

# A QUALIFIED DEFENSE OF QUALIFIED IMMUNITY

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## INTRODUCTION

Qualified immunity, as John Jeffries has remarked, is “the most important doctrine in the law of constitutional torts.”<sup>1</sup> That is because it shields a government official from a civil suit for monetary damages unless said official violates “clearly established” constitutional rights.<sup>2</sup> As highlighted by the other contributions to this annual federal courts issue, qualified immunity has generated substantial commentary and criticism over the years. Such critical attention should come as no surprise. After all, the doctrine seeks to balance competing values that are in tension: “On one hand, government officials sometimes suffer no personal liability even when they violate constitutional rights. But at the same time, the threat of punishing an officer for violating previously unknown rights could chill legitimate governmental action.”<sup>3</sup>

In recent years, two new fronts of attack have emerged. This Essay responds to both and provides a qualified defense of qualified immunity. Part I addresses Will Baude’s argument that qualified immunity finds no support in positive law.<sup>4</sup> Part II turns to Joanna Schwartz’s pioneering empirical work that has been marshaled to question qualified immunity’s effectiveness as a matter of policy.<sup>5</sup>

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1 John C. Jeffries, Jr., *What’s Wrong with Qualified Immunity?*, 62 FLA. L. REV. 851, 852 (2010).

2 *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

3 Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1, 3 (2015).

4 See William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45 (2018).

5 Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2 (2017) [hereinafter Schwartz, *How Qualified Immunity Fails*]. We also briefly discuss Schwartz’s prior groundbreaking empirical work on how individual officers are indemnified in civil rights litigation. See, e.g., Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885 (2014) [hereinafter Schwartz, *Police Indemnification*].

These two sets of criticisms—a one-two punch that qualified immunity is both unlawful *and* ineffective—merit serious consideration and further investigation. Neither, however, is dispositive; there are important counterpoints that merit further analysis. But ours is a qualified defense, as qualified immunity is by no means perfect. Based on our empirical work on qualified immunity in the circuit courts,<sup>6</sup> we conclude with some recommendations on how the Supreme Court should improve the doctrine to better ensure it advances its intended objectives.

### I. IS QUALIFIED IMMUNITY UNLAWFUL?

One of the sharpest criticisms of qualified immunity in recent years challenges whether positive law supports it. Indeed, Will Baude pointedly asks, “Is Qualified Immunity Unlawful?”<sup>7</sup> He also offers an answer: yes—with a qualification; he does not take a definitive view on whether *stare decisis* supports qualified immunity, although he suggests a couple of reasons why it might not. On Baude’s account, today’s qualified immunity is not supported by historical sources, is not an appropriate reaction to judicial overreach regarding the scope of Section 1983, and is not a sound application of fair notice principles.

Baude’s analysis, unsurprisingly, is not frivolous. And it has already had a real-world impact. Citing Baude’s work, Justice Clarence Thomas—who has joined numerous opinions awarding qualified immunity—has urged the Supreme Court to “reconsider [its] qualified immunity jurisprudence.”<sup>8</sup> The implications of Justice Thomas’s about-face (assuming that it actually is an about-face<sup>9</sup>) may be significant whether or not his view commands a majority. The Court often summarily reverses lower courts that fail to grant qualified

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6 See Aaron L. Nielson & Christopher J. Walker, *Strategic Immunity*, 66 EMORY L.J. 55 (2016); Nielson & Walker, *supra* note 3.

7 Baude, *supra* note 4.

8 *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1872 (2017) (Thomas, J., concurring in part and concurring in the judgment).

9 Recently, in *District of Columbia v. Wesby*, 138 S. Ct. 577 (2018), Justice Thomas authored an opinion awarding qualified immunity. In that opinion, he did not suggest that qualified immunity may be unlawful; to the contrary, he went out of his way to reprove the circuit court for misapplying qualified immunity:

Our conclusion that the officers had probable cause to arrest the partygoers is sufficient to resolve this case. But where, as here, the Court of Appeals erred on both the merits of the constitutional claim and the question of qualified immunity, “we have discretion to correct its errors at each step.” We exercise that discretion here because the D.C. Circuit’s analysis, if followed elsewhere, would “undermine the values qualified immunity seeks to promote.”

*Id.* at 589 (citations omitted) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011)). The full Court agreed that the circuit court erred by not awarding the officers qualified immunity. *Id.* at 593.

immunity.<sup>10</sup> The Justices' willingness to do so may decrease if one member of the Court rejects the doctrine out of hand.<sup>11</sup>

We applaud Baude's efforts to get the law right. But we are not persuaded that his analysis dooms qualified immunity, especially in light of stare decisis. When it comes to qualified immunity, the question is largely statutory in character, and so—under the current law of precedent, which we take as given in this Essay—stare decisis should apply with special force.<sup>12</sup> Indeed, to the extent that there is a constitutional dimension, it involves *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,<sup>13</sup> in which the Court itself, without a statutory basis, created a cause of action against federal officials. But where the judiciary finds an implied right of action, as it did in *Bivens*, precedent says that the judiciary has greater discretion to create defenses to that cause of action. Baude's substantive criticisms, even if accurate, thus potentially may be irrelevant to an entire category of qualified immunity cases—namely, suits against federal officers.

In any event, although Baude presents plausible arguments, some historical evidence may be in tension with his thesis. He also is too quick to reject the possibility that Section 1983 has been read too broadly and that, absent

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10 See, e.g., *Wesby v. District of Columbia*, 816 F.3d 96, 102 (D.C. Cir. 2016) (“Indeed, in just the past five years, the Supreme Court has issued 11 decisions reversing federal courts of appeals in qualified immunity cases, including five strongly worded summary reversals.”). The court goes on to recite the eleven Supreme Court decisions. See *id.*; see also *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) (favorably citing Baude's criticism of qualified immunity).

