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THE BRANCH BEST QUALIFIED TO ABOLISH IMMUNITY

Scott Michelman*

Qualified immunity—the legal doctrine that shields government officials from suit for constitutional violations unless the right they violate “is sufficiently clear that every reasonable official would have understood that what he is doing violates that right”—has come under increasing judicial and scholarly criticism from diverse ideological viewpoints. This Essay considers the question of which branch of government should fix it. I take as a starting point the many critiques of qualified immunity and then turn to the question of whether courts should wait for Congress to reform this problematic doctrine. Do considerations of stare decisis or institutional competence counsel in favor in leaving to Congress the task of reform?

I argue that they do not. In light of the Supreme Court’s persistent and pervasive involvement with the development of all aspects of modern qualified immunity doctrine, from its content to its scope to the manner and timing of its assertion and resolution in the courts, qualified immunity has become a special province of the Court rather than a mere byproduct of statutory interpretation that should be corrected (if at all) by Congress. The Court is best positioned to understand the effects of the doctrine on the development of constitutional law.

Moreover, the criteria to which the Court traditionally looks in deciding whether it should overrule a precedent counsel in favor of judicial reform. The factual and legal foundations underlying qualified immunity have been eroded. The doctrine is unworkable, producing contradictions and confusions and stultifying the development of constitutional law. Although it is reasonable to assume that officers and municipal governments rely on the protection of qualified immunity for the protection of municipal coffers, the Court should not, and in prior cases did not, afford weight to a reliance interest in violating the Constitution. From Pierson to Pearson, qualified immunity is a mess of the Supreme Court’s making, and the Supreme Court should clean it up.

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INTRODUCTION

The critics and critiques of qualified immunity—the legal doctrine that shields government officials from suit for constitutional violations unless the right they violate is “sufficiently clear that every reasonable official would have understood that what he is doing violates that right”¹—are by now legion. The Supreme Court has several times revised the doctrine in response to criticism and concern; each of these efforts has opened the doctrine up to new criticisms or exacerbated preexisting problems. Qualified immunity has been attacked as ahistorical; unjustified as a matter of statutory interpretation; grounded on inaccurate factual assumptions; antithetical to the purposes of official accountability and of the statute of which it is putatively a part; unadministrable; regularly misapplied; a hindrance to the development of constitutional law; a basis for strategic manipulation by judges; and a source of jurisdictional problems.² As Professor Baude has noted, the chorus of dissent from the doctrine is growing louder of late:

Recently publicized episodes of police misconduct vividly illustrate the costs of unaccountability. Indeed, the NAACP Legal Defense Fund has explicitly called for “re-examining the legal standards governing . . . qualified immunity.” The legal director of the ACLU of Massachusetts has named the doctrine of qualified immunity as among the policing precedents that “we must seek to tear down.” Judge Jon Newman has argued that “the defense of qualified immunity should be abolished” by Congress.³

Amidst these concerns, qualified immunity appears ripe for yet another revision or perhaps even abolition. Surprisingly little attention, however, has been paid to the question of how significant doctrinal reform should be achieved—and specifically which branch of the federal government is best situated to devise and implement such reform.

The answer is not immediately clear. Many of the Supreme Court’s refinements to the doctrine over the years have been in the nature of common-law tweaks and glosses; the last major change was in the adjudicatory process for qualified immunity,⁴ not the substance of the qualified-immunity

1 Mullenix v. Luna, 136 S. Ct. 305, 308 (2015) (per curiam) (quoting Reichle v. Howards, 566 U.S. 658, 664 (2012)).

2 See *infra* notes 38–48.

3 William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 48 (2018) (omission in original) (first quoting *LDF Statement on the Non-Indictment of Cleveland Police Officers in the Shooting Death of Tamir Rice*, NAACP LEGAL DEFENSE FUND (Dec. 18, 2015), <http://www.naacpldf.org/press-release/ldf-statement-non-indictment-cleveland-police-officers-shooting-death-tamir-rice>; then quoting Matthew Segal, Opinion, *Beyond #Black Lives Matter: Police Reform Must Be Bolstered by Legal Action*, GUARDIAN (July 27, 2016), <https://www.theguardian.com/commentisfree/2016/jul/27/beyond-black-lives-matter-police-reform-legal-action>; and then quoting Jon O. Newman, Opinion, *Here’s a Better Way to Punish the Police: Sue Them for Money*, WASH. POST (June 23, 2016), https://www.washingtonpost.com/opinions/heres-a-better-way-to-punish-the-police-sue-them-for-money/2016/06/23/c0608ad4-3959-11e6-9ccd-d6005beac8b3_story.html?utm_term=.6c23efa65ab8).

4 See *Pearson v. Callahan*, 555 U.S. 223, 227 (2009).

test, so it might be considered mainly an exercise of the Supreme Court's supervisory authority over the federal courts. The last major substantive amendment to the doctrine resulted from a Supreme Court decision more than thirty-five years ago—without discussion of the propriety of judicial reformulation or separation of powers.⁵ Since that revision, the Supreme Court has professed increasing concern about trenching on congressional prerogatives when it comes to defining remedies for civil rights violations.⁶ But Congress has barely touched § 1983 in the half-century since the Court began recognizing the qualified immunity defense.⁷ Thus, the precise locus of responsibility for modifying or abolishing qualified immunity has been left unclear.

This Essay poses the question squarely: If qualified immunity is to be changed, corrected, or abolished, which branch should do it?

The question is one that requires the application of familiar separation of powers and institutional-competence arguments in the context of an unusual doctrine with an unusual history. Ordinarily, given that qualified immunity is a product of statutory interpretation rather than constitutional elaboration, changes to its substance would be the responsibility and prerogative of Congress. The Supreme Court has expressed a special reluctance to overrule its decisions concerning the interpretation of a statute.⁸ And as noted, the Court has been increasingly hesitant to expand civil rights remedies in the absence of express direction from Congress.

Nonetheless, I argue that characteristics peculiar to qualified immunity render the Supreme Court specially—though not, to be clear, exclusively—qualified to apply substantive reforms or even abolish the doctrine. Part I sets the stage for my argument by tracing the evolution of qualified immunity and showing how the Court both created the doctrine and has been entirely responsible for its refinement and amendment. Part I concludes by summarizing the critiques of the doctrine that I take as the jumping-off point for the question I seek to answer: If qualified immunity is to be reformed or abolished, which branch of government should undertake that task?

5 See *Harlow v. Fitzgerald*, 457 U.S. 800, 813–20 (1982).

6 See, e.g., *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017) (“When a party seeks to assert an implied cause of action under the Constitution itself, just as when a party seeks to assert an implied cause of action under a federal statute, separation-of-powers principles are or should be central to the analysis. The question is ‘who should decide’ whether to provide for a damages remedy, Congress or the courts? The answer most often will be Congress. When an issue ‘involves a host of considerations that must be weighed and appraised,’ it should be committed to ‘those who write the laws’ rather than ‘those who interpret them.’” (quoting *Bush v. Lucas*, 462 U.S. 367, 380 (1983))); *Alexander v. Sandoval*, 532 U.S. 275, 286–87 (2001) (“Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress. . . . ‘Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals.’” (quoting *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 365 (1991) (Scalia, J., concurring in part and concurring in the judgment))).

