 1081, 1090–91 (1986).

helps ensure predictability²²⁸ at the outset of litigation, which could improve argumentation, provide attorneys greater knowledge for screening cases, and in turn reduce litigation costs.²²⁹

Another virtue is that this reduces the resource burdens on individual defendants. The resource burden occurs at two stages: training/maintenance and litigation. Each officer receives some form of legal training to understand the rules within which they must operate. Presumably, these policies are hopefully based on proper interpretations of the law, though sometimes they are not. And when officers are sued, they must look to the legal rules that exist. Each action requires some resource expenditure—whether time, money, or other resource. In other words, “there ain’t no such thing as a free lunch.”²³⁰ Someone—whether the city who trained them or the officer who committed the tort—must pay for resource expenditures.

The larger the realm of liability at each stage, the more likely someone must expend greater resources. For example, if we were to take the Ninth Circuit approach, cities may expend greater resources by having their legal staff evaluate non-controlling, extra-jurisdictional case law to ensure compliance with legal rules in other jurisdictions, just for the sake of liability. Because, as here, I propose narrowing the battlefield, both cities and officers can focus their training solely on the case law that exists in their jurisdiction. This likely will reduce costs as the players become more familiar with the rules, and there certainly will be less case law through which they would need to sort—either for litigation or training purposes.

While § 1983 imposes *individual* liability on the officers,²³¹ and thus would put the burden on the officer to expend those resources, the widespread use of indemnity agreements has effectively shifted that resource burden to the municipality.²³² Unfortunately, resource disparities exist between government entities

²²⁸ Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 38–40 (1994).

²²⁹ See, e.g., Kermit Roosevelt III, *Certainty vs. Flexibility in the Conflict of Laws*, PENN. L.: LEGAL SCHOLARSHIP REPOSITORY 2019, at 9, 15 n.81 (discussing how more predictable and certain rules can reduce litigation costs).

²³⁰ ROBERT A. HEINLEIN, *THE MOON IS A HARSH MISTRESS* 160, 227 (1966).

²³¹ MARTIN A. SCHWARTZ & KATHRYN R. URBONYA, *FED. JUD. CTR., SECTION 1983 LITIGATION*, 96 (2d ed. 2008), <https://www.fjc.gov/sites/default/files/2012/Sec19832.pdf> [<https://perma.cc/4HX3-WMAZ>] (discussing the difference between official and private capacity suits and their respective monetary obligations). As a practical matter, however, officers are almost always indemnified by their employer. Schwartz, *supra* note 22, at 890 (noting that officers between 2006 and 2011 only paid .02 percent of \$730 million in civil suit because the municipality usually indemnifies them). The rationale still remains the same because § 1983 ultimately imposes the burden on the individual, and municipalities will not always indemnify officers, such as when on-duty officers act outside the scope of their duties. Teresa E. Ravenell & Armando Brigandi, *The Blurred Blue Line: Municipal Liability, Police Indemnification, and Financial Accountability in Section 1983 Litigation*, 62 VILL. L. REV. 839, 845–48 (2017).

²³² Schwartz, *supra* note 22, at 900–02. The fact that some indemnity waivers will not cover an individual officer’s conduct, *see id.*, and because ultimately § 1983 creates monetary

for various reasons, and legal staff must make decisions about how extensively to research issues for both training purposes and litigation defense. Enlarging the field of battle could exacerbate resource disparities and put some defendants at a disadvantage compared to their similarly situated but differently located counterparts. And narrowing the battlefield to the specified controlling authority creates uniform, specific rules that could improve arguments on both ends because the litigants will have less case law to sift through, and this could focus their arguments on what is important.

Another virtue to narrowing the field of battle to controlling circuit court precedent is that it best comports with qualified immunity's underlying rationale: fair notice. Qualified immunity is about ensuring that officers do not incur individual liability for making quick decisions in "hazy" areas of the law.²³³ Arguably, the law is still hazy when new legal principles are espoused at the district court level because the district court's ruling has not been properly validated by an appeals court. Our federal system has built-in appeals courts precisely to ensure that the district court gets it right. While courts of appeals affirm lower court decisions the vast majority of the time,²³⁴ this number is much higher for qualified immunity cases.²³⁵ Either way, if one policy reason for qualified immunity is to protect officers' ability to make decisions when the law is unclear, permitting the district court to wrongfully impose liability at any amount is unacceptably high. In short, when even learned judges disagree on the constitutional rules, it is manifestly unfair to hold a mostly legally untrained officer responsible for their erroneous, in-the-field decisions. Limiting clearly established law only to circuit courts ensures, as far as possible, that purported constitutional rules have been vetted before they impose liability on those officers.

However, there are good arguments to confine the field of battle even more narrowly, letting only the Supreme Court clearly establish the law. Such a proposal prioritizes fair notice because the legal rules would only come from one body, and those cases would be more easily identifiable and uniform compared to the various rules developed at the circuit court level. Additionally, while courts of appeals rarely overturn lower court decisions, the Supreme Court very often overturns the decisions of cases it actually hears.²³⁶ These issues may be more

obligations on the individual officer, an individual officer may still need to expend substantial resources in his defense, which justifies a rule of limiting resource expenditure on the defendant—one of the major purposes animating qualified immunity in the first place.

²³³ *Saucier v. Katz*, 533 U.S. 194, 206 (2001) ("Qualified immunity operates in this case, then, just as it does in others, to protect officers from the sometimes 'hazy border between excessive and acceptable force.'" (quoting *Priester v. Riviera Beach*, 208 F.3d 919, 926–27 (11th Cir. 2000))).

²³⁴ Barry C. Edwards, *Why Appeals Courts Rarely Reverse Lower Courts: An Experimental Study to Explore Affirmation Bias*, 68 EMORY L.J. ONLINE 1035, 1037 (2019).

²³⁵ Michael E. Solimine, *Revitalizing Interlocutory Appeals in the Federal Courts*, 58 GEO. WASH. L. REV. 1165, 1189–90 (1990).

²³⁶ Edwards, *supra* note 234, at 1039. But the fact that the Supreme Court does not hear many of the various appeals means that, in practical terms, the Supreme Court only ever reverses less than 1 percent of all appealed cases. *Id.*

pressing in the qualified immunity context due to the substantial attention the Court has given it, which is perhaps why the Court has been very persistent in overturning qualified immunity decisions.²³⁷ Perhaps for this reason, the Supreme Court has questioned—but never decided—whether a single decision from a court of appeals can constitute clearly established law.²³⁸

One major problem with permitting the Supreme Court alone to clearly establish law is that it could result in constitutional stagnation due to the Supreme Court's exceptionally low number of appeals cases it hears each year.²³⁹ And such stagnation could grant defendants a superpowered defense in qualified immunity because defendants could essentially have several bites at the apple before the Supreme Court's caseload permits it to hear the case. Were Congress to require that clearly established law come only from the Supreme Court, this may incentivize the Court to prioritize developing constitutional law by hearing far more qualified immunity cases each term.