11 Summary reversals often appear unanimous because no dissent is registered. Yet that façade of unanimity may be false. See, e.g., William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1, 14 (2015) (“Not only are we often ignorant of the Justices' reasoning, we often do not even know the votes of the orders with any certainty. While Justices do sometimes write or note dissents from various orders, they do not always note a dissent from an order with which they disagree.”). It typically takes five votes to summarily reverse a decision. See *id.* at 20 n.60 (citing STEPHEN M. SHAPIRO ET AL., *SUPREME COURT PRACTICE* 350–57 (10th ed. 2013)).

12 See, e.g., *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2410 (2015) (“As against this superpowered form of [statutory] stare decisis, we would need a superspecial justification to warrant reversing [the precedent].”); BRYAN A. GARNER ET AL., *THE LAW OF JUDICIAL PRECEDENT* 333 (2016) (“Stare decisis applies with special force to questions of statutory construction.”). But see Hillel Y. Levin & Michael Lewis Wells, *Qualified Immunity and Statutory Interpretation: A Response to William Baude*, CALIF. L. REV. ONLINE (forthcoming 2018), <https://ssrn.com/abstract=3131242> (disagreeing with Baude's interpretive methodology and arguing that Section 1983 is a common-law statute such that “questions concerning the ‘lawfulness’ and contours of qualified immunity doctrine should not and never have been answered simply by looking to the common law as it stood in 1871”). This Essay is not the place for considering the first principles of precedent. Thus, we take the Court's current approach as given. Suffice it to say, if accepting Baude's view requires rethinking the Court's approach to stare decisis itself, his burden is even heavier. Likewise, Congress, of course, is free to revisit qualified immunity if it wishes. The political considerations that may be relevant to Congress for such a question, however, are irrelevant to the legal analysis presented in this Essay.

13 403 U.S. 388 (1971).

qualified immunity, some applications of Section 1983 would violate fair notice principles. In other words, Baude's analysis is too unqualified; one should be wary of confident answers where, as here, the question has many layers. When all of this is put together, the pull of stare decisis should be especially strong.

### A. *Stare Decisis*

In evaluating the lawfulness of qualified immunity, it is important to recall that stare decisis is also part of "our law."<sup>14</sup> This is particularly true for *statutory* stare decisis.<sup>15</sup> As the Supreme Court recently explained in *Kimble v. Marvel Entertainment*, when it comes to nonconstitutional holdings, "*stare decisis* carries enhanced force" because those who think the judiciary got the issue wrong "can take their objections across the street, and Congress can correct any mistake it sees."<sup>16</sup> Moreover, the Court has stressed that statutory stare decisis applies "whether [the Court's] decision focused only on statutory text or also relied . . . on the policies and purposes animating the law," and, "[i]ndeed," it applies "even when a decision has announced a 'judicially created doctrine' designed to implement a federal statute."<sup>17</sup> Even Justice Thomas, who gives the least weight to stare decisis of all the current Justices, appears to acknowledge its force when it comes to statutes.<sup>18</sup>

Because of stare decisis, courts ordinarily do not revisit statutory issues that have been decided absent some "special justification" beyond mere wrongness.<sup>19</sup> At least under current doctrine, moreover, this point holds true even if the statutory methodology used in resolving the now-decided

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14 William Baude, Essay, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2360 (2015) ("Precedent, like waiver, was a well-established common-law-doctrine at the time of the Founding.").

15 See, e.g., *Patterson v. McLean Credit Union*, 491 U.S. 164, 172–73 (1989).

16 *Kimble*, 135 S. Ct. at 2409.

17 *Id.* (quoting *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2411 (2014)); see also *id.* ("All our interpretive decisions, in whatever way reasoned, effectively become part of the statutory scheme, subject (just like the rest) to congressional change.").

18 See, e.g., Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 GEO. WASH. L. REV. 317, 326 n.49 (2005) ("Both Justice Scalia and Justice Thomas embrace statutory stare decisis." (first citing *Rasul v. Bush*, 542 U.S. 466, 494 (2004) (Scalia, J., dissenting); and then citing *Fogerty v. Fantasy*, 510 U.S. 517, 538–39 (1994) (Thomas, J., concurring)). Whether it is wise that stare decisis carries more force in the statutory context, and whether perhaps there should be exceptions to it, are questions for another day. See, e.g., Randy J. Kozel, *Statutory Interpretation, Administrative Deference, and the Law of Stare Decisis*, 97 TEX. L. REV. (forthcoming 2019).

19 *Halliburton*, 134 S. Ct. at 2407 (quoting *Dickerson v. United States*, 530 U.S. 428, 443 (2000)); see also, e.g., *Kimble*, 135 S. Ct. at 2409 ("Respecting *stare decisis* means sticking to some wrong decisions. The doctrine rests on the idea, as Justice Brandeis famously wrote, that it is usually 'more important that the applicable rule of law be settled than that it be settled right.'" (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting))).

case is suspect—otherwise, a great many cases may have to be revisited.<sup>20</sup> In fact, courts often do not even ask—much less know—whether precedent is wrong. One of the drivers of stare decisis, after all, is judicial economy; litigants and judges can accept some questions as already answered.<sup>21</sup>

These familiar principles matter because much of qualified immunity falls squarely within statutory stare decisis. One may disagree with the Supreme Court’s decision fifty years ago that qualified immunity applies in the Section 1983 context, but it is a decision.<sup>22</sup> And one may disagree with the Court’s decision thirty-five years ago in *Harlow v. Fitzgerald* that qualified immunity uses an objective rather than a subjective standard.<sup>23</sup> But that question too has already been decided, as has the question whether qualified immunity applies outside of the context of false arrests.<sup>24</sup> In fact, the thrust of *Harlow’s* holding commanded the support of the entire Court; Chief Justice Burger dissented because the holding did not go far enough.<sup>25</sup> No one disputed the basic point that immunity exists and that it uses an objective standard.<sup>26</sup>

By Baude’s account, the Supreme Court has applied *Harlow* to uphold qualified immunity more than two dozen times, often with no recorded dissent.<sup>27</sup> And the Court issued another such unanimous opinion after Baude’s article went to print,<sup>28</sup> plus another with only a two-Justice dissent.<sup>29</sup> These

20 For instance, Justice Thomas urges that *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), was wrongly decided. See, e.g., *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2526 (2015) (Thomas, J., dissenting). Even so, he accepts it under stare decisis, although he would not extend it. See *id.*

21 See, e.g., *Kimble*, 135 S. Ct. at 2409 (explaining that stare decisis “reduces incentives for challenging settled precedents, saving parties and courts the expense of endless relitigation”).