7 See *infra* text accompanying notes 119–20 (describing two minor amendments).

8 See, e.g., *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 695 (1978).

Part II argues that, in light of the unusual history of judicial activism—and concomitant congressional passivity—in the development of qualified immunity, the doctrine has effectively become a special province of the Court, and therefore separation-of-powers concerns are less salient than in the context of most precedents concerning statutory interpretation. Relatedly, the Court has a special responsibility concerning constitutional enforcement generally, and civil rights actions to enforce the Constitution are a critical part of both defining constitutional rights and ensuring that they remain a meaningful and not merely theoretical restraint on government conduct. For these reasons, the Court's standard reluctance to overrule its statutory interpretations in light of the possibility of congressional intervention carries less weight here.

In Part III, I consider the related question of whether qualified immunity satisfies the Court's standard criteria for abandoning precedent. Although strict, they are not insurmountable, and I demonstrate that (again taking as a baseline the numerous critiques of qualified immunity) qualified immunity meets these criteria—the legal principles of the doctrine have eroded (or most accurately are in regular flux); the factual premises underlying the doctrine have been undermined; it has proven unworkable; and it anchors no reliance interest that the Court should recognize as legitimate.

Part IV considers and responds to counterarguments arising out of the separation of powers and considers what Congress's role should be. Part V concludes with a call for the Supreme Court to face squarely and decide the question whether qualified immunity should be reformed or abolished altogether.

I. THE RISE OF QUALIFIED IMMUNITY AS COMMON LAW

When the Court revitalized and expanded the scope of 42 U.S.C. § 1983 in 1961,⁹ the words “qualified immunity” (and its predecessor, the defense of “good faith and probable cause”) would have been relatively unfamiliar to a reader of the Federal Reporter and were essentially absent from the pages of the Supreme Court Reporter. The text of § 1983 itself sets forth no defenses or exceptions.¹⁰ Accordingly, the rise of qualified immunity was by no means a foregone conclusion.

Nonetheless, in 1967, in *Pierson v. Ray*,¹¹ the Supreme Court declared that “[t]he legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities,” and the Court “presume[d]

9 See *Monroe v. Pape*, 365 U.S. 167 (1961), *overruled on other grounds by Monell*, 436 U.S. 658.

10 42 U.S.C. § 1983 (“Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .”).

11 386 U.S. 547 (1967).

that Congress would have specifically so provided had it wished to abolish” these immunities.¹² Accordingly, the Court held in *Pierson* that § 1983 had implicitly incorporated absolute immunity for judges and, for police officers, the defense of “good faith and probable cause” that was to become known as qualified immunity.¹³

For the first decade and a half of the doctrine’s existence, the Court fleshed out and tinkered with the “good faith and probable cause” defense, and then gave it its first major overhaul in 1982. The tinkering took various forms. In *Scheuer v. Rhodes*,¹⁴ for instance, the Court implied that the contours of qualified immunity might vary depending on the responsibilities of the particular officer alleged to have violated the law.¹⁵ That suggestion came to little, and the standard today does not vary based on an official’s level of responsibility. In *Wood v. Strickland*,¹⁶ the Court made clear that qualified immunity was available not only to police officers but to other non-law enforcement personnel as well, such as school officials.¹⁷ In *Butz v. Economou*,¹⁸ the Court extended qualified immunity to federal officials.¹⁹

The Court’s major revision came in *Harlow v. Fitzgerald*.²⁰ Previously, qualified immunity had consisted of two alternative prongs, one subjective and one objective. Qualified immunity could be defeated either by a showing that the officer acted in bad faith—a subjective inquiry into the officer’s own motivations—or by a showing that the officer “knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff]”—an objective question.²¹ In *Harlow*, the Court confronted what it viewed as problems inherent in the “subjective prong”: that questions regarding a government official’s motive would shield insubstantial claims from early resolution and subject government officials to wide-ranging and distracting discovery.²² The Court’s solution to this problem was simply to abolish the “subjective prong” of qualified immunity entirely²³—or, in historical terms, to lop off the first half of the “defense of good faith and probable cause”—

12 *Id.* at 554–55.

13 *See id.* at 556–57.

14 416 U.S. 232 (1974), *abrogated on other grounds by* *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

15 *See id.* at 247 (“[I]n varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time.”).

16 420 U.S. 308 (1975).

17 *Id.* at 318.

18 438 U.S. 478 (1978).

19 *Id.* at 504.

20 457 U.S. 800 (1982).

21 *Id.* at 815 (alteration in original) (emphasis omitted) (quoting *Wood*, 420 U.S. at 322).

22 *See id.* at 815–16.

23 *See id.* at 817–18.

leaving plaintiffs with only one route to overcome qualified immunity: a showing that the defendant's conduct "violate[d] clearly established statutory or constitutional rights of which a reasonable person would have known."²⁴ The Court cited no basis in the statutory text or legislative history for this change.

The doctrine evolved still further, virtually always in favor of government defendants and to the disadvantage of civil rights plaintiffs. The construct of "a reasonable officer," by which the reasonableness of a defendant's conduct was to be judged, became "any reasonable officer" or "every reasonable official"²⁵—thus implying that in order for a plaintiff to overcome qualified immunity, the right violated must be so clear that its violation in the plaintiff's case would have been obvious not just to the average "reasonable officer" but to the least informed, least reasonable "reasonable officer." The Supreme Court also required that the right be defined with such specificity that the reasonable officer "would [have] underst[ood] that *what he is doing* violates that right."²⁶ As a result, defendants receive immunity unless it was clearly established not just that the relevant right existed but also that the specific action the officer took violated that right. This principle, applied repeatedly by the Supreme Court in the context of police shootings and chases, has become almost an insuperable barrier for civil rights plaintiffs in those contexts.²⁷ Although the Court has clarified that a plaintiff need not point to a case with "fundamentally similar" or "materially similar" facts in order to overcome qualified immunity,²⁸ the caselaw must nonetheless have made the unconstitutionality of the challenged conduct "apparent" or given the officer "fair warning" that it was unconstitutional²⁹—a high bar given the limitless variety of factual circumstances in which constitutional violations can arise. Each of the revisions described has come from the Supreme Court.

Alongside its amendments to the substance of qualified immunity doctrine, the Court developed a complex procedural structure for adjudication that has had as significant an effect on qualified immunity in practice as the

24 *Id.* at 818.

25 *See, e.g.,* *Messerschmidt v. Millender*, 565 U.S. 535, 556 (2012) ("The question in this case is . . . whether the Magistrate [so obviously] erred [in issuing the warrant] . . . that any reasonable officer would have recognized the error."); *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) ("A Government official's conduct violates clearly established law when, at the time of the challenged conduct, '[t]he contours of [a] right [are] sufficiently clear' that every 'reasonable official would [have understood] that what he is doing violates that right.'" (alterations in original) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987))).

26 *Anderson*, 483 U.S. at 640 (emphasis added).

27 *See, e.g.,* *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (per curiam); *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (per curiam); *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2020 (2014); *Scott v. Harris*, 550 U.S. 372, 381 (2007); *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam).

28 *Hope v. Pelzer*, 536 U.S. 730, 741 (2002).

29 *Id.* at 739, 740.

immunity test itself. First, the Court—in another abandonment of a prior approach without direction from Congress—demanded that the immunity inquiry be resolved as early in litigation as possible, thus taking the question out of the hands of the jury in nearly all cases and giving defendants an early opportunity for dismissal.³⁰ Second, the Court increased the leverage of government officials further by making denials of qualified immunity (unlike denials of ordinary motions to dismiss) immediately appealable.³¹ Accordingly, defendants in § 1983 cases often can avail themselves of at least two opportunities—one in the trial court and one in the appeals court—to have the suit dismissed at the outset before they are required to answer and begin discovery.