In the end, compelling reasons support rejecting the Ninth Circuit approach because it creates greater resource burdens on small cities and their officers. Essentially, the Ninth Circuit requires officers and attorneys to constantly monitor extra-jurisdictional case law, which imposes greater costs than if they only looked at controlling authority. It also flips the concept of fair notice on its head because it permits liability based off non-binding case law far removed from the officer or attorney and on unvetted district court legal conclusions. In effect, the Ninth Circuit approach “bind[s] this circuit by the decisions of others.”²⁴⁰ But even in small municipalities, municipal attorneys have some ethical requirements to pay attention to controlling case law and to disclose any controlling, adverse law.²⁴¹

²³⁷ *White v. Pauly*, 137 S. Ct. 548, 551 (2017) (“In the last five years, this Court has issued a number of opinions reversing federal courts in qualified immunity cases.” (citing *City of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1774 n.3 (2015))).

²³⁸ *City of Escondido v. Emmons*, 139 S. Ct. 500, 503 (2019) (“Assuming without deciding that a court of appeals decision may constitute clearly established law for purposes of qualified immunity” (citing *Sheehan*, 135 S. Ct. at 1776))).

²³⁹ Compare Oliver Roeder, *The Supreme Court's Caseload Is on Track to Be the Lightest in 70 Years*, FIVETHIRTYEIGHT (May 17, 2016, 9:00 AM), <https://fivethirtyeight.com/features/the-supreme-courts-caseload-is-on-track-to-be-the-lightest-in-70-years> [<https://perma.cc/65P7-W99E>], with *Federal Judicial Caseload Statistics 2019*, U.S. CTS., <https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2019> [<https://perma.cc/9ULG-E3Q3>].

²⁴⁰ Coates, *supra* note 134 (quoting *Garcia v. Miera*, 817 F.2d 650, 658 (10th Cir. 1987)).

²⁴¹ Arguably, the model rules impose a competency standard on municipal attorneys that requires them to be just smart enough and search just enough case law to be considered competent. See MODEL RULE OF PRO. CONDUCT r. 1.1 (AM. BAR. ASS'N 2020) (“A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”). Municipal attorneys who do not pay attention to *controlling* case law when instructing their police officers on the Fourth Amendment might therefore violate this rule, since failing to adhere to controlling case law is clearly incompetent.

By requiring clearly established law to come only from the aforementioned resources, courts would simply be requiring officers and their legal teams to pay attention to the decisional law that would be controlling for their jurisdiction. This approach best comports with fair notice as it would not be unfair to hold an officer liable for violating constitutional rights of which he should have known because the right in question had already been addressed by a controlling court in his jurisdiction. Additionally, this incentivizes up-to-date legal training in the jurisdiction that matters to the officers because cities could then be held liable for their failure to properly train officers. The virtue of this approach is that it incentivizes prevention rather than purely compensation.

Finally, this in no way impairs growing a continuing body of case law or upsets legal norms. Persuasive authority from other jurisdictions may still be used in § 1983 cases, as it should be. However, the rule I propose limits that authority to only one portion of the qualified immunity analysis: whether a constitutional violation occurred. Courts should not be constrained to their own jurisdiction when developing constitutional law. Indeed, it is often valuable for litigants and courts to look to persuasive authority when litigating first impression cases, for example.²⁴² This proposal would not inhibit whatsoever a court's ability to develop constitutional law based, in part, on extra-jurisdictional authority.

But courts should be confined to their jurisdiction when looking at the “clearly established law” prong. While finding a constitutional violation based on extra-jurisdictional authority promotes constitutional development—and thus prevention—finding a clearly established law violation instead seeks to shield individual officers from liability based precisely on the lack of underdeveloped constitutional law. In short, permitting the law to be “clearly established” based on any relevant authority would simply duplicate the constitutional violation analysis. This proposal refocuses the qualified immunity analysis in a way that promotes constitutional law development yet protects officers when they must make constitutionally violative decisions, the unconstitutionality of which they could not have known beforehand.

One wrinkle in the analysis is resource level. Larger cities may have more resources that permit them to “farm” out liability or high-profile cases while smaller cities may be forced to litigate these issues themselves. It is possible that while larger cities may farm out cases, both the smaller and the larger cities may decide to *train* officers in-house, if any is done at all, through their own legal staff. Regardless, all attorneys must comply with the model rules, and they apply equally to an attorney's training of officers as well as their defending of them.

Attorneys also have an obligation to disclose controlling, adverse case law to the judge. MODEL RULE OF PRO. CONDUCT r. 3.3(a)(2) (AM. BAR. ASS'N 2020).

²⁴² Michael F. Smith, *Litigating Cases with Questions of First Impression*, 81 DEF. COUNS. J. 101, 103 (2014) (“[C]ase law from other jurisdictions will provide insight into the public policy considerations that have guided other courts in reaching the position you are advocating on behalf of your client.”).

b. What Level of Factual Detail Should Be Required?

In addition to my proposal that Congress adopt qualified immunity via statute, Congress should also clarify what level of factual detail is required to clearly establish the law. The Court's current standard requires that "all but the plainly incompetent or those who knowingly violate the law" should receive immunity.²⁴³ Consequently, when courts determine clearly established law, appeals to general rules and standards usually will not suffice.²⁴⁴ Rather, the "rule's contours must be so well defined that it is 'clear to a reasonable officer that his conduct was unlawful in the situation he confronted.'"²⁴⁵ And while there does not need to be a case "directly on point," existing precedent does need to place the constitutional question "beyond debate."²⁴⁶ The Supreme Court therefore requires that existing precedent to be particularized with similar facts to the case at hand and not defined at a "high level of generality."²⁴⁷

Remarkably, the Supreme Court's standard here actually comports very well with the broader qualified immunity policy concerns, and the standard is likewise clear. Courts generally must find some case with similar facts, and the controlling principle from that case must be so well-defined that every officer would know beforehand that his conduct would violate the law. Unique facts would therefore militate in favor of granting officers qualified immunity.²⁴⁸

Such a standard comports well with qualified immunity's policy of ensuring fair notice. When officers are unaware of the law because of the unique circumstances presented to them, they lack "fair notice" that what they are doing could potentially violate the law. This standard only prevents—or at least it should prevent—an officer from being liable for his or her misconduct when even judges themselves cannot agree on whether the rule prohibits the misconduct or when no case before has clearly addressed the exact issue that confronted the officer. Thus, any uncertainty or ambiguity regarding the propriety of the officer's actions should create some deference in favor of the officer, especially in light of the Supreme Court's pronouncement that qualified immunity should "protect all but the plainly incompetent." Because the Supreme Court's standard regarding factual similarity is clear (especially when considered with deference towards

²⁴³ *White v. Pauly*, 137 S. Ct. 548, 551 (2017) (quoting *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015)); *City of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1774 (2015) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011)).