22 *Pierson v. Ray*, 386 U.S. 547, 555 (1967) (“A policeman’s lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does . . . the same consideration would seem to require excusing him from liability for acting under a statute that he reasonably believed to be valid.”). Thus, the Court recognized “under § 1983 a ‘good faith and probable cause’ defense coextensive with their defense to false arrest actions at common law.” *Imbler v. Pachtman*, 424 U.S. 409, 418–19 (1976).

23 457 U.S. 800, 818 (1982) (“[G]overnment officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”); see also *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (discussing how “the *Harlow* Court refashioned the qualified immunity doctrine”).

24 See, e.g., *Wood v. Strickland*, 420 U.S. 308, 318 (1975) (applying qualified immunity in the context of school board members).

25 See *Harlow*, 457 U.S. at 829 (Burger, C.J., dissenting) (“I find it inexplicable why the Court makes no effort to demonstrate why the Chief Executive of the Nation should not be assured that senior staff aides will have the same protection as the aides of Members of the House and Senate.”).

26 *Harlow*, of course, addressed suits against federal officials. But the same analysis applies in the Section 1983 context.

27 See Baude, *supra* note 4, at 82–83.

28 See *District of Columbia v. Wesby*, 138 S. Ct. 577 (2018).

include unanimous opinions authored by Justices of very different ideological views, including Chief Justice Roberts<sup>30</sup> and Justices Sotomayor,<sup>31</sup> Alito,<sup>32</sup> Ginsburg,<sup>33</sup> and Thomas.<sup>34</sup> Indeed, Justice Ginsburg, joined by Justice Breyer, has gone out of her way to explain the importance of the doctrine, at least in certain contexts.<sup>35</sup> The Court's embrace of qualified immunity has thus been emphatic, frequent, longstanding, and nonideological. In short, for decades at the nation's highest court, qualified immunity has been an unquestioned principle of American statutory law.

Congress, moreover, has enacted new statutes against that backdrop.<sup>36</sup> For instance, in 1996, well into the current age of qualified immunity, Congress amended Section 1983.<sup>37</sup> At that point, there was no question that the Supreme Court had blessed qualified immunity under Section 1983, as well as an objective standard. But Congress did not amend the statute to undo the Court's holdings. Similarly, since *Harlow* was decided, rather than retreating from qualified immunity, Congress has added it into the U.S. Code in other places.<sup>38</sup> To be sure, it is perilous to infer much from this; Congress acts or does not act for many reasons.<sup>39</sup> Yet for purposes of *stare decisis*, the judiciary often relies on just these sorts of considerations.<sup>40</sup> This reality sug-

29 See *Kisela v. Hughes*, 138 S. Ct. 1148 (2018); see also *id.* at 1162 (Sotomayor, J., dissenting, joined by Ginsburg, J.).

30 *Filarsky v. Delia*, 566 U.S. 377 (2012).

31 *Lane v. Franks*, 134 S. Ct. 2369 (2014). To be sure, Justice Sotomayor sometimes dissents from qualified immunity decisions. See, e.g., *Mullenix v. Luna*, 136 S. Ct. 305, 313 (2015) (Sotomayor, J., dissenting). But not always—including in cases involving use of potentially deadly force. See, e.g., *City & Cnty. of San Francisco v. Sheehan*, 135 S. Ct. 1765 (2015).

32 *Plumhoff v. Rickard*, 134 S. Ct. 2012 (2014).

33 *Wood v. Moss*, 134 S. Ct. 2056 (2014).

34 *Wesby*, 138 S. Ct. at 577; *Reichle v. Howards*, 566 U.S. 658 (2012).

35 See *Reichle*, 566 U.S. at 2097 (Ginsburg, J., concurring) (“Officers assigned to protect public officials must make singularly swift, on the spot, decisions whether the safety of the person they are guarding is in jeopardy.”).

36 See, e.g., *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2414–15 (2015) (explaining that amendments that do not undo precedent support *stare decisis*).

37 See Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, § 309(c), 110 Stat. 3847, 3853 (“Section 1979 of the Revised Statutes (42 U.S.C. 1983) is amended by inserting before the period at the end of the first sentence: ‘, except that in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.’”).

38 See, e.g., 6 U.S.C. § 1104(b)(1) (“Any authorized official who observes, or receives a report of, covered activity and takes reasonable action in good faith to respond to such activity shall have qualified immunity from civil liability for such action, consistent with applicable law in the relevant jurisdiction.”); 14 U.S.C. § 645 (recognizing qualified immunity for those who provide certain medical information).

39 See, e.g., *GARNER ET AL.*, *supra* note 12, at 346–51 (distinguishing between legislative reenactment, amendment, and silence); Frank H. Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533, 537–39 (1983).

40 See, e.g., *Barrett*, *supra* note 18, at 322–23.

gests that if the United States as a society does not want qualified immunity, Congress should enact new legislation.

All of this poses a problem for Baude's analysis, at least to the extent that one might attempt to leverage his article to reject precedent. Although Baude does not take a definitive position on *stare decisis*, he offers two potential arguments, neither of which is especially persuasive.

First, Baude observes that the Supreme Court's sometimes wobbly path regarding qualified immunity undermines the force of *stare decisis*.<sup>41</sup> To be sure, Baude is right that the Court has at times charted different paths. Yet this point should not be overstated.