Third, and perhaps most significant to the development of constitutional rights, the Court first prescribed, then in an about-face backed away from, a requirement that courts first adjudicate the merits of the constitutional claims asserted before turning to the question of whether the violation was clearly established. In various cases in the late 1990s and early 2000s, most prominently in *Saucier v. Katz*,³² the Supreme Court instructed courts to observe a strict merits-first “order of battle,”³³ mainly to avoid the stagnation in the development of constitutional law that would result if courts could repeatedly say that a particular circumstance was not a “clearly established” constitutional violation without saying whether it was a constitutional violation at all³⁴—thus “leav[ing] standards of official conduct permanently in limbo”³⁵ and trapping plaintiffs in a perpetual twilight of potential constitutional violations for which no one could be held accountable because the law had never been “clearly established.” Less than a decade after *Saucier*, the Court in *Pearson v. Callahan*³⁶ abandoned the “order of battle” requirement and held that courts have discretion to choose whether to address the merits of the constitutional question first or the question of whether the right was “clearly established.”³⁷

In sum, then, from *Pierson* to *Pearson*, the fifty years of qualified immunity jurisprudence have been characterized by repeated judicial revisions, both small and large, to the substance and the procedural framework of qualified immunity. Throughout these revisions and reversals, Congress has

30 See *Hunter v. Bryant*, 502 U.S. 224, 228 (1991) (per curiam) (“Immunity ordinarily should be decided by the court long before trial.”). But cf. *Scheuer v. Rhodes*, 416 U.S. 232, 242–43 (1974) (“If the immunity is qualified, not absolute, the scope of that immunity will necessarily be related to facts as yet not established either by affidavits, admissions, or a trial record.”), *abrogated on other grounds by Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

31 See *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985).

32 533 U.S. 194 (2001).

33 This widely used description of the *Saucier* rule appears to have originated in *Brosseau v. Haugen*, 543 U.S. 194, 201–02 (2004) (Breyer, J., concurring).

34 See *Saucier*, 533 U.S. at 201.

35 *Camreta v. Greene*, 563 U.S. 692, 706 (2011).

36 555 U.S. 223 (2009).

37 *Id.* at 227, 236.

remained silent on the question of qualified immunity, and the Supreme Court has modified the doctrine based on its own policy judgments.

Meanwhile, qualified immunity has been the subject of increasing criticism from lawyers, commentators, and even judges themselves. Qualified immunity has been attacked as ahistorical;³⁸ unjustified as a matter of statutory interpretation;³⁹ grounded in assumptions about officers' likelihood of paying judgments that are at odds with the prevailing practice of indemnification;⁴⁰ too effective at protecting officers at the expense of accountability for constitutional violations;⁴¹ improperly applied as "an absolute shield" from liability that teaches officers "that they can shoot first and think later";⁴² antithetical to the congressional purpose behind 42 U.S.C. § 1983 of holding officers liable for constitutional violations;⁴³ internally inconsistent or impossible to apply with consistency;⁴⁴ an inappropriate influence on the substance of constitutional law;⁴⁵ an obstacle to the development of constitutional law;⁴⁶ an invitation to strategic manipulation;⁴⁷ and a source of awkwardness concerning jurisdiction and constitutional avoidance.⁴⁸

38 See *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1871–72 (2017) (Thomas, J., concurring in part and concurring in the judgment) ("In further elaborating the doctrine of qualified immunity for executive officials . . . we have diverged from the historical inquiry mandated by the statute. . . . Until we shift the focus of our inquiry to whether immunity existed at common law, we will continue to substitute our own policy preferences for the mandates of Congress.").

39 See Baude, *supra* note 3, at 47–48.

40 See, e.g., Cornelia T.L. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability Under Bivens*, 88 GEO. L.J. 65, 67–68 (1999); Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 938–40 (2014); Lynn Adelman, *The Supreme Court's Quiet Assault on Civil Rights*, DISSENT (Fall 2017), <https://www.dissentmagazine.org/article/supreme-court-assault-civil-rights-section-1983>.

41 See Erwin Chemerinsky, *Closing the Courthouse Doors*, 41 HUM. RTS. 5, 5 (2014); Erwin Chemerinsky, Opinion, *How the Supreme Court Protects Bad Cops*, N.Y. TIMES (Aug. 26, 2014), http://www.nytimes.com/2014/08/27/opinion/how-the-supreme-court-protects-bad-cops.html?_r=0; Segal, *supra* note 3.

42 *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting).

43 See Adelman, *supra* note 40.

44 See *infra* text accompanying notes 107–14.

45 See David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. PA. L. REV. 23, 27 (1989).

46 See *Pearson v. Callahan*, 555 U.S. 223, 236 (2009); Adelman, *supra* note 40; *cf.* *Dist. of Columbia v. Wesby*, 138 S. Ct. 577, 589 n.7 (2018) ("We continue to stress that lower courts 'should think hard, and then think hard again,' before addressing both qualified immunity and the merits of an underlying constitutional claim." (quoting *Camreta v. Greene*, 563 U.S. 692, 707 (2011))).

47 See Aaron L. Nielson & Christopher J. Walker, *Strategic Immunity*, 66 EMORY L.J. 55, 117 (2016); Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1, 45–46 (2015).

48 See *Camreta*, 563 U.S. at 722 (Kennedy, J., dissenting) (objecting to majority's recognition of Article III jurisdiction over appeals by victorious governmental parties who were granted immunity after having lost the constitutional merits, and observing that "our

My purpose here is not to revisit or explore the details of these various critiques, but instead to consider whether, taking these critiques as given, the task of reforming or abolishing qualified immunity may appropriately be undertaken by the Court in the absence of congressional action. I therefore turn next to the Supreme Court's framework for answering this type of question—the law of statutory *stare decisis*—and apply it to qualified immunity.

II. THE CASE FOR JUDICIAL INTERVENTION

Judicial correction of qualified immunity is consistent with both the history of its development and with the Court's approach to *stare decisis* in this area. The Court's history of taking ownership of this doctrine, together with the constitutional implications of the doctrine itself, should overcome the force of the special "statutory *stare decisis*" rule.

The Court has recognized that *stare decisis* has special force in the context of statutory interpretation.⁴⁹ Unlike constitutional interpretations—which only the Court itself can reconsider absent the rare event of constitutional amendment—the Court's interpretations and applications of statutes are subject to being overruled by Congress.⁵⁰ That is, if Congress thinks the Court has misinterpreted a statute, Congress has the power to clarify or amend the statute to correct the Court's mistake. Accordingly, the Court often—but not always—applies what Professor Eskridge has called a "super-strong presumption against overruling statutory precedents."⁵¹ The result of this presumption is to leave to Congress the task of deciding whether to overrule the Supreme Court's statutory interpretations.

In the case of qualified immunity, however, the special statutory *stare decisis* rule has diminished force. At the outset, like the general rule of *stare decisis* itself, the special statutory *stare decisis* rule is not inflexible. As Justice Frankfurter noted, "the Court has not always declined to re-examine cases whose outcome Congress might have changed."⁵² Indeed, Professor Eskridge observed in 1988 that "the Supreme Court has overruled or materially modified statutory precedents more than eighty times since 1961."⁵³

Even if such reversals on matters of statutory interpretation are the exception rather than the rule, the history and quasi-constitutional context

recent qualified immunity cases tend to produce decisions that are in tension with conventional principles of case-or-controversy adjudication").

49 See, e.g., *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 695 (1978); *Francis v. S. Pac. Co.*, 333 U.S. 445, 450 (1948); *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 488–89 (1940).