²⁴⁴ *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018).

²⁴⁵ *District of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018) (quoting *Saucier v. Katz*, 533 U.S. 194, 202 (2001)).

²⁴⁶ *White*, 137 S. Ct. at 551 (quoting *Mullenix*, 136 S. Ct. at 308).

²⁴⁷ *Id.* at 551–52 (quoting *Ashcroft*, 563 U.S. at 742).

²⁴⁸ *Id.* at 552 ("[The panel] recognized that 'this case presents a unique set of facts and circumstances' in light of *White*'s late arrival on the scene. This alone should have been an important indication to the majority that *White*'s conduct did not violate a 'clearly established' right." (citations omitted)); *Sheehan*, 135 S. Ct. at 1776 ("Even a cursory glance at the facts of *Graham* confirms just how different that case is from this one.").

the officer), and because it comports well with the underlying policy justifications, Congress should rubber-stamp this aspect of Supreme Court jurisprudence.

c. Adopting an “Obvious” Exception

I additionally propose that Congress, in adopting qualified immunity by statute, should adopt an “obviousness” exception. One major justification for qualified immunity is to prevent officers from hesitating when deciding to enforce the law.²⁴⁹ The reasoning is that perhaps by giving officers “breathing room” to make quick decisions in hazy areas of law,²⁵⁰ officers will be encouraged to vigorously execute the law.²⁵¹

As a result, when courts review qualified immunity, they look to whether a constitutional right had been violated, and, even if a right had been violated, whether that right was clearly established at the time it was violated.²⁵² Because the first prong looks only to whether a violation occurred, it is the clearly established law prong that acts as a defense and gives officers breathing room. One significant strategy for defendants to claim the law is not clearly established, thus invoking qualified immunity’s protections, is to marshal unique facts—a strategy the Supreme Court has endorsed.²⁵³ In essence, the more a defendant can focus on the unique facts and nature of the case and distinguish it from past precedent, the more likely a court will find the law has not been clearly established.²⁵⁴ This defense strategy has taken on increasing importance as the Supreme Court has constantly doubled-down on the notion that, when analyzing clearly established law, the right in question should not be defined at such a high level of generality.²⁵⁵ And the Court has blasted the Ninth Circuit in the past for defining the right so specifically and, in essence, failing to grant immunity based on the unique facts presented.²⁵⁶

However, critics have complained that the Court’s clearly established jurisprudence makes it too easy for defendants to avoid liability based on nothing

²⁴⁹ See *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (“Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.”).

²⁵⁰ *Sampson v. County of Los Angeles*, 974 F.3d 1012, 1029 (9th Cir. 2020) (Zouhary, J., concurring in part and dissenting in part) (quoting *Ashcroft*, 563 U.S. at 743).

²⁵¹ *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982).

²⁵² *White*, 137 S. Ct. at 551 (quoting *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015)).

²⁵³ See *supra* note 248.

²⁵⁴ See *White*, 137 S. Ct. at 552 (“[The panel] recognized that ‘this case presents a unique set of facts and circumstances’ in light of *White*’s late arrival on the scene. This alone should have been an important indication to the majority that *White*’s conduct did not violate a ‘clearly established’ right.” (citations omitted)).

²⁵⁵ *Id.* at 551–52.

²⁵⁶ *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (“This Court has ‘repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality.’” (quoting *City of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1775–76 (2015))).

more than these unique facts.²⁵⁷ Such an argument is troubling if qualified immunity's rationale is fair notice. When the defendant commits a constitutional violation, and there is an obviousness to the misconduct, it does not make sense to immunize the officer even where the facts at hand are unique and no case before is sufficiently like it. Thus, officers should not be immunized for their misconduct when they knew, or had reason to know, their conduct would be wrongful.

Adopting such an obviousness exception may help preserve some of the doctrine's legitimacy because it would not immunize officers in highly inflammatory and perhaps high-profile situations. For example, the Supreme Court recently denied certiorari in the *Jessop* case.²⁵⁸ This meant that the Ninth Circuit's grant of qualified immunity to the officers in that case would stand. In *Jessop*, the Ninth Circuit granted qualified immunity to officers who essentially stole over \$200,000 while executing a search warrant.²⁵⁹ At least in a rough sense, the officers should have known this behavior was wrongful before committing the conduct.²⁶⁰ In this case, the obviousness rules may have helped to fairly impose liability on facts which the Court otherwise would not have, as evidenced by the Court's cert denial. The Supreme Court has already tacitly endorsed such an obviousness rule, though its exact parameters are uncertain.²⁶¹ And the Tenth Circuit has also implemented a qualified immunity test that explicitly explores how obvious the misconduct was when determining whether qualified immunity should apply.²⁶²

²⁵⁷ Meera Jagannathan, *'They Get a Get-Out-of-Jail-Free Card': How Qualified Immunity Protects Police and Other Government Officials from Civil Lawsuits*, MARKETWATCH (June 29, 2020, 10:26 AM), <https://www.marketwatch.com/story/they-get-a-get-out-of-jail-free-card-why-law-enforcement-and-other-government-officials-are-protected-from-civil-lawsuits-2020-06-24> [<https://perma.cc/4GLC-96JH>].

²⁵⁸ *Jessop v. City of Fresno*, 936 F.3d 937 (9th Cir. 2019), *reh'g denied* 206 L. Ed. 2d 956 (2020).

²⁵⁹ *Id.* at 939–40.

²⁶⁰ *But see* Matt Ford, *To Protect and Serve, or Pilfer and Steal?*, NEW REPUBLIC: THE SOAPBOX (Apr. 17, 2020), <https://newrepublic.com/article/157342/supreme-court-police-qualified-immunity> [<https://perma.cc/CK7Y-2S2W>] (referring to the *Jessop* decision as “stunning” but acknowledging the Court of Appeals’ important distinction: that the officer should have known morally theft was prohibited but not necessarily violative of the Fourth Amendment). While the Ninth Circuit court’s decision relies on a fine distinction, it does illustrate one problem: Obvious to who? There may be circumstances where misconduct is obvious to a judge but perhaps not obvious to an officer. For example, there may be unique situations that an officer confronts that typically do not fall within the ambit of his training. However, these situations may be well understood by judges in other contexts.

²⁶¹ *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (“For that reason, we have held that *Garner* and *Graham* do not by themselves create clearly established law outside ‘an obvious case.’ . . . This is not a case where it is obvious that there was a violation of clearly established law . . .” (quoting *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004))).