Consider the Court's objective standard. It is true that before *Harlow*, the Court's qualified immunity analysis had a subjective component. The *Harlow* Court reversed course and said the standard is objective.<sup>42</sup> This shift has strengthened the immunity; not only is it now easier for an officer to prevail, the post-*Harlow* version of qualified immunity enables resolution of the immunity earlier in the litigation and more ready access to interlocutory appellate review.<sup>43</sup> *Harlow*, however, was decided thirty-five years ago. In other words, the Court's test for qualified immunity—i.e., using an objective standard to query whether the defendant violated a clearly established right—is settled.

Baude's inconsistency point is stronger when it comes to the Court's procedural approach. As we have explained elsewhere, the Court has taken a zigzagging path.<sup>44</sup> On one hand, ordinary principles of appellate procedure suggest that the Court should first decide whether the alleged right was clearly established—i.e., whether an individual receives qualified immunity—before addressing whether the right was violated.<sup>45</sup> On the other hand, that may lead to “constitutional stagnation.”<sup>46</sup> For a while, the Court did not say whether the constitutional question must be decided first or second. Yet in 2001, in *Saucier v. Katz*, the Court held that courts should always decide the constitutional question first.<sup>47</sup> Eight years later, the Court unanimously overruled *Saucier* in *Pearson v. Callahan*.<sup>48</sup> There, the Court held that courts have

41 See Baude, *supra* note 4, at 81. This is second in Baude's account.

42 See, e.g., *Mitchell v. Forsyth*, 472 U.S. 511, 517 (1985) (explaining that *Harlow* “purged qualified immunity doctrine of its subjective components”).

43 See *id.* at 526–27.

44 See Nielson & Walker, *supra* note 3, at 15–23.

45 See *id.* at 13 (“Chief Justice Marshall's stern admonition that constitutional questions should only be answered when ‘indispensably necessary to the case’ is not lightly brushed aside.” (citing *Ex parte Randolph*, 20 F. Cas. 242, 254 (C.C.D. Va. 1833) (No. 11,558))).

46 See *id.* at 12 (“Because a great deal of constitutional litigation occurs in cases subject to qualified immunity, many rights potentially might *never* be clearly established should a court ‘skip ahead to the question whether the law clearly established that the officer's conduct was unlawful in the circumstances of the case.’ The danger, in short, is one of ‘constitutional stagnation.’” (footnote omitted) (first quoting *Saucier v. Katz*, 533 U.S. 194, 201 (2001); and then quoting *Pearson v. Callahan*, 555 U.S. 223, 232 (2009))).

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

48 See *Pearson*, 555 U.S. at 236.

discretion whether to decide the constitutional question first.<sup>49</sup> And since *Pearson*, at least a few Justices have suggested that procedures should be changed again.<sup>50</sup>

We agree that the procedural rules for qualified immunity have shifted, but we are not persuaded that this undermines stare decisis. After all, there is an important difference between *substantive* qualified immunity and *procedural* qualified immunity. The Supreme Court's substantive qualified immunity law is based on its interpretation of Section 1983. The Court's procedural qualified immunity law, by contrast, presumably stems from its *supervisory* authority over the lower courts.<sup>51</sup> That the Court has chosen to exercise its supervisory powers in a new way since *Pearson* does not undermine its substantive holding that Congress intended qualified immunity to be part of Section 1983. The two questions are distinct. At most, then, Baude's point suggests that stare decisis should have less sway should the Court again revisit its procedural framework for qualified immunity. But that is not Baude's target.

*Pearson* itself, moreover, is now almost a decade old and in overruling *Saucier*, the unanimous *Pearson* Court explained why stare decisis was overcome. Specifically, the Court stressed that procedural rules can be changed more readily than substantive rules,<sup>52</sup> especially when they are recent in origin.<sup>53</sup> By contrast, *Harlow* is not procedural, and it is much older than *Saucier*.

In his second stab at a possible argument against stare decisis, Baude suggests that the Court's statutory interpretation may be driven by constitutional concerns, in which case perhaps the strong version of stare decisis should not apply. This argument is puzzling. To begin, Baude offers scant evidence. He quotes a *question* from a casebook—not a holding from a court opinion.<sup>54</sup> He also cites Justice Frankfurter's *dissenting* opinion in *Monroe v. Pape*—which also does not say that it is a constitutional question, but only

49 See *id.*

50 See Nielson & Walker, *supra* note 3, at 22–23 (discussing instances in which *Pearson* has been reconsidered).

51 See Nielson & Walker, *supra* note 6, at 82–83; see also *Forbes v. Twp. of Lower Merion*, 313 F.3d 144, 148–49 (3d Cir. 2002) (grounding qualified immunity procedural rules in an appellate court's "supervisory power" over lower courts); Aaron-Andrew P. Bruhl, *Hierarchy and Heterogeneity: How to Read a Statute in a Lower Court*, 97 CORNELL L. REV. 433, 485 n.162 (2012) (arguing that the Supreme Court has power to require lower courts to "follow decisional-sequencing rules").

52 See *Pearson*, 555 U.S. at 233–34 (explaining that "[l]ike rules governing procedures and the admission of evidence . . . *Saucier's* two-step protocol does not affect the way in which parties order their affairs" and that because "the *Saucier* rule is judge made and implicates an important matter involving internal Judicial Branch operations[,] [a]ny change should come from this Court, not Congress").

53 See *id.* at 234 (stressing that the rule was only "eight years" old).

54 See Baude, *supra* note 4, at 80 n.205 ("Could Congress narrow or abolish immunities in § 1983 actions?" (quoting RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1041 (7th ed. 2015))).

that the correct interpretation of Section 1983 “has significance *approximating* constitutional dimension.”<sup>55</sup> Baude also acknowledges that other scholars have rejected such a theory.<sup>56</sup> In any event, even if the Court does think there is a constitutional undertone to qualified immunity, Baude does not demonstrate that such an undertone would be erroneous, at least in all applications. For instance, although eliminating qualified immunity would not *always* offend fair notice (more on that below), it may *sometimes*.<sup>57</sup> If so, that may be enough to trigger constitutional avoidance, at least for stare decisis purposes.<sup>58</sup>