50 See cases cited *supra* note 49.

51 William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1363 (1988).

52 *Monroe v. Pape*, 365 U.S. 167, 221 (1961) (Frankfurter, J., dissenting in part) ("Decisions involving statutory construction, even decisions which Congress has persuasively declined to overrule, have been overruled here."), *overruled in part by Monell*, 436 U.S. 658.

53 See Eskridge, *supra* note 51, at 1363 (going on to justify his count in a detailed appendix).

of qualified immunity render it an exceptional doctrine. Unlike most statutory fields in which the Court and Congress engage in an active dialogue over the content and application of the law, constitutional tort law has been dominated by the Supreme Court. Since the 1960s, the Court has consistently played a robust and practically legislative role in the interpretation of § 1983—including frequent tweaks to and sometimes even outright reversals of previously settled doctrine without intervention by Congress.⁵⁴ The Court’s policymaking tendencies have been particularly acute regarding qualified immunity, in which the doctrinal twists and turns have, as noted, included the decision to recognize the defense in the first place in the absence of a textual basis in § 1983, the modification of the qualified immunity standard, and the prescription and later reversal of the “order of battle”;⁵⁵ indeed, the Court itself has acknowledged that it has been “forthright in revising the immunity defense for policy reasons.”⁵⁶

Beyond the qualified immunity context, other aspects of § 1983 and parallel constitutional tort claims have been the subjects of substantial judicial revision as well. The most prominent among these is the issue of whether municipal liability could exist under § 1983—which the Supreme Court initially denied,⁵⁷ then in a reversal allowed,⁵⁸ and then further addressed by developing an elaborate set of rules untethered either to statutory text or common law.⁵⁹ Another prominent judicial overhaul has occurred in the context of constitutional tort claims against federal officials, which the Supreme Court initially recognized,⁶⁰ then spent several decades pruning back,⁶¹ in spite of Congress’s apparent endorsement of the doctrine as the

54 See Rudovsky, *supra* note 45, at 25 (“[T]he Court . . . has engaged in an aggressive reconstruction of the scope of § 1983.”).

55 See *supra* notes 32–37 and accompanying text.

56 Crawford-El v. Britton, 523 U.S. 574, 594 n.15 (1998); see also Anderson v. Creighton, 483 U.S. 635, 645 (1987) (“[T]he Court [in *Harlow*] completely reformulated qualified immunity along principles not at all embodied in the common law.”); Harlow v. Fitzgerald, 457 U.S. 800, 813–14 (1982) (“The resolution of immunity questions inherently requires a balance between the evils inevitable in any available alternative.”); Owen v. City of Independence, 445 U.S. 622, 651–56 (1980) (rejecting extension of qualified immunity to shield municipality defendants, in part on the basis of policy judgments about deterrence, remediation, and loss spreading); Wood v. Strickland, 420 U.S. 308, 318 (1975) (extending qualified immunity to cover school officials on the basis of “[c]ommon-law tradition, recognized in our prior decisions, and strong public-policy reasons”).

57 *Monroe*, 365 U.S. at 191–92.

58 *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 689, 701 (1978).

59 See generally *Bd. of Cty. Comm’rs v. Brown*, 520 U.S. 397, 430–37 (1997) (Breyer, J., dissenting) (outlining, and criticizing, the Court’s “policy or custom” criterion for municipal liability, elaborated through twenty years’ worth of jurisprudence, as atextual, contrary to historical practice, and having “produced a body of law that is neither readily understandable nor easy to apply”).

60 See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971).

61 See *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017) (summarizing the Court’s *Bivens* jurisprudence since 1980).

Court initially conceived it.⁶² The Supreme Court has also interposed an atextual absolute immunity defense for important categories of constitutional tort defendants, including prosecutors, judges, and legislators;⁶³ and created, elaborated on, and then substantially altered the framework for using § 1983 to enforce rights created by other federal statutes⁶⁴—all without intervention from Congress.⁶⁵ Regarding absolute immunity, the Court has acknowledged adapting the common-law defense for prosecutors to address policy concerns associated with the rise of governmental as opposed to private prosecutors.⁶⁶

In light of the Court's leading role in this area of law, Professors Beermann and Sunstein have argued that § 1983 should be treated for purposes of statutory *stare decisis* as a common-law statute like the Sherman Act—an area that Congress expects the Court to shape and refine.⁶⁷ Indeed, as

62 See *Carlson v. Green*, 446 U.S. 14, 19–20 (1980) (“[W]hen Congress amended [the Federal Tort Claims Act] in 1974 to create a cause of action against the United States for intentional torts committed by federal law enforcement officers, the congressional comments accompanying that amendment made it crystal clear that Congress views FTCA and *Bivens* as parallel, complementary causes of action.” (citation omitted)); see also 28 U.S.C. § 2679(b)(2)(A) (specifically preserving, distinct from the FTCA, a “civil action against an employee of the Government . . . which is brought for a violation of the Constitution of the United States”); *United States v. Smith*, 499 U.S. 160, 166–67 (1991) (noting that the FTCA creates a remedy for torts by federal employees that is exclusive of other remedies with two exceptions, one of which is for *Bivens* (citing 28 U.S.C. § 2679(b)(2))).

63 See *Imbler v. Pachtman*, 424 U.S. 409, 424 (1976) (prosecutors); *Pierson v. Ray*, 386 U.S. 547, 554–55 (1967) (judges); *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951) (legislators).

64 Compare *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980) (recognizing enforceability of federal statutes generally under § 1983), and *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 508 (1990) (“A plaintiff alleging a violation of a federal statute will be permitted to sue under § 1983 unless (1) ‘the statute [does] not create enforceable rights, privileges, or immunities within the meaning of § 1983,’ or (2) ‘Congress has foreclosed such enforcement of the statute in the enactment itself.’” (alteration in original) (quoting *Wright v. Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418, 423 (1987))), with *Gonzaga Univ. v. Doe*, 536 U.S. 273, 285–86 (2002) (“A court’s role in discerning whether personal rights exist in the § 1983 context should . . . not differ from its role in discerning whether personal rights exist in the implied right of action context. Both inquiries simply require a determination as to whether or not Congress intended to confer individual rights upon a class of beneficiaries. Accordingly, where the text and structure of a statute provide no indication that Congress intends to create new individual rights, there is no basis for a private suit, whether under § 1983 or under an implied right of action.” (citations omitted)).

65 The Supreme Court has similarly been willing to reverse course regarding the interpretation of other Reconstruction-Era civil rights laws, such as 42 U.S.C. §§ 1982 and 1985(3). See *Griffin v. Breckenridge*, 403 U.S. 88, 92–96, 101–02 (1971) (overruling *Collins v. Hardyman*, 341 U.S. 651 (1951)); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 419–20, 420 n.25 (1968) (disavowing characterization of the law in *Hurd v. Hodge*, 334 U.S. 24, 31 (1948)).

66 *Rehberg v. Paulk*, 566 U.S. 356, 364–65 (2012).