²⁶² Then-Judge Gorsuch described the Tenth Circuit’s sliding scale approach as follows: “[T]he more obviously egregious the conduct in light of prevailing constitutional principles, the less specificity is required from prior case law to clearly establish the violation.” Wilson

In short, an obviousness exception may help re-center the focus of qualified immunity on fair notice. But the fair notice policy is undermined when officers receive immunity for obvious wrongs simply because no other case was factually similar. This is because officers receive immunity when no immunity was intended—either under § 1983’s provisions or even under the Supreme Court’s fair notice rationale. Adopting an obviousness exception may additionally reduce some public controversy if it successfully reduces the immunization of officers in highly inflammatory contexts. It additionally promotes § 1983’s goal of compensating victims when a government actor violates their constitutional rights. At the same time, this deflection may help appease those who wish to abolish qualified immunity outright and engage in meaningful reform discussions. In short, adopting an obviousness exception helps strike a better balance between § 1983’s compensation goals and qualified immunity’s public policy goal of encouraging vigorous execution of the law.

d. Addressing Indemnity Waivers

One additional proposal that may strike the preferred balance between § 1983 liability and qualified immunity is for cities to voluntarily include in their indemnity waivers a provision exempting the governing entity from indemnifying officers who violate the “obviousness” standard. The officer then would be required to satisfy the entire judgment personally, and it would require the officer to repay any expenses the governing entity incurred defending the officer. Such a proposal does two things: (1) it comports with the plain meaning of § 1983’s text and its purpose—requiring *individuals* to be responsible for civil judgments in their *individual* capacity—which indemnity waivers undermine,²⁶³ and (2) it puts the burden clearly on the individual officer, which may prevent such egregious violations in the future or deter some from joining the force in the first place.

Furthermore, officers should not receive the benefit of indemnity waivers—and maybe even qualified immunity—when their actions violate department policy.²⁶⁴ The city should not be required to pay for civil judgments

v. City of Lafayette, 510 F. App’x 775, 777 (10th Cir. 2013) (quoting *Casey v. City of Fed. Heights*, 509 F.3d 1278, 1284 (10th Cir. 2007)).

²⁶³ See Schwartz, *supra* note 22. However, at least one scholar sees indemnity waivers as “less prevalent” and consequently less important for ensuring police accountability than other measures. See Stephen Rushin, *Police Union Contracts*, 66 DUKE L.J. 1191, 1221 (2017) (recognizing that a “significant number of contract require the municipality to indemnify officers” but also noting that “[p]olice-reform advocates may argue that any of these provisions constitutes a significant limitation on officer accountability . . . [but they] seemed less prevalent than [other] categories”).

²⁶⁴ Notably, the Ninth Circuit looks to police department training in determining whether officers have violated clearly established law, *Drummond v. City of Anaheim*, 343 F.3d 1052, 1061–62 (2003), even though the Supreme Court has said that such materials should not affect the analysis. *City of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1777 (2015) (“Nor does it matter for purposes of qualified immunity that . . . the officers did not follow their

against an officer when the officer violates the city department's policy in the first place, especially when the city has done its due diligence in training the officer. Of course, if the city has not appropriately trained the officers, other causes of action exist that may provide compensation.²⁶⁵ Permitting indemnification for officers when they violate departmental policies only hurts taxpayers because, ultimately, taxpayers must bear an indemnified officer's costs. Such a policy does not make sense when the municipality has fully complied with its obligation to properly supervise and train officers. Because department policies are closer to the officer's mind and action, it would not be unfair to hold them liable when they violate those policies.

C. *The Sequencing Problem*

The third problem with qualified immunity is that, in its current state, it *does* prevent creating a continuous body of constitutional law. As previously discussed, the Supreme Court established the *Saucier* analysis.²⁶⁶ The *Saucier* analysis created a rigid two-part mandatory sequencing.²⁶⁷ First, in assessing qualified immunity, a court must establish whether a constitutional violation occurred.²⁶⁸ If no violation occurred, the inquiry ends as qualified immunity itself is not needed.²⁶⁹ Only after a violation has occurred would a court then identify whether the constitutional right allegedly violated was clearly established at the time it was violated.²⁷⁰ The Court then announced its reasoning and policy justification for a required sequencing: "The law might be deprived of this explanation were a court simply to skip ahead to the question whether the law clearly established"²⁷¹

However, the Court has since reversed course (again)²⁷² and no longer requires the strict *Saucier* sequencing.²⁷³ Though permitting courts to use that sequencing if they so choose, the Supreme Court primarily did away with the sequencing on judicial conservation of resources grounds.²⁷⁴ The effect of eliminating *Saucier* sequencing is problematic for many reasons. First, it puts the

training. . . . Even if an officer acts contrary to her training, however . . . that does not itself negate qualified immunity").

²⁶⁵ See, e.g., *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690–91 (1978).

²⁶⁶ *Saucier v. Katz*, 533 U.S. 194, 200 (2001).

²⁶⁷ *Id.* at 201.

²⁶⁸ *Id.*

²⁶⁹ E.g., *id.*

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² Karen M. Blum, *The Qualified Immunity Defense: What's "Clearly Established" and What's Not*, 24 *TOURO L. REV.* 501, 507 (2008) (eerily predicting that though mandatory sequencing was then required, it would "likely change in the not-too-distant future").

²⁷³ *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

²⁷⁴ *Id.*

courts in “permanent limbo.”²⁷⁵ In other words, because courts can refrain from deciding difficult constitutional questions when there is another way (in this case, deciding if the law was “clearly established”), courts can continually avoid constitutional issues, effectively preventing the law from fully developing on any issue.²⁷⁶ And available studies show that the Court’s departure from the rigid two-step *Saucier* approach has led to some constitutional stagnation, even if limited.²⁷⁷ For example, the appellate courts were much more likely to find a constitutional violation under *Saucier*’s mandatory two-step sequencing than under the non-mandatory sequencing courts use now to analyze qualified immunity.²⁷⁸

Thus, constitutional stagnation is not some sort of theoretical boogeyman—it is very real with very real consequences. A more recent study substantiated these claims, showing that since *Pearson v. Callahan*, courts have increasingly bypassed the constitutional violation analysis and skipped to the clearly established law prong.²⁷⁹ In effect, this means officers may continue to allegedly violate constitutional rights and receive immunity for it because not one of the prior courts who first heard the matter took the time to decide if the officer violated constitutional rights.²⁸⁰ Furthermore, a comparison between *Saucier* qualified immunity cases and *Pearson* qualified immunity cases shows that in the *Pearson* non-mandatory sequencing era, officers receive immunity far more than they did under *Saucier*.²⁸¹ It is possible that this significant change stems from the courts’ failures to “clearly establish” Fourth Amendment law by not deciding the constitutional violation prong. Had a court clearly established the law, one victim—rather than two, three, or maybe even four—would have been the only one denied compensation for an officer’s bad behavior.