Finally, and perhaps most significant of all, even if the Court’s statutory analysis was influenced by a mistaken constitutional concern (and again, there is little evidence of that), it should not diminish the force of statutory stare decisis. The Court sometimes reads statutes to avoid constitutional concerns. If after doing so the Court later concludes that, in fact, there is no constitutional violation, stare decisis logically should continue to apply to the Court’s earlier statutory holdings. After all, a central premise of this version of constitutional avoidance is that the Court presumes that Congress did not want to push constitutional limits.<sup>59</sup> Thus, even if the constitutional question is later definitively resolved, judges cannot forget that it was an open question *when the statute was enacted*, the relevant time period. Hence, respect for Congress would counsel in favor of retaining the Court’s original interpretation, even if the constitutional concern, and thus constitutional avoidance, that

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55 365 U.S. 167, 221–22 (1961) (Frankfurter, J., dissenting) (emphasis added). Justice Frankfurter also made this point in arguing that the Supreme Court had not yet squarely addressed what “under color of” means, and that the Court’s earlier decisions addressing that phrase do not merit heightened stare decisis force. *See id.* That point, of course, is no longer true; the Court has now squarely addressed such issues, including the availability of qualified immunity.

56 *See* Baude, *supra* note 4, at 80 n.205 (“It bears emphasizing that qualified immunity does not appear to be constitutionally required.” (quoting Seth P. Waxman & Trevor W. Morrison, *What Kind of Immunity? Federal Officers, State Criminal Law, and the Supremacy Clause*, 112 *YALE L.J.* 2195, 2209 (2003))).

57 For instance, imagine an officer engages in conduct that has been explicitly blessed by the Supreme Court but nonetheless is sued for it, and in the course of that litigation, the Supreme Court overrules its prior decision. Presumably imposing liability on that officer would offend principles of fair notice. *Cf.* *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 156–57 (2012) (applying the fair notice doctrine outside of the context of fines); Theodore J. Boutrous, Jr. & Blaine H. Evanson, Essay, *The Enduring and Universal Principle of “Fair Notice,”* 86 *S. CAL. L. REV.* 193, 194 (2013) (noting that “the due process clause . . . shields all defendants from unfair and arbitrary punishment”).

58 *See, e.g., Clark v. Martinez*, 543 U.S. 371, 380 (2005) (upholding a statutory interpretation as a matter of stare decisis even though the case before the Court did not raise the same constitutional concerns); *Sofamar Danek Grp., Inc. v. Gaus*, 61 F.3d 929, 936 n.36 (D.C. Cir. 1995) (similar).

59 *See, e.g., INS v. St. Cyr*, 533 U.S. 289, 336 (2001) (Scalia, J., dissenting) (“The doctrine of constitutional doubt is meant to effectuate, not to subvert, congressional intent, by giving *ambiguous* provisions a meaning that will avoid constitutional peril, and that will conform with Congress’s presumed intent not to enact measures of dubious validity.”).

prompted that original decision would not apply to new statutes going forward.

Because of *stare decisis*, moreover, some of Baude's more pointed criticisms lose their barbs. Baude laments, for instance, that in the certiorari process, the Court treats qualified immunity under Section 1983 like it does the limits on federal habeas relief contained in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), even though AEDPA is "a federal statute that was enacted by Congress and that is clear about the limitations on relief."<sup>60</sup> In particular, Baude protests that the Court often summarily reverses appellate courts that misapply both AEDPA and qualified immunity, even though only one has a statutory basis.<sup>61</sup>

That criticism, however, is in some tension with *stare decisis*. The Court has concluded that Congress incorporated qualified immunity in Section 1983. And based on that conclusion, the Court has done its best to see that Congress's will is respected. Baude's criticism makes sense if the Court *agrees* that decades of statutory holdings are wrong but it makes much less sense if the Court decides not to second guess its own statutory decisions. Moreover, the fact that the Court has summarily reversed lower courts more often in recent decades is most plausibly explained by things other than a changed view of qualified immunity's importance.<sup>62</sup> Most obviously, the Court's certiorari docket has markedly shrunk,<sup>63</sup> giving it more time to focus on error correction. It is a stretch to suppose that the Court has stopped granting certiorari in other cases *because* it is spending too much time on qualified

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60 Baude, *supra* note 4, at 87.

61 *See id.* at 86.

62 It is true that the Court need not prioritize qualified immunity cases when it comes to granting certiorari. The Court, however, has discretion to pick its own docket. The Court believes that qualified immunity cases are especially important for the reasons given in *Harlow*:

At the same time, however, it cannot be disputed seriously that claims frequently run against the innocent as well as the guilty—at a cost not only to the defendant officials, but to the society as a whole. These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office.

*Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982) (footnote omitted). In any event, it is one thing to criticize the Court for granting fact-bound cases. But the logic of Baude's criticism may go further—that the Court should *never* grant certiorari in these cases because, on Baude's account, AEDPA is statutory law while qualified immunity is simply made up. To be sure, perhaps one could argue that the Court's confidence about its precedent should play a role in certiorari, or at least in deciding whether to summarily reverse a lower court. But should the Court be criticized for not using its certiorari powers to fight a rearguard action against its own precedent?

63 *See, e.g.*, Paul A. Holton, Comment, *The "Do Nothing" Court: Why a Reduced Supreme Court Docket Is a Good Thing*, 50 U.S.F. L. REV. 291 (2016) (noting the decades-long trend).

immunity; surely, the change in the Court's diminished docket is endogenous.<sup>64</sup>

### B. *Bivens*

On the subject of stare decisis, it is worth noting that one aspect of qualified immunity presumably not protected by statutory stare decisis is *Bivens*.<sup>65</sup> After all, there is no statutory hook for the idea that federal officers should be entitled to qualified immunity. But that is because *Bivens* itself has no statutory hook. Instead, *Bivens* is a judicially created cause of action to enforce the Constitution.<sup>66</sup> Whatever the merits of *Bivens*, it is not a creation of Congress.<sup>67</sup> This fact is important because the Supreme Court has held that when the judiciary creates a right of action, it has special discretion to fashion defenses to that right of action.<sup>68</sup>

Baude devotes essentially no attention to *Bivens*. The existence of *Bivens*, however, may undermine the force of his analysis, at least in part. At most, his analysis suggests that qualified immunity in the context of Section 1983 is unlawful; it does not suggest that qualified immunity in the context of *Bivens* is unlawful. If the Court were to revisit qualified immunity on “lawfulness” grounds, accordingly, its revision need not extend to *Bivens*. To be sure, the Court seems to treat the immunity standard under *Bivens* and Sec-

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64 Another possibility for the uptick in qualified immunity cases? Maybe the lower courts have begun to misapply—from the Supreme Court's perspective—qualified immunity more often, perhaps reflecting the changed composition of the lower courts.