67 See Jack M. Beermann, *A Critical Approach to Section 1983 with Special Attention to Sources of Law*, 42 STAN. L. REV. 51, 57 (1989) (“In interpreting § 1983, text and history answer so few questions that the Court is forced to look elsewhere, as it sometimes

shown by the Court's willingness to contradict or even reverse itself outright several times in applying constitutional tort law—and specifically in applying qualified immunity—the Court has not considered itself especially constrained by the special statutory stare decisis rule. When the Court abandoned the *Saucier* “order of battle” requirement in *Pearson*, the Court brushed aside stare decisis because “the *Saucier* rule is judge made and implicates an important matter involving internal Judicial Branch operations.”⁶⁸ When the Court overhauled the immunity doctrine in *Harlow*, it did not even mention stare decisis.⁶⁹ Likewise, stare decisis has not come up in other recent Supreme Court decisions reshaping constitutional tort law or § 1983 doctrine.⁷⁰ The Court's most prominent invocation of stare decisis in this field was in *Monell v. Department of Social Services*,⁷¹ where it overruled its holding in *Monroe v. Pape*⁷² that municipalities could not be defendants under § 1983; even there, although the Court felt compelled to grapple with stare decisis and with Congress's opportunity to correct *Monroe*, the Court ultimately concluded that instead of “plac[ing] on the shoulders of Congress the burden of the Court's own error,”⁷³ the appropriate course was to overrule its own prior decision.⁷⁴

The Court's history of particular activism in constitutional tort litigation is supported by the field's close nexus with constitutional law itself. As the Court has repeatedly recognized, a civil rights action for damages is one of the main ways—and in some instances, the only way—that the Constitution can be enforced.⁷⁵ Accordingly, the Court has repeatedly recognized causes

admits.”); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 421–22 (1989) (“[S]ection 1983 is silent on many important questions, including available defenses, burdens of pleading and persuasion, and exhaustion requirements. Because of the textual silence, judges must fill the gaps. To this extent, the statute delegates power to make common law.” (footnote omitted)). *But cf.* Richard H. Fallon, Jr., *Three Symmetries Between Textualist and Purposivist Theories of Statutory Interpretation—and the Irreducible Roles of Values and Judgment Within Both*, 99 CORNELL L. REV. 685, 719 n.180 (2014) (observing that that the Court has not consistently treated § 1983 as a “common law statute” in the manner of the Sherman Act).

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

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

70 *See, e.g.*, *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017) (reformulating approach to determining the existence of a *Bivens* damages action against federal officers for violating constitutional rights); *Gonzaga Univ. v. Doe*, 536 U.S. 273, 285–86 (2002) (reformulating approach to determining enforceability of federal statutory rights under § 1983).

71 436 U.S. 658 (1978).

72 365 U.S. 167 (1961).

73 *Monell*, 436 U.S. at 695 (quoting *Girouard v. United States*, 328 U.S. 61, 70 (1946)).

74 *See id.* at 695–701.

75 *See, e.g.*, *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982) (“In situations of abuse of office, an action for damages may offer the only realistic avenue for vindication of constitutional guarantees.”); *Davis v. Passman*, 442 U.S. 228, 245 (1979) (“For Davis, as for *Bivens*, ‘it is damages or nothing.’” (quoting *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 410 (1971) (Harlan, J., concurring in the judgment))); *Bivens*, 403 U.S. at 410 (Harlan, J., concurring in the judgment) (explaining how an innocent

of action to enforce the Constitution in the absence of statutory authorization. The *Bivens* decision, quoting from *Marbury v. Madison* the principle that “[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury,” recognized a damages cause of action to redress violations of constitutional rights.⁷⁶ Outside of the damages context, the Supreme Court has long recognized federal courts’ inherent equitable power to enjoin constitutional violations, dating back at least to 1908 in *Ex parte Young*⁷⁷ and with roots in English common law.⁷⁸ Beyond civil litigation altogether, the Court has developed the exclusionary rule as a means for safeguarding constitutional rights by deterring officers from violating the Fourth Amendment;⁷⁹ the Court has repeatedly revised this constitutional enforcement doctrine as well.⁸⁰

Although the Court has imposed significant limits on the *Bivens* remedy in light of separation-of-powers concerns,⁸¹ it continues to recognize—and has recently reaffirmed—its inherent authority to enjoin constitutional violations by either federal or state officials.⁸² This power follows directly from the *Marbury* principle that “where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded,”⁸³ and from courts’ traditional authority to devise appropriate remedies for violations of law.⁸⁴ The Court has thus

presume[d] that justiciable constitutional rights are to be enforced through the courts. And, unless such rights are to become merely precatory, the class

person subjected to an unlawful search and seizure has no need of the exclusionary remedy).

76 *Bivens*, 403 U.S. at 397 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803)).

77 209 U.S. 123 (1908).

78 See *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384 (2015).

79 See *Weeks v. United States*, 232 U.S. 383, 398 (1914), *overruled on other grounds by Mapp v. Ohio*, 367 U.S. 643 (1961).

80 See, e.g., *Utah v. Strieff*, 136 S. Ct. 2056, 2061 (2016) (describing the independent-source, inevitable-discovery, and attenuation exceptions to the exclusionary rule); *Davis v. United States*, 564 U.S. 229, 238–39 (2011) (describing the good-faith exception to the exclusionary rule); *Wong Sun v. United States*, 371 U.S. 471, 484–85 (1963) (describing “fruit of the poisonous tree” corollary to exclusionary rule).

81 See, e.g., *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017).

82 See *Armstrong*, 135 S. Ct. at 1384.

83 *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803); *accord Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971); see also *De Lima v. Bidwell*, 182 U.S. 1, 176–77 (1901) (“If there be an admitted wrong, the courts will look far to supply an adequate remedy.”); *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 624 (1838) (“[It would] involve a monstrous absurdity in a well organized government, that there should be no remedy, although a clear and undeniable right should be shown to exist.”); 3 WILLIAM BLACKSTONE, COMMENTARIES *23 (noting the “general and indisputable rule, that where there is a legal right, there is also a legal remedy, by suit or action at law, whenever that right is invaded”).

84 See generally *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 66–71 (1992).

of those litigants who allege that their own constitutional rights have been violated, and who at the same time have no effective means other than the judiciary to enforce these rights, must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights.⁸⁵

Accordingly, it is *Bivens* itself, and not the Court's recent limitations on that line of cases, that best reflects the Court's proper role in developing rules for constitutional enforcement. As the conservative Justice Harlan put it, concurring in *Bivens*, "the judiciary has a particular responsibility to assure the vindication of constitutional interests such as those embraced by the Fourth Amendment."⁸⁶ Even Justice Frankfurter, the lone dissenter from the Court's expansion of § 1983 in *Monroe v. Pape*, argued specifically that stare decisis had less force where the Court dealt with causes of action to enforce the Constitution: "Necessarily, the construction of the Civil Rights Acts raises issues fundamental to our institutions. This imposes on this Court a corresponding obligation to exercise its power within the fair limits of its judicial discretion."⁸⁷ Along similar lines, Justice Scalia later observed that "this Court has applied the doctrine of stare decisis to civil rights statutes less rigorously than to other laws."⁸⁸

Ironically, even the Court's long retreat from *Bivens* itself⁸⁹ proves that the Court continues to subscribe to a key aspect of the *Bivens* view of judicial power: that the Court can and should take a leading role in shaping constitutional enforcement doctrines⁹⁰—even if for the modern Court that means contracting them as well as expanding them. For instance, in spite of the Court's recognition that Congress has effectively acquiesced in *Bivens*,⁹¹ the Court has spent decades pruning back the doctrine instead of leaving it on the course set during the period of development to which Congress had acquiesced.⁹² Accordingly, the Court's recent attempts to cast its role in the

85 *Davis v. Passman*, 442 U.S. 228, 242 (1979).

86 *Bivens*, 403 U.S. at 407 (Harlan, J., concurring in the judgment).

87 *Monroe v. Pape*, 365 U.S. 167, 221–22 (1961) (Frankfurter, J., dissenting in part), *overruled in part by* *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978).

88 *Johnson v. Transp. Agency*, 480 U.S. 616, 672–73 (1987) (Scalia, J., dissenting) (emphasis omitted).