In addition to leaving constitutional law less developed, “[d]eterrence is diminished . . . and the individual and societal interest in the vindication of rights is sacrificed.”²⁸² When qualified immunity prevents a constitutional body of law

²⁷⁵ Michael T. Kirkpatrick & Joshua Matz, *Avoiding Permanent Limbo: Qualified Immunity and the Elaboration of Constitutional Rights from Saucier to Camreta (and Beyond)*, 80 FORDHAM L. REV. 643, 643 (2011).

²⁷⁶ See *id.* at 651.

²⁷⁷ Nielson & Walker, *supra* note 200. The authors’ findings are mixed: Post-*Pearson*, courts do not avoid taking up new constitutional issues, but the rate at which they find constitutional violations post-*Pearson* has decreased, leading to some stagnation. *Id.* at 37–38.

²⁷⁸ *Id.*

²⁷⁹ Andrew Chung et al., *For Cops Who Kill, Special Supreme Court Protection*, REUTERS: INVESTIGATES (May 8, 2020, 12:00 PM), <https://www.reuters.com/investigates/special-report/usa-police-immunity-scotus> [<https://perma.cc/RN66-VJ7L>] (finding that at least three dozen cases have been handed down without going through the full two-step process). *Pearson* is the seminal case in which Justice Alito announced that the Court would no longer require the *Saucier* two-step sequencing.

²⁸⁰ *Id.* (“In effect, the same conduct can repeatedly go unpunished.”).

²⁸¹ *Id.* (showing that the percentage of plaintiffs winning dropped from 57 percent to 43 percent).

²⁸² Rudovsky, *supra* note 55, at 55. It is interesting that Rudovsky considered this implication well before mandatory sequencing was required. However, as mandatory sequencing has been

from being fully developed, law enforcement officers will continue to act in potentially unlawful ways because courts “dodge” the difficult constitutional issues. That leaves a salient question: Can a ruling that a right was *not* clearly established serve to “clearly establish” law in the future? Perhaps not, as this does not give an officer “fair notice” that any constitutional right could be violated since the Court never ruled on whether a constitutional violation occurred at all.²⁸³ Only when the court at issue rules on the constitutional question *should* an officer have “fair notice,” though some courts have cleverly disguised the issue.²⁸⁴

In short, the Court’s usual policy of constitutional avoidance is not well-suited for qualified immunity cases.²⁸⁵ Additionally, the Court’s espoused justification of judicial conservation of resources²⁸⁶ fails because qualified immunity requires that courts evaluate the contours of a constitutional right to determine if clearly established law exists.²⁸⁷ In other words, the Court saves no resources in skipping to the second part of the question when the second part of the question requires the court to at least evaluate the most important and time-consuming aspect of the first part of the question.

Finally, one other problem with *Pearson*’s elimination of the *Saucier* approach merits some attention. Giving courts discretion on whether to declare a constitutional violation or not gives different circuits more or less of a voice when it comes to establishing a constitutional right.²⁸⁸ For example, the Ninth Circuit, when deciding to exercise discretion, creates rights—or rather finds violations of previously unknown rights—at twice the national rate of the other circuits.²⁸⁹ The implication of this is that—at least between circuits—individuals

“undone,” it is fitting that the concerns of a pre-*Saucier* time should come back to haunt the Court.

²⁸³ See *Thompson v. Rahr*, 885 F.3d 582, 590 (9th Cir. 2018) (“In the face of the then-current law, there was not a clearly established constitutional violation. Going forward, however, the law is clearly established in this scenario.”).

²⁸⁴ See *id.* at 588, 590. Additionally, even when courts may not “dodge” the constitutional violation question entirely, there may be some danger they will nonetheless “finesse” or shortchange the analysis because the clearly established law prong provides such a strong defense. See *Rudovsky*, *supra* note 55, at 56.

²⁸⁵ *Kirkpatrick & Matz*, *supra* note 275, at 651; see also *Camreta v. Greene*, 563 U.S. 692, 705–07 (2011) (discussing the problems with the Court’s constitutional avoidance policy on qualified immunity claims).

²⁸⁶ *Pearson v. Callahan*, 555 U.S. 223, 236–37 (2009).

²⁸⁷ *Kirkpatrick & Matz*, *supra* note 275, at 651; see also Alexander A. Reinert, *Does Qualified Immunity Matter?*, 8 U. ST. THOMAS L.J. 477, 485 (2011) (“Often the question of what law is ‘clearly established’ is determined by deciding the scope of the right the plaintiff asserts.”).

²⁸⁸ *Nielson & Walker*, *supra* note 200, at 40–41.

²⁸⁹ *Id.* at 41. However, the Supreme Court has consistently chided the Ninth Circuit for finding constitutional violations by taking too general of an approach to the factual inquiry required. *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (“This Court has ‘repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality.’” (quoting *City of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1775–76 (2015))). This

living within the Ninth Circuit are much more likely to receive compensation than the other circuits, which leads to the problem we previously addressed: lack of uniformity.²⁹⁰ It also means that the officers within the Ninth Circuit have a faster moving body of law to govern them.

1. *The Sequencing Fix*

As part of a congressional reform package, I would recommend reintroducing the *Saucier* analysis. Requiring the courts to first look to see whether a constitutional violation occurred is beneficial for two reasons: (1) it actually helps *preserve* the judicial conservation of resources argument in some cases because if no violation occurred, then the court does not need to go any further; and (2) it best provides officers “fair notice” because the existing constitutional law will be more clear, and they will consequently have more guidance in enforcing the law. While the right at stake will be clearly established, the only remaining difficult question for the court is “caging in” the specific facts of the case to see whether those facts fall within a previously declared right.

Additionally, the congressional reform package will create greater uniformity between circuits as well as within them. Because the current law permits intra-circuit judges discretion to apply the sequencing or not, some intra-circuit judges will, and others will not.²⁹¹ For example, Republican judges are much more likely to decide the law was not clearly established rather than seek to find a constitutional violation in the first place.²⁹² This problem is more clear in the Ninth Circuit because the Ninth Circuit has more judges and thus more combinations of panels to draw from, which—depending on the “luck of the draw”—could determine whether a right is violated in the first place or whether it just was not clearly established.²⁹³ This often holds true when Ninth Circuit cases are heard en banc because the Ninth Circuit will not have all twenty-plus judges hear the case. This unfairly applies the law to similarly situated victims and deprives plaintiffs and defendants the full gambit of procedural protections given to others. Currently, the courts have little guidance intra-circuit on when to “avoid” the constitutional problem,²⁹⁴ so clear guidance from Congress will make that determination simple.

shows the Supreme Court often locks horns with the Ninth Circuit on their qualified immunity jurisprudence.

²⁹⁰ Nielson & Walker, *supra* note 200, at 42.

²⁹¹ *Id.* at 42–46.

²⁹² *Id.* at 45–46.

²⁹³ Christopher P. Banks, *The Politics of En Banc Review in the “Mini-Supreme Court”*, 13 J.L. & POL. 377, 388–89 (1997) (discussing how the Ninth Circuit’s large size forced them to hold “mini” en banc proceedings).