65 *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (finding an implied right of action against federal officers for constitutional violations).

66 See, e.g., *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring) (“*Bivens* is a relic of the heady days in which this Court assumed common-law powers to create causes of action . . .”).

67 Whether stare decisis should protect *Bivens* on the theory that Congress has now acquiesced is a different question. See, e.g., *Meshal v. Higgenbotham*, 804 F.3d 417, 428 (D.C. Cir. 2015) (citing Carlos M. Vázquez & Stephen I. Vladeck, *State Law, the Westfall Act, and the Nature of the Bivens Question*, 161 U. PA. L. REV. 509, 566–70 (2013) (noting but not resolving that possible argument)). It is also a question for another day.

68 See, e.g., *Davis ex rel. LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 685 (1999) (Kennedy, J., dissenting) (“[T]he definition of an implied cause of action inevitably implicates some measure of discretion in the Court to shape a sensible remedial scheme.”); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 284 (1998) (“Because the private right of action under Title IX is judicially implied, we have a measure of latitude to shape a sensible remedial scheme that best comports with the statute.”); *Franklin v. Gwinnett Cty. Pub. Schs.*, 503 U.S. 60, 77 (1992) (Scalia, J., concurring) (“In my view, when rights of action are judicially ‘implied,’ categorical limitations upon their remedial scope may be judicially implied as well.”). To be sure, the Supreme Court has suggested that the same sort of immunity should apply for Section 1983 and *Bivens* claims. See *Butz v. Economou*, 438 U.S. 478, 504 (1978). But that was a matter of judicial choice, not legislative command.

tion 1983 as interchangeable. But that is a matter of judicial choice, not statutory command.<sup>69</sup>

### C. History

In response to this analysis, one might ask, “Okay, sure, but leaving aside *stare decisis*, is qualified immunity unlawful?” In other words, is *stare decisis* just propping up a mistake? Unfortunately, that is a hard question to answer—meaning it is not easy to shake off *stare decisis*. The truth is that the history is murky, which, under the law of precedent, counsels in favor of the status quo. The more clearly erroneous an earlier decision, the less force *stare decisis* has;<sup>70</sup> hence, by parity of reasoning, the more uncertainty there is about an earlier decision, the greater force *stare decisis* has. Relevant here, we are not certain that Baude’s asserted founding era “legality principle” in which even reasonable mistakes grounded liability is as comprehensive as he suggests. To be sure, we do not claim to have definitive answers. But at least five points merit further attention.

First, Baude is right that the mere fact that Section 1983 does not mention qualified immunity is not dispositive. Defenses were often not listed in statutes when section 1983 was enacted. Congress arguably enacted Section 1983 against that backdrop.<sup>71</sup>

Second, from the earliest days of the republic, American law has sometimes shied away from holding government officials liable for reasonable mistakes. Indeed, the Fourth Amendment itself is not violated when an officer makes such a reasonable mistake.<sup>72</sup> Likewise, beginning in the eighteenth century, Congress enacted laws protecting certain customs officials for reasonable mistakes via “certificates . . . [of] ‘reasonable cause.’”<sup>73</sup> The reason? “Such collection of customs duties was uniquely important to the economic wellbeing of the new republic, so Congress wanted to ensure that collectors would not shy away from vigorously enforcing their mandates.”<sup>74</sup> That

69 The relationship between *Bivens* and Section 1983 deserves more attention than it has received to date; it also is a bigger issue than we can tackle here. Katherine Mins Crocker has thoughtfully begun to explore these issues. See Katherine Mins Crocker, *Qualified Immunity and Constitutional Structure*, 117 MICH. L. REV. (forthcoming 2019).

70 See, e.g., *United States v. Gaudin*, 515 U.S. 506, 521 (1995) (affording less precedential force to a decision that is “manifestly erroneous”); Randy J. Kozel, *Stare Decisis as Judicial Doctrine*, 67 WASH. & LEE L. REV. 411, 416–21 (2010) (assessing this *stare decisis* factor).

71 See, e.g., Baude, *supra* note 4, at 52 (“The most widely known theory of qualified immunity draws upon this historical background in a general way, arguing that the immunity is a common-law backdrop that could be read into the statute . . .”).

72 See, e.g., *Heien v. North Carolina*, 135 S. Ct. 530 (2014) (holding, for originalist reasons, that the Fourth Amendment allows reasonable mistakes of law).

73 See *id.* at 536–37; see also Brief for the United States as Amicus Curiae Supporting Respondent at 13, *Heien*, 135 S. Ct. 530 (No. 13-604) (referencing Act of Mar. 2, 1799, ch. 22, § 89, 1 Stat. 627, 695–96; Act of July 31, 1789, ch. 5, § 36, 1 Stat. 29, 47; Act of Feb. 24, 1807, ch. 19, § 1, 2 Stat. 422).