89 *See* *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017) (describing development of the law from 1983 to 2017).

90 *See Bivens*, 403 U.S. at 392; *id.* at 407 (Harlan, J., concurring in the judgment) ("[I]t seems to me that the range of policy considerations we may take into account is at least as broad as the range of a legislature would consider with respect to an express statutory authorization of a traditional remedy.").

91 *See supra* note 62 and accompanying text.

92 *See supra* note 89 and accompanying text. *Compare* *Carlson v. Green*, 446 U.S. 14, 18 (1980) ("*Bivens* established that the victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right [subject to just two exceptions]."), *with Ziglar*, 137 S. Ct. at 1857 ("[E]xpanding the *Bivens* remedy is now a 'disfavored' judicial activity." (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009))).

shaping of civil rights remedies as a narrow one⁹³ are in tension with its actions.

From the special judicial responsibility for the enforcement of constitutional rights, the Court's leading role in shaping the contours of a constitutional tort cause of action and its defenses naturally follows. As the Court explained, in determining whether § 1983 should be interpreted to incorporate the common-law rule of prosecutorial immunity, for instance: "We . . . must determine whether the same considerations of public policy that underlie the common-law rule likewise countenance absolute immunity under § 1983."⁹⁴ The special judicial power to craft a remedy in this area logically includes the power to define the contours of that remedy and its limits. That power, combined with fifty years' worth of history of treating § 1983 like a common-law statute that Congress expects the Court to interpret, overcomes the usually rigorous application of *stare decisis* in the context of statutory precedents.

III. QUALIFIED IMMUNITY AND ORDINARY STARE DECISIS

Despite the Court's willingness to modify the qualified immunity framework over the past half century, including by overruling its own precedents, one would still expect the Court, before eliminating or significantly curtailing qualified immunity, to look to its own internal norms for ensuring consistency in the law by generally adhering to its precedents. Do these "ordinary" principles of *stare decisis* defeat reexamination of qualified immunity? I argue that they do not.

Stare decisis, of course, is a strong presumption but not an "inexorable command."⁹⁵ The Supreme Court has identified four criteria to guide the determination whether the presumption of fidelity to precedent should be overcome:

Thus, for example, we may ask whether the rule has proven to be intolerable simply in defying practical workability; whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation; whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; or whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.⁹⁶

If the critiques of qualified immunity enumerated in Part I are correct, then the Court's criteria for overruling a past decision are satisfied.

93 See *supra* note 6 and accompanying text.

94 *Imbler v. Pachtman*, 424 U.S. 409, 424 (1976).

95 *Pearson v. Callahan*, 555 U.S. 223, 233 (2009) (quoting *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997)).

96 *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854–55 (1992) (citations omitted); see also *Lawrence v. Texas*, 539 U.S. 558, 567–79 (2003) (considering reliance, factual/historical questions, and legal erosion in deciding to overrule *Bowers v. Hardwick*, 478 U.S. 186 (1986)).

First, the factual assumptions underlying qualified immunity are almost certainly wrong. The principal justifications for the establishment of the doctrine were fairness to officers who must exercise discretion in the face of uncertainty and protection of officers from personal liability that might exert a chilling effect on their performance of their duties.⁹⁷ In fact, according to recent empirical research underlying some of the most potent critiques of the doctrine, qualified immunity does not serve these purposes at all. Instead, officials avoid liability because of the near-universal governmental practice of indemnifying employees.⁹⁸ This factual rebuttal is particularly powerful in light of the Court's explicit assumption—in brushing aside plaintiffs' argument that qualified immunity should not be extended "because the Federal Government and various state governments have established programs through which they reimburse officials for expenses and liability incurred in suits challenging actions they have taken in their official capacities"—that plaintiffs "*could not reasonably contend* that the programs to which they refer make reimbursement sufficiently certain and generally available to justify reconsideration of the balance struck in *Harlow* and subsequent cases."⁹⁹ Thus, whatever its applicability when the Court first created the qualified immunity rule, the goal of shielding officers from personal liability has today been rendered moot.¹⁰⁰ Accordingly, the principal rationales for qualified immunity have been undermined: § 1983 neither threatens to chill officers' performance of their duties nor unfairly to "mulct[] [them] in damages"¹⁰¹—because in fact officers by and large do not pay § 1983 judgments at all.¹⁰²

97 See *Scheuer v. Rhodes*, 416 U.S. 232, 240 (1974) (explaining that official immunity at common law was based on "two mutually dependent rationales: (1) the injustice . . . of subjecting to liability an officer who is required, by . . . his position, to exercise discretion; (2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good" (footnote omitted)); accord Alan K. Chen, *The Burdens of Qualified Immunity: Summary Judgment and the Role of Facts in Constitutional Tort Law*, 47 AM. U. L. REV. 1, 15 (1997) (noting that qualified immunity jurisprudence in the Supreme Court "began with a focus on the fairness and overdeterrence rationales").

98 See generally Schwartz, *supra* note 40.

99 *Anderson v. Creighton*, 483 U.S. 635, 641 n.3 (1987) (emphasis added).

100 Although she does not purport to explain why the Court has relied on the assumption that individual officers will pay their own judgments, Professor Schwartz has hypothesized: "One possible explanation is that few states had indemnification statutes in 1961, when the Supreme Court made clear . . . that individuals could sue government officials under § 1983." Schwartz, *supra* note 40, at 892 n.24.

101 *Pierson v. Ray*, 386 U.S. 547, 555 (1967).

102 See Schwartz, *supra* note 40, at 943; accord Barbara E. Armacost, *Qualified Immunity: Ignorance Excused*, 51 VAND. L. REV. 583, 587 (1998) ("[G]iven indemnification and absent some systemic bias, incentives might be balanced such that officials *will*, in fact, consider all the societal costs and benefits of their actions. If so, governmental liability would present little or no risk of overdeterrence, making qualified immunity unnecessary." (footnote omitted)); Richard H. Fallon, Jr., *Asking the Right Questions About Officer Immunity*, 80 FORDHAM L. REV. 479, 497 (2011) ("[I]t might be desirable to reconsider current doctrines that

The second criterion, legal erosion, is in one sense difficult to meet here in the face of the Court's repeated application of qualified immunity and insistence on lower courts' adherence to it.¹⁰³ The courts' difficulty in applying the doctrine to the Supreme Court's satisfaction¹⁰⁴ and in a consistent manner,¹⁰⁵ however, points to the inherent instability of the rule. Moreover, it is difficult to identify a firm foundation for a doctrine that has been revised so many times over the years by the Court itself.¹⁰⁶ Thus, if the question of legal erosion is understood to be in part about whether the doctrine stands on a firm foundation, the answer favors overruling. Put another way, the doctrine is, through its repeated shifts and instability, eroding itself.

Closely related to the doctrine's lack of strong legal foundation is the third *stare decisis* criterion: unworkability. Courts have had difficulty apply-

largely shield governments from direct liability for their officials' wrongs, especially if empirical studies were to establish that government employers routinely indemnify their officials anyway.").

103 See Adelman, *supra* note 40 ("The Court has been extremely aggressive on this issue. Of the nineteen opinions it has issued since 2001, in seventeen it found that government officials were entitled to qualified immunity because the plaintiff could not produce a precedent with facts close enough to those in the case at bar. . . . Also, more than one-third of these seventeen defendant-friendly rulings came in summary reversals, which are rare in the Supreme Court. The Court continually reminds us that its job is not error-correction but to decide broader questions. In these summary reversals, however, the only question was whether the clearly established law standard applied to a particular set of facts, a pure error-correcting issue."); see also Kit Kinports, *The Supreme Court's Quiet Expansion of Qualified Immunity*, 100 MINN. L. REV. HEADNOTES 62, 63–64 (2016); Scott Michelman, Taylor v. Barkes: *Summary Reversal Is Part of a Qualified Immunity Trend*, SCOTUSBLOG (June 2, 2015, 11:17 AM), <http://www.scotusblog.com/2015/06/taylor-v-barkes-summary-reversal-is-part-of-a-qualified-immunity-trend>.