²⁹⁴ See Kirkpatrick and Matz, *supra* note 275, at 655–56. Justice Kagan eloquently describes the uncomfortable tension in qualified immunity cases with the Court’s policy on avoiding far-reaching constitutional questions in *Camreta v. Greene*, 563 U.S. 692, 705–07 (2011).

D. The Execution Problem

The fourth problem, and perhaps most controversial, is that qualified immunity in practice undermines qualified immunity's purpose. As an affirmative defense, qualified immunity can be raised at any stage of the litigation, even the motion to dismiss stage.²⁹⁵ And the Supreme Court has repeatedly (and perhaps more consistently than any other facet of qualified immunity) emphasized that qualified immunity should be asserted as early as possible.²⁹⁶ The whole point of qualified immunity is to provide officers with “immunity from suit rather than a mere defense to liability”²⁹⁷ and to ensure “insubstantial claims” are weeded out before official discovery even begins.²⁹⁸

Because motions to dismiss and summary judgment motions require fact-specific inquiries, courts find it difficult to actually grant qualified immunity at the pleading stage.²⁹⁹ One reason for this is the procedural posture: motions to dismiss require liberal constructions, and motions for summary judgment require a slant in favor of the nonmovant party.³⁰⁰ This no doubt partially accounts for Joanna Schwartz's findings that in a two-year period, when defendants raised qualified immunity, only 0.6 percent of those cases were dismissed at the motion to dismiss stage, and only 2.6 percent were dismissed at the summary judgment stage.³⁰¹ This study suggests that qualified immunity fails to accomplish one of its major goals: dispensing with litigation early and providing immunity even from suit, not just liability.³⁰²

For a Court so concerned about protecting government officials from the burdens of litigation,³⁰³ these numbers are concerning. The numbers get increasingly concerning as there has been a steady rise of litigation under § 1983, putting qualified immunity front and center in an increasing number of cases.³⁰⁴ Consequently, qualified immunity remains all the more relevant as more and more state and local governments must somehow dispose of and answer the numerous § 1983 claims against its officers. Thus, ensuring qualified immunity actually serves its intended purpose has become far more important. After all, what good is a defense that does not serve its intended purpose? The Supreme Court's

²⁹⁵ Reinert, *supra* note 287, at 487.

²⁹⁶ Pearson v. Callahan, 555 U.S. 223, 232 (2009) (quoting Hunter v. Bryant, 502 U.S. 224, 227 (1991)).

²⁹⁷ Mitchell v. Forsyth, 472 U.S. 511, 526 (1985); *see also* Coates, *supra* note 134, at 12.

²⁹⁸ Anderson v. Creighton, 483 U.S. 635, 639–40 n.2 (1987).

²⁹⁹ *See* Coates, *supra* note 134, at 11; *see also* Blum, *supra* note 272, at 508 n.34 (citing Hydrick v. Hunter 449 F.3d 978, 988 (9th Cir. 2006)) (“[A] motion to dismiss on qualified immunity grounds puts the court in the difficult position of deciding far-reaching constitutional questions on a non-existent factual record.”); Leon Friedman, *Qualified Immunity When Facts Are in Dispute*, 16 *TOURO L. REV.* 857, 864 (2000).

³⁰⁰ Smith v. City of Hemet, 394 F.3d 689, 701 (9th Cir. 2005).

³⁰¹ Schwartz, *supra* note 12, at 2.

³⁰² Mitchell, 472 U.S. at 526–27.

³⁰³ Schwartz, *supra* note 12, at 14.

³⁰⁴ *Id.* at 27 tbl.1.

consistent policy justification for enforcing qualified immunity has been to shield government officials from litigation as early as possible, so the officials can vigorously execute the law without backseat driving.³⁰⁵

We have the competing concerns of private individuals whose constitutional rights have been potentially violated, however. Granting these victims justice—and compensation—as early as possible is also desirable. The legal procedural framework used as a vehicle for vindicating those rights currently requires not automatically dismissing claims without any factual record.³⁰⁶ In other words, tensions arise because through § 1983, Congress requires complete vindication while the Supreme Court requires early dismissal.³⁰⁷ These competing concerns require that one side must give ground in every qualified immunity case. Which side wins, then, likely results from the individual judges and their theories of how to resolve this sticky dilemma,³⁰⁸ as there is little guidance from the Supreme Court.

1. *The Execution Fix*

So far, the “adjustments” I have proposed to qualified immunity have been straightforward in their application and require little more than clarifying existing law. Additionally, these changes do not require much in the way of judicial resources nor do they substantively alter how practitioners litigate qualified immunity. But ensuring that qualified immunity serves its intended purposes requires more than just mere legal changes. While the legal clarifications make the doctrine better, simpler, and more legitimate, they do nothing to resolve the inherent paradox between an affirmative defense to litigation and a procedural framework that requires permissive readings for fact-intensive scenarios. If the only thing standing in the way of satisfying the competing claims is the procedural framework, the smart move is to amend that procedural framework.

Qualified immunity is important at three stages: the pleading stage, pre-trial motion stage, and the trial stage. However, this paper focuses only on a congressional fix to the pleading requirements for qualified immunity. In the following, I provide three suggestions regarding how to establish a pleading requirement and enforcement mechanism that support the purpose and benefits of qualified immunity.

³⁰⁵ See *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1866 (2017) (quoting *Anderson v. Creighton*, 483 U.S. 635, 638 (1987)).

³⁰⁶ See *Pearson v. Callahan*, 555 U.S. 223, 238–39 (2009) (expressing that deciding qualified immunity at the pleading stage can be difficult when the factual record from the pleadings is underdeveloped).

³⁰⁷ Compare *Rudovsky*, *supra* note 55 (describing that 42 U.S.C. § 1983 “admits of no immunities” (quoting *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976))), with *Saucier v. Katz*, 533 U.S. 194, 200 (2001) (recognizing that the qualified immunity decision should be made early in the litigation process).

³⁰⁸ See *Nielsen & Walker*, *supra* note 200, at 43–46.

First, I propose that Congress require a § 1983 plaintiff plead with particularity the facts which, when taken as true, show the officer violated a constitutional right. This mirrors the typical pleading requirements for alleging fraud.³⁰⁹ Imposing a heightened pleading standard under a § 1983 allegation makes sense because it reinforces some of the concerns against suing a polity of which the litigant is a part. For one, a heightened pleading standard may disincentivize frivolous allegations and immature pleadings (when complainant prematurely alleges a cause of action without much of the factual story)³¹⁰ and provides officers early and fair notice of the precise conduct alleged to be unconstitutional.