74 Reply Brief for Petitioner at 6, *Heien*, 135 S. Ct. 530 (No. 13-604).

sounds a lot like the rationale for qualified immunity.<sup>75</sup> Although these statutes marked a departure from prefounding “common law,”<sup>76</sup> their purpose was to provide “immunity” to these officials.<sup>77</sup> Thus, it was not unheard of for an officer to escape individual liability even if, in fact, the officer violated the law. In 2014, the Supreme Court explicitly likened these certificates of probable cause to modern qualified immunity.<sup>78</sup>

It is true that not every officer received immunity in every case, and the statutes authorizing such certificates did not always apply. As Baude notes, Chief Justice Marshall in *Little v. Barreme* refused to excuse the conduct of Captain George Little, who had captured a Danish vessel without congressional authorization.<sup>79</sup> But perhaps that was because Little’s mistake was not a *reasonable* one; that the President told Little what to do does not mean it was a reasonable reading of the statute.<sup>80</sup> By contrast, where the certificates of reasonable cause applied, and where the mistake was reasonable, the same Chief Justice Marshall did conclude that the officer was not liable, even if, in

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75 See, e.g., John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 VA. L. REV. 207, 244 (2013) (explaining that qualified immunity is intended to prevent “timidity and caution in the exercise of government powers that generally operate to the public good”).

76 See Fabio Arcila, Jr., *The Framers’ Search Power: The Misunderstood Statutory History of Suspicion & Probable Cause*, 50 B.C. L. REV. 363, 398 (2009).

77 See, e.g., *id.* at 396 (“The federal district court controlled the immunity issue under the Collection Act because it had exclusive jurisdiction over the forfeiture proceeding. If the seizure was found proper, this was a complete defense against a claimant’s damages claim. If not, the Collection Act specified that ‘the same court’—namely the federal judge—was required to ‘cause a proper certificate or entry to be made’ of ‘a reasonable cause of seizure’ if it believed such cause had supported the search. Such a certification immunized the customs officer and the prosecutor.” (footnote omitted)). As Professor Arcila explains, the law for other sorts of searches was more complicated. A searcher who relied on an invalid warrant was almost always entitled to immunity; if there was a warrant, he would receive immunity only if contraband was found. See *id.* at 372–74 (collecting authorities).

78 See *Heien*, 135 S. Ct. at 537 (“[A] certificate of probable cause functioned much like a modern-day finding of qualified immunity . . .”). It is worth nothing that certificates of probable cause at least sometimes were for the purpose of “indemnification” rather than immunity. See, e.g., *United States v. Sherman*, 98 U.S. 565, 566–67 (1879). How these statutes worked merits sustained, comprehensive analysis beyond the scope of this Essay.

79 See Baude, *supra* note 4, at 55 (discussing *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804)).

80 Compare *Little*, 6 U.S. (2 Cranch) at 179 (“I confess the first bias of my mind was very strong in favour of the opinion that though the instructions of the executive could not give a right, they might yet excuse from damages. . . . But I have been convinced that I was mistaken, and I have receded from this first opinion. I acquiesce in that of my brethren, which is, that the instructions cannot change the nature of the transaction, or *legalize an act which without those instructions would have been a plain trespass.*” (emphasis added)), with *Messerschmidt v. Millender*, 565 U.S. 535, 554 (2012) (refusing to give “dispositive” weight in the immunity analysis to participation by a supervisor).

truth, the law may have been violated.<sup>81</sup> This point suggest limits to Baude’s “legality principle.”

Third, some nineteenth century authority supports a good-faith defense.<sup>82</sup> As Cooley’s *Treatise on Torts* explained:

It is for the best interests of society that those who offend against the laws shall be promptly punished, and that any citizen who has good reason to believe that the law has been violated shall have the right to cause the arrest of the offender. For the purpose of protecting him in so doing, it is the established rule, that if he have reasonable grounds for his belief, and act thereon in good faith in causing the arrest, he shall not be subjected to damages merely because the accused is not convicted. This rule is founded upon grounds of public policy, in order to encourage the exposure of crime . . . .<sup>83</sup>

As Baude acknowledges, similar statements are found elsewhere in nineteenth-century sources.<sup>84</sup> To be sure, Baude argues that perhaps we should limit such defenses to specific torts. His is a fair point, but we note that the *principle* offered in these sources was not necessarily so limited. The breadth of that principle in 1871 and the understanding of how such a principle should be applied merits additional study. Suffice it to say here, however, this is a complicated subject.<sup>85</sup>

Fourth, before the enactment of Section 1983, the Supreme Court at times criticized efforts to punish at least certain types of officers for reasonable mistakes. For instance, in *Wilkes v. Dinsman*, decided in 1849, the Court stated that an officer, “being intrusted with a discretion for public purposes, is not to be punished for the exercise of it, unless it is first proved . . . that he exercised the power confided in cases without his jurisdiction, or in a manner not confided to him, as with malice, cruelty, or wilful oppression,” and

81 See, e.g., *United States v. Riddle*, 9 U.S. (5 Cranch) 311, 313 (1809) (“A doubt as to the true construction of the *law* is as reasonable a cause for seizure as a doubt respecting the fact.”).

82 See *Pierson v. Ray*, 386 U.S. 547, 555 (1967) (“Under the prevailing view in this country a peace officer who arrests someone with probable cause is not liable for false arrest simply because the innocence of the suspect is later proved.”); Alan K. Chen, *The Facts About Qualified Immunity*, 55 EMORY L.J. 229, 273 (2006) (examining “qualified immunity’s common law ancestor, good faith tort immunity”).

83 1 THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENTLY OF CONTRACT 326 (John Lewis ed., 3d ed. 1906) (quoting *Ball v. Rawles*, 28 P. 937 (Cal. 1892)).

84 See Baude, *supra* note 4, at 53–54 (discussing *Filarsky v. Delia*, 566 U.S. 377 (2012), which quotes *Wasson v. Mitchell*, 18 Iowa 153, 155–56 (1864)).

85 See, e.g., Ann Woolhandler, *Patterns of Official Immunity and Accountability*, 37 CASE W. RES. L. REV. 396, 414–33 (1987) (explaining in detail the evolution of immunity throughout the nineteenth century); see also *id.* at 430 (explaining that during the Taney Court, executive officials exercising “judgment” often received immunity while “low-ranking officials, particularly sheriffs and collectors” generally did not receive such immunity because their acts were merely “ministerial,” but acknowledging that when sheriffs exercised judgment, immunity could apply (citing, *inter alia*, *South v. Maryland*, 59 U.S. (18 How.) 396 (1855))).

further that “it is not enough to show he committed an error in judgment, but it must have been a malicious and wilful error.”<sup>86</sup> In so holding, the Court openly endorsed the principle that “unless maliciously and wilfully done . . . [an] action will not lie for a mistake in law.”<sup>87</sup> The Court also favorably quoted the precept that it would “be opposed to all the principles of law, justice, and sound policy, to hold that officers called upon to exercise their deliberate judgments are answerable for a mistake in law, either civilly or criminally, when their motives are pure, and untainted with fraud or malice.”<sup>88</sup>

To be sure, *Wilkes* arose in a narrow context (naval law) and involved a high ranking (although, notably, a subcabinet level) officer. And we concede that other cases advanced different ideas, such as the 1891 case decided by the Massachusetts Supreme Judicial Court that Baude mentions.<sup>89</sup> But especially given the Supreme Court’s strong language, is it unthinkable that Congress enacted Section 1983 against a background understanding that officers, at least when judgment is involved, are not liable for reasonable mistakes? Again, we do not purport to have a definitive answer. But the question strikes us as fair.

And fifth, in 1896, the Supreme Court arguably recognized something akin to *Harlow’s* objective standard.<sup>90</sup> This case, of course, postdates Section

86 *Wilkes v. Dinsman*, 48 U.S. (7 How.) 89, 130–31 (1849).

87 *Id.* (quoting *Drewe v. Coulton*, 1 East 563 (1787)).

88 *Id.* (quoting *Jenkins v. Waldron*, 11 Johns. 114, 121 (N.Y. Sup. Ct. 1814)); *see also* *Butz v. Economou*, 438 U.S. 478, 491 (1978) (“He was held not liable in damages since ‘a public officer, acting to the best of his judgment and from a sense of duty, in a matter of account with an individual [is not] liable in an action for an error of judgment.’” (quoting *Kendall v. Stokes*, 44 U.S. (3 How.) 87, 97–98 (1845))); *Kendall*, 44 U.S. at 98 (“Sometimes erroneous constructions of the law may lead to the final rejection of a claim in cases where it ought to be allowed. But a public officer is not liable to an action if he falls into error in a case where the act to be done is not merely a ministerial one, but is one in relation to which it is his duty to exercise judgment and discretion; even although an individual may suffer by his mistake. A contrary principle would indeed be pregnant with the greatest mischiefs. It is unnecessary, we think, to refer to the many cases by which this doctrine has been established.” (footnote omitted)).

89 Baude concedes that “[t]he original pattern of personal liability became more complicated over time,” but observes that “[e]ven so, one could still find cases” applying the harsher, earlier rule (for the defendant) that there was no good faith defense. Baude, *supra* note 4, at 57 (discussing *Miller v. Horton*, 26 N.E. 100 (Mass. 1891)). As an aside, it is interesting that “[d]uring the middle of the nineteenth century, discretionary immunity was invoked more frequently in actions against federal than against state officials. This may have resulted, however, from the nature of the federal agency actions at issue.” Woolhandler, *supra* note 84, at 425 n.148.

90 *See Spalding v. Vilas*, 161 U.S. 483, 498 (1896) (“Whatever difficulty may arise in applying these principles to particular cases, in which the rights of the citizen may have been materially impaired by the inconsiderate or wrongful action of the head of a Department, it is clear—and the present case requires nothing more to be determined—that he cannot be held liable to a civil suit for damages on account of official communications made by him pursuant to an act of Congress, and in respect of matters within his authority, by reason of any personal motive that might be alleged to have prompted his action; for,

1983's enactment and is addressed to high-ranking officials, but in its analysis, the Court cited older cases about judges to support its conclusion.<sup>91</sup> We agree that, as a historical matter, the objective standard is harder to defend than a good-faith standard. But it is noteworthy that something at least akin to an objective standard had some purchase in the nineteenth century. And, in any event, even if an objective standard is not supported by the historical record, in the real world, perhaps not much would change if the standard were subjective. Presumably, courts often would award qualified immunity through targeted use of summary judgment, as they already do in related contexts.<sup>92</sup>

We do not pretend to provide an exhaustive account of the law of implied defenses in 1871. This issue calls out for additional historical examination and analysis. Yet these points should give some pause to those who would adopt Baude's account, at least on the record to date.<sup>93</sup> No doubt a "legality principle" has support in precedent. But exceptions to that principle do too.

#### D. *The "Course Correction" Counterargument*

Even if the Supreme Court erred regarding qualified immunity, an additional argument in favor of retaining it for Section 1983 suits is that perhaps doing so mitigates another possible judicial error: allowing a plaintiff to bring a federal suit for damages against a state officer who, in the course of violating federal law, also violates state law. The Court embraced that reading of Section 1983 in a 1961 case called *Monroe v. Pape*,<sup>94</sup> but there is a

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personal motives cannot be imputed to duly authorized official conduct." Again, we do not want to overstate our position; *Spalding* is not a simple case. Cf. Woolhandler, *supra* note 84, at 453–57 (discussing *Spalding* and the principles in tension during this era of law and observing that "[t]o state categorically that, at the turn of the century, the legality model prevailed in actions for coercive relief, while the discretion model prevailed in damages actions, would ignore numerous exceptions").

91 See Woolhandler, *supra* note 84, at 454 & n.305 (noting the Court's reliance on cases about judges but seemingly suggesting that the Court could also have relied on immunity for executive officials, which has been recognized as early as 1845 (citing, *inter alia*, *Kendall v. Stokes*, 44 U.S. (3 How.) 86 (1845))).

92 As the Court explained in *Crawford-El v. Britton*, 523 U.S. 574 (1998), which addressed the intersection of a subjective standard (under the Constitution itself) and qualified immunity, trial courts should structure their proceedings to resolve the subjective issue sooner rather than later. See *id.* at 597–601. This may include only allowing "a focused deposition of the defendant before allowing any additional discovery." *Id.* at 599. The Court stressed, moreover, that generalized attacks