104 See, e.g., *City & County of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1774–78 (2015) (reversing court of appeals and granting qualified immunity to officers who forcibly entered the room of a mentally disabled woman and shot her multiple times); *Carroll v. Carman*, 135 S. Ct. 348, 349–50 (2014) (per curiam) (reversing court of appeals and granting qualified immunity to officer who went into a private backyard and onto the deck without a warrant); *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2020–24 (2014) (reversing district court and court of appeals and granting qualified immunity to officers who fired fifteen shots to end a high-speed car chase and killed the driver and passenger); *Scott v. Harris*, 550 U.S. 372, 374–86 (2007) (reversing district court and court of appeals and granting qualified immunity to officer who ended a car chase by running the driver off the road and rendering him a quadriplegic).

105 See Schwartz, *supra* note 40, at 893 ("Qualified immunity decisions have been described as 'one of the most morally and conceptually challenging tasks federal appellate [court] judges routinely face.' The law is not clear about how factually similar a prior decision must be to the instant case in order for the law to be 'clearly established.'" (footnote omitted) (quoting Charles R. Wilson, "Location, Location, Location": *Recent Developments in the Qualified Immunity Defense*, 57 N.Y.U. ANN. SURV. AM. L. 445, 447 (2000))); see also Lindsey de Stefan, Comment, "No Man Is Above the Law and No Man Is Below It": *How Qualified Immunity Reform Could Create Accountability and Curb Widespread Police Misconduct*, 47 SETON HALL L. REV. 543, 552 n.56 (2017) (citing examples of disagreements among federal courts about the contours of qualified immunity).

106 See *supra* Part I.

ing qualified immunity consistently, as figuring out what a reasonable officer “should have known” and at what level of specificity a legal principle has been established can devolve into an almost metaphysical exercise.¹⁰⁷ Application of the doctrine in nearly every case requires judges to make a legal determination based on vague and malleable concepts like the “reasonable officer” and “fair warning.”¹⁰⁸ Moreover, the procedural change introduced by *Pearson*—the grant of judicial discretion to decide whether to begin with the constitutional merits or the “clearly established” question—has opened the door for strategic behavior by judges, and differences in approaches between Republican and Democratic appointees on the federal bench have been documented.¹⁰⁹

Another sign of unworkability is that qualified immunity doctrine creates tensions both with other legal doctrines and within itself. As an example of the former, consider *Camreta v. Greene*,¹¹⁰ in which the Supreme Court found it necessary to bend standard rules of justiciability to permit defendants who lose on the constitutional merits but are granted qualified immunity to seek Supreme Court review of a case that they have won.¹¹¹ Whether or not this exception to the Court’s usual understanding of Article III is justified, Justice Kennedy’s dissent persuasively demonstrates that the rule is a departure from the Court’s typical approach to standing and permits, effectively, certain parties to “file[] a new declaratory judgment action in [the Supreme] Court against the Court of Appeals.”¹¹² And as an example of the doctrine’s internal inconsistency, consider the appropriate result in a qualified immunity case in which the majority of an appellate panel believes that an officer has violated a clearly established right and the dissent sees no constitutional violation at all.¹¹³ The Supreme Court has reasoned that “[i]f judges . . . disa-

107 See Karen M. Blum, *Section 1983 Litigation: The Maze, the Mud, and the Madness*, 23 WM. & MARY BILL RTS. J. 913, 962–64 (2015) (“In my forty years of teaching, I have participated in Section 1983 programs for litigants and judges all over the country. For twenty years, I have co-authored a treatise on Police Misconduct Litigation under Section 1983 and taught a course on the same subject. It astounds me that so much of the law surrounding Section 1983 litigation remains uncertain, unpredictable, and seemingly dependent upon the ‘judicial experience and common sense’ of the particular judge hearing the case.” (footnotes omitted) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009))); Alan K. Chen, *The Facts About Qualified Immunity*, 55 EMORY L.J. 229, 231 (2006) (“Over the past four decades, the Court has devoted an extraordinary amount of energy struggling to define and to clarify the procedures under which parties litigate, and lower courts adjudicate, officials’ immunity claims. This effort has been largely unsuccessful”); John C. Jeffries, Jr., *What’s Wrong with Qualified Immunity?*, 62 FLA. L. REV. 851, 852 (2010) (“[D]etermining whether an officer violated ‘clearly established’ law has proved to be a mare’s nest of complexity and confusion.”).

108 See *supra* text accompanying notes 20–29.

109 See *supra* note 47.

110 563 U.S. 692 (2011).

111 See *id.* at 703–09.

112 *Id.* at 727 (Kennedy, J., dissenting).

113 See, e.g., *Wesby v. District of Columbia*, 765 F.3d 13 (D.C. Cir. 2014) (2–1 panel majority affirmed summary judgment for plaintiffs on the merits and denial of qualified

gree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy.”¹¹⁴ Accepting that premise, along with the fairly anodyne assumption that judges are not unreasonable—or at the very least that if a judge doesn’t see a constitutional violation, a law enforcement officer in the field can hardly be expected to do so—it follows that one dissenting judge’s disagreement as to the constitutional violation should a fortiori trigger qualified immunity. That is, if the assumptions behind qualified immunity are correct, a lone dissenter, simply by dissenting, should logically *change* the qualified immunity calculus and require the panel to reject what otherwise would be the prevailing (majority) position because the very existence of the dissent on the merits proves that reasonable minds differ. Of course, that’s not how it works given the rule of majority vote. But the fact that the presence of a dissenter on the merits question logically undermines the majority’s holding on qualified immunity shows how difficult the qualified immunity doctrine is to apply in a consistent manner. In light of qualified immunity’s amalgam of doctrinal paradoxes and malleable concepts, courts’ consistent struggles to apply the doctrine consistently should come as no surprise.

Finally, qualified immunity generates no legitimate reliance interests. “Legitimate” is a key qualifier here because it is not hard to imagine that many a municipality relies on qualified immunity to protect its bottom line by reducing the frequency of judgments against it for constitutional violations. But protection of government coffers occurs only where a government officer has in fact violated the Constitution—otherwise, the claim would be defeated not by absence of a “clearly established” constitutional right but by the lack of the constitutional violation in the first place. The Supreme Court has long recognized, rightly, that actors cannot legitimately rely on a privilege to violate constitutional rights.¹¹⁵ That principle answers any claimed reliance interest here. Moreover, to the extent individual defendants might

immunity; dissent would have reversed summary judgment), *rev’d*, 138 S. Ct. 577 (2018); *Millender v. County of Los Angeles*, 620 F.3d 1016 (9th Cir. 2010) (en banc) (8–3 majority affirmed denial of summary judgment based on qualified immunity; two of three dissenters would have found no constitutional violation), *rev’d sub nom.* *Messerschmidt v. Millender*, 565 U.S. 535 (2012); *Callahan v. Millard County*, 494 F.3d 891 (10th Cir. 2007) (2–1 panel majority reversed district court’s denial of qualified immunity; dissent would have found no constitutional violation), *rev’d sub nom.* *Pearson v. Callahan*, 555 U.S. 223 (2009); *Haugen v. Brosseau*, 339 F.3d 857 (9th Cir. 2003) (2–1 panel majority reversed grant of summary judgment based on qualified immunity; dissent would have found no constitutional violation), *opinion amended on denial of reh’g*, 351 F.3d 372 (9th Cir. 2003) (mem.), *rev’d*, 543 U.S. 194 (2004) (per curiam).

114 *Wilson v. Layne*, 526 U.S. 603, 618 (1999).

115 *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 700 (1978) (noting that actors “simply cannot ‘arrange their affairs’ on an assumption that they can violate constitutional rights indefinitely”); *see also* *Smith v. Wade*, 461 U.S. 30, 50 (1983) (“[W]e assume, and hope, that most officials are guided primarily by the underlying standards of federal substantive law—both out of devotion to duty, and in the interest of avoiding liability for compensatory damages. At any rate, the conscientious officer who desires clear guidance on how to do his job and avoid lawsuits can and should look to the standard for actionability in the first

rely on qualified immunity to shield them from the distractions of litigation, empirical research suggests that the doctrine in fact does not perform this function.¹¹⁶

In sum, taking the extant critiques of qualified immunity as a starting point, the criteria for overruling *Pierson* are satisfied. The Court should not feel beholden to adhere to current qualified immunity doctrine for reasons of ordinary stare decisis.

IV. WHAT ABOUT CONGRESS?

The principal objection to a judicial overhaul of immunity is, of course, separation of powers. After all, § 1983 is a statute, which Congress can rewrite.

But, as detailed above, Congress has a history of leaving § 1983 alone and ceding its interpretation to the courts. In the half century since *Monroe v. Pape*¹¹⁷ launched the widespread use of § 1983 as a mechanism for constitutional accountability,¹¹⁸ the Court has decided dozens of cases that have shaped the interpretation of § 1983—sometimes, as noted, in dramatic ways. Meanwhile, Congress has amended § 1983 just twice, to make discrete changes aimed not at the interpretation of the statute generally but at its application to two particular circumstances: first, to extend § 1983 to apply to constitutional violations by officials of the District of Columbia,¹¹⁹ and second, to provide that judges cannot be enjoined under § 1983 unless they have first been subjected to a declaratory judgment and violated it, or declaratory relief was unavailable.¹²⁰

instance.”); *Owen v. City of Independence*, 445 U.S. 622, 649 (1980) (“[A] municipality has no ‘discretion’ to violate the Federal Constitution.”).

116 See Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 *YALE L.J.* 2, 2–4 (2017) (“I reviewed the dockets of 1,183 Section 1983 cases filed against state and local law enforcement defendants in five federal court districts over a two-year period and measured the frequency with which qualified immunity motions were brought by defendants, granted by courts, and dispositive before discovery and trial. I found that qualified immunity rarely served its intended role as a shield from discovery and trial in these cases. Across the five districts in my study, just thirty-eight (3.9%) of the 979 cases in which qualified immunity could be raised were dismissed on qualified immunity grounds.”)

117 365 U.S. 167 (1961), *overruled in part by Monell*, 436 U.S. 658.

118 See Ruggero J. Aldisert, *Judicial Expansion of Federal Jurisdiction: A Federal Judge’s Thoughts on Section 1983, Comity and the Federal Caseload*, 1973 *LAW & SOC. ORD.* 557, 563 (describing the 1100 percent increase in cases brought under § 1983 in the decade after *Monroe*); Harry A. Blackmun, *Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?*, 60 *N.Y.U. L. REV.* 1, 19 (1985) (explaining that in the twenty-two years before *Monroe*, the number of § 1983 claims to reach the Court “can almost be counted on one hand”).

119 See Act of Dec. 29, 1979, Pub. L. No. 96-170, 93 Stat. 1284 (codified as amended at 42 U.S.C. § 1983).

120 See Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, § 309(c), 110 Stat. 3847, 3853 (codified as amended at 42 U.S.C. § 1983).

The judiciary not only has more experience shaping the law of § 1983 but is also in the best position to evaluate its effects in ensuring constitutional compliance. In adjudicating § 1983 actions, judges are constantly learning about the statute's effects and shortcomings and can see it at work in concrete cases. Based on the Supreme Court's observations of the way in which § 1983 actions shape the law, the Court has made several changes to the procedures for adjudicating these cases.¹²¹ Congress would have had to study these effects to understand them; the Justices view them firsthand.

The argument for judicial superintendence of qualified immunity does not eliminate a role for Congress. It is possible, given the quasi-constitutional nature of § 1983 actions, the force of the *Marbury* principle, and the "serious constitutional question" that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim,¹²² that Congress's power over § 1983 might not be plenary. But short of abolishing § 1983 entirely, Congress of course has the constitutional authority to amend § 1983. Congress has indeed legislated in many critical areas of civil rights enforcement, such as prohibiting private discrimination in employment and adding attorneys' fees as a remedy for constitutional tort actions. In each of these areas, Congress's actions have taken place in dialogue with the Court—for instance, overruling Court decisions that misconstrue civil rights statutes,¹²³ or accepting judicial invitations to fill a statutory lacuna.¹²⁴ Recognizing judicial authority to reinterpret § 1983 so as to reform qualified immunity does not deny congressional power to do the same. The point is, rather, that congressional power is not exclusive. Given the Court's long history in this area, its recognized inherent power to devise enforcement mechanisms for constitutional rights, and the quasi-constitutional nature of § 1983, the Court is equally empowered and better positioned to act in this special

121 *Compare* *Saucier v. Katz*, 533 U.S. 194, 201 (2001) (requiring that lower courts adjudicating qualified immunity issues begin with the constitutional merits before deciding whether the law was "clearly established"), *with* *Pearson v. Callahan*, 555 U.S. 223, 227 (2009) (abandoning the *Saucier* merits-first "order of battle"), *and* *Camreta v. Greene*, 563 U.S. 692, 703–09 (2011) (permitting, in light of *Pearson*, governmental defendants to appeal from constitutional merits rulings even where they won on the basis of immunity).

122 *Webster v. Doe*, 486 U.S. 592, 603 (1988) (quoting *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 681 n.12 (1986)).

123 *See, e.g.*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 2, 123 Stat. 5, 5 (noting purpose to overrule *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007)); Civil Rights Act of 1991, Pub. L. No. 102-166, § 2, 105 Stat. 1071, 1071 (noting purpose to overrule *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989)).

124 *See* Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 (codified as amended in scattered sections of 20, 26, and 42 U.S.C.) (creating a statutory basis to award attorneys' fees for prevailing plaintiffs in § 1983 cases); S. REP. NO. 94-1011, at 1 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5908, 5909 (noting that the Act was passed in response to the Supreme Court's holding the previous year in *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 242 (1975), which held that "the circumstances under which attorneys' fees are to be awarded and the range of discretion of the courts in making those awards are matters for Congress to determine").

field of federal law. If qualified immunity is in need of reform or abolition, the Court need not and should not wait for Congress.

CONCLUSION

Scholars, attorneys, and the Justices themselves have raised serious questions about whether the qualified immunity doctrine as currently constructed is legitimate, effective, and salutary. These critiques suggest not only that the doctrine is in need of reform but that overruling Supreme Court precedent on qualified immunity would be consistent with the Court's criteria for the relaxation of stare decisis. Given the Supreme Court's unique history and responsibility in this area of law, the Court is well qualified to take up these critiques without awaiting congressional action. In the appropriate case, the Supreme Court should squarely address whether qualified immunity should be reformed or abolished.