While some may recoil at requiring a heightened pleading standard for factual allegations on civil claims because it may weed out more potential litigants, it is important to remember that this standard will not substantially impair complainants with good facts. Complainants will still enjoy the presumption that all well-pleaded facts are taken as true in defeating a motion to dismiss.³¹¹ Additionally, even when complainants may struggle to allege a “particular” story because they failed to initiate a lawsuit when the memory or action was fresh, they always have recourse to informal discovery.

Normally, informal discovery may be difficult when dealing with two private parties because the actions may often be of private concern, or there may just be little available informal evidence. However, because § 1983 always involves a state actor, much informal discovery (or, perhaps, pre-discovery) is available for potential litigants. Both local and national laws require the public have *some* access to public records, and this can often include body cam footage, incident reports, and perhaps officer-specific information.³¹²

Consequently, litigants seeking to impose liability on state actors have a wealth of publicly available pre-discovery documents which can assist them in “pleading with particularity” within the statute of limitations without requiring officer depositions. This informal discovery permits potential litigants to access a wealth of information that will help them clear a heightened pleading hurdle without subjecting the officer to the costs of litigation. And all too often, in an age of constant videoing of police actions, widely available videos can help a

³⁰⁹ See FED. R. CIV. P. 9(b).

³¹⁰ See, e.g., Richard A. Epstein, *Bell Atlantic v. Twombly: How Motions to Dismiss Become (Disguised) Summary Judgments*, 25 WASH. U. J.L. & POL’Y 61, 98–99 (2007). But see generally Alexander A. Reinert, *The Costs of Heightened Pleading*, 86 IND. L.J. 119 (2011) (discussing how heightened pleading standards may not actually do what advocates claim).

³¹¹ *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

³¹² See generally Chris Pagliarella, *Police Body-Worn Camera Footage: A Question of Access*, 34 YALE L. POL’Y REV. 533 (2016) (discussing the Freedom of Information Act and how different states have taken different approaches in considering body cam footage as a public record and the difficult choices municipalities must make in determining whether to disclose such a record). Additionally, informal discovery tools—like bystander video recordings—may receive additional protections via the First Amendment, see generally Tyler Finn, Note, *Qualified Immunity Formalism: “Clearly Established Law” and the Right to Record Police Activity*, 119 COLUM. L. REV. 445 (2019), and these protections may encourage or lead to additional informal discovery.

potential litigant clear that heightened pleading hurdle, especially as governments enact protections for videoing officer interactions.³¹³

Second, I propose that Congress require the complainant anticipate the officer will invoke qualified immunity and plead past it. Thus, in addition to pleading a particular factual story that shows the officer violated a constitutional right, I propose the complainant must also, in their complaint, pinpoint the exact case law that they allege should have put the officer on fair notice that the officer violated the complainant's constitutional rights. To be clear, the complainant still enjoys a presumption that well-pleaded particular facts are true.³¹⁴ At this stage, then, the complainant may use those facts to particularly describe how the specific case law put the officer on fair notice that his specific conduct constituted a constitutional violation. In other words, the plaintiff must show through existing case law that the officer should have known better.

In reviewing this under a motion to dismiss, I propose courts need not be rigid: a "close enough" standard may suffice to survive a motion to dismiss. Under this new standard at the motion to dismiss stage, courts would be encouraged to focus on the clearly established law prong of the analysis. All a reviewing court needs to do would be to ask: Taking the complainant's facts as true, would the case law proposed *likely* have let the officer know beforehand that his conduct was unconstitutional?³¹⁵ If so, the case may proceed; if not, it must be dismissed. Once again, there would be no change to other procedural mechanisms, so even if a plaintiff failed the first time, they could still get another chance to properly plead their case.

One specific virtue that animates this proposed fix is the ability to simplify the standard and make it more meaningful. Currently, for qualified immunity to attach, the defendant must raise it in their complaint and essentially "prove the negative" because they must attempt to show that clearly established law did not exist to put them on notice.³¹⁶ If they cannot show the lack of case law in their

³¹³ See Catherine Kim, *Viral Videos of Police Violence Are Leading to Disciplinary Action*, VOX (June 6, 2020, 1:10 PM), <https://www.vox.com/2020/6/6/21282412/protests-viral-videos-police-violence-disciplinary-action-suspension-firing> [<https://perma.cc/H6MX-6NKD>]; see also Frank Rudy Cooper et al., *Nevada Criminal Justice Reform Bills Falls Far Short*, NEV. INDEP. (Aug. 1, 2020, 4:00 PM), <https://thenevadaindependent.com/article/nevada-criminal-justice-reform-bill-falls-far-short> [<https://perma.cc/S4WJ-DAVF>] (discussing a Nevada bill on criminal justice reform that would offer protections to those who record police brutality).

³¹⁴ See *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 555 (2007)).

³¹⁵ This "likely" standard at the motion to dismiss stage resembles one of the factors used in evaluating whether a preliminary injunction should be issued. See, e.g., *Rubin ex rel. N.L.R.B. v. Vista Del Sol Health Servs., Inc.*, 80 F. Supp. 3d 1058, 1075 (C.D. Cal. 2015) (discussing how a preliminary injunction requires a threshold showing of "a likelihood of success on the merits").

³¹⁶ As an affirmative defense, the burden rests on the government officials to plead and prove qualified immunity, including the proposition that clearly established law did not control their actions. See *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982). Of a necessity, this requires the

responsive pleading, the motion will be denied and defendants lose the virtue of a defense meant to shield them at the earliest stages of litigation.³¹⁷ Thus, government attorneys must sift through all potentially available case law to make their case. The burden of that exhausting research falls on government attorneys who must shift that monetary burden on taxpayers. But by placing the burden on the plaintiff, we would save the government from expending significant resources and restrict them to only distinguishing the complainant's proposed case law from the complainant's proposed facts. Additionally, it makes sense to put the initial burden on the plaintiff since they have the greatest incentive, those cases are contingency-based, and it is difficult to prove the negative.³¹⁸ This ensures state actors are not treated as presumptively guilty at the pleading stages.

Third, I propose that Congress permit, as an implementation option, allowing courts to choose to utilize screeners to first review § 1983 complaints to see if the complaints meet the baseline requirements. This option already exists for *pro se* litigants within prison under the Prison Litigation Reform Act.³¹⁹ These screeners could look to see whether procedural requirements have been met and the likelihood that a court will find it meets the necessary requirements. These screeners could act as a “buffer” in § 1983 litigation between the litigant and the officers when the litigant has failed to present a claim “within the ballpark” of stating a valid cause of action. This reinforces judicial economy since these screeners can become “experts” in this area and because only a finite amount of clearly established law can exist in an area of law. Screeners also reinforce qualified immunity's main goal—protecting officers from insubstantial litigation—because the screeners act as an additional buffer or shield between a potential litigant and the officer.

At the outset, these revised pleading requirements impose a higher standard on complainants than those imposed in the Federal Rules of Civil Procedure.³²⁰ And understandably, many activists may question whether these pleading

officers to prove the lack of something; in this case, it is the lack of case law governing their actions.

³¹⁷ See *Doe v. Univ. of Ky.*, 860 F.3d 365, 371–72 (6th Cir. 2017) (reiterating that the policy behind qualified immunity is to dispense with litigation as early as possible if qualified immunity applies).

³¹⁸ See, e.g., *Harris v. Libke*, No. 2014-CA-001029-MR, 2016 WL 3752119, at *12–*13 (Ky. Ct. App. July 8, 2016) (“Generally, courts do not expect a party to prove the negative of an issue.”). *But see generally* Elinor R. Jordan, *Is Qualified Immunity an Affirmative Defense in Name Alone? Why Courts Should Shift Away from Placing the Burden to Refute Qualified Immunity on § 1983 Plaintiffs*, 69 NAT'L LAW. GUILD REV. 160 (2012) (discussing how most federal circuits inappropriately place the burden of pleading past an affirmative defense on plaintiffs).

³¹⁹ See Schlanger, *supra* note 27, at 1669 n.361 (discussing judicial pre-screening as an optional mechanism that courts have created and the Prison Litigation Reform Act encourages). The Prison Litigation Reform Act, to some degree, similarly operates as a procedural “fix” because it is aimed at reducing frivolous litigation—a goal it has made good strides in achieving. *Id.* at 1559–60.

³²⁰ See FED. R. CIV. PRO. 1, 8(b).

requirements also violate 42 U.S.C. § 1983 and its purpose.³²¹ After all, on its face, § 1983 “admits of no immunities.”³²² It is a fair criticism. Undoubtedly, many more potential litigants may be screened out at the initial pleading stage than would otherwise be under current practice.³²³ However, a few principles militate against the conclusion that discouraging potential litigants necessarily impedes civil rights litigation.

For one, a goal of the pleading standard mechanism is to balance the need for judicial economy (screen out improper litigants) and the desire to encourage victims to pursue legal remedies.³²⁴ While our earlier legal history loosely enforced a very permissive pleading standard,³²⁵ the modern landscape has shifted to a more stringent pleading standard.³²⁶ Here, this standard, while imposing a heightened pleading requirement for specific cases, reflects the value that we should permit only potentially successful litigants to substantially expend judicial resources on legal matters. Thus, in discouraging frivolous or likely unsuccessful litigation earlier in the process, the standard preserves judicial economy and brings pleading practices in harmony with the Supreme Court’s espoused purpose for the doctrine: shielding officers from disabling litigation.³²⁷

Next, some critics may argue this will cast a wider net in that it may discourage potentially successful litigants from pursuing a claim because it poses a greater degree of difficulty. However, this argument should not carry the day. While, as mentioned, this imposes a higher obstacle for *all* litigants, not just likely unsuccessful litigants, the additional burden is minimal. Indeed, this may even save some litigants time, since, in stating their claim and pointing to applicable case law, it narrows the field from which to argue. Because qualified immunity remains fact-intensive and the Supreme Court requires a high degree of specificity,³²⁸ litigants will only have a limited number of cases from which to argue their case in the complaint. A successful pleading showing qualified immunity may apply may very well discourage state actors from relying on qualified immunity in those cases and instead focus their claim on whether a violation occurred in the first place.

³²¹ See 42 U.S.C. § 1983.

³²² Rudovsky, *supra* note 55.

³²³ Compare Schlanger, *supra* note 27, at 1660 (explaining the effects of the PRLA on inmate litigation) with Schwartz, *supra* note 12, at 11 (discussing the very limited number of cases dismissed early in the litigation process).

³²⁴ See generally Keith N. Hylton, *When Should a Case Be Dismissed? The Economics of Pleading and Summary Judgment Standards*, 16 SUP. CT. ECON. REV. 39 (2008), for a great economic modelling analysis for optimizing when cases should be dismissed via procedural pleading mechanisms.

³²⁵ *Conley v. Gibson*, 355 U.S. 41, 47–48 (1957) (holding that the Federal Rules of Civil Procedure only require a “short and plain statement” rather than specific facts).

³²⁶ See *Ashcroft v. Iqbal*, 556 U.S. 662, 684 (2009) (holding heightened pleading requirements apply to all cases while deciding a qualified immunity case).

³²⁷ *Id.* at 685.

³²⁸ *City of Escondido v. Emmons*, 139 S. Ct. 500, 503 (2019).

This leads to another desirable outcome and one already addressed earlier as a “fix” for qualified immunity.³²⁹ In encouraging and forcing litigants to focus their inquiries on whether a constitutional violation occurred, constitutional case law in the area will continually develop. This achieves the desirable outcome of providing a comprehensive body of law that will then serve to put other officers in the future on “fair notice” that their actions could violate constitutional rights. More than encouraging litigants, a successful pleading mechanism should, where possible, prioritize and incentivize prevention rather than mere compensation.

Finally, and perhaps most importantly, this mechanism really does not alter how the law should be operating anyway. As mentioned, the first part of the pleading standard does not change existing law or pleading practice. Additionally, while the “likely” standard and requiring plaintiffs to plead past qualified immunity are new, plaintiffs are still protected through current motion practice. Plaintiffs get to tell the story with their facts, and those facts cannot be disputed; motions to dismiss are therefore generally inappropriate on factually disputed constitutional violation questions.³³⁰ This fix just re-emphasizes that courts must still look at the clearly established law prong on a motion to dismiss, and this analysis should not be shortchanged based on any factual disputes, since the facts must be plaintiffs’ facts.³³¹ True, requiring a complainant to anticipate and plead the non-existence of an affirmative defense is new, but, as discussed, this newness solely serves to promote the Supreme Court’s goals without adding much of an additional burden.

Finally, Congress may choose to implement this via amending the Federal Rules of Civil Procedure and creating special institutionalized pleading requirements for qualified immunity cases. Or Congress may so choose to implement via a separate statute. Regardless, the outcome would remain the same.

CONCLUSION

In conclusion, qualified immunity poses an interesting dilemma where a past Congress has required vindication, but the Supreme Court, in interpreting the defense, requires early dismissals. However, this inherent controversy need not be so stark. The qualified immunity doctrine remains in disarray because Congress refuses to provide clarification on the scope of a statute it has passed. Congress *can* strike the right balance between those competing interests through amending its pleading mechanism and standards. In doing so, Congress will give qualified immunity renewed legitimacy and best vindicate litigants’ rights, while also protecting our public officials from frivolous litigation.

³²⁹ *Supra* Section C.1.

³³⁰ *Griffin Indus., Inc., v. Irvin*, 496 F.3d 1189, 1199 (11th Cir. 2007) (“We are required to accept the facts as set forth in the plaintiff’s complaint as true, and our consideration is limited to those facts contained in the pleadings and attached exhibits.”).

³³¹ *See Coates*, *supra* note 134, at 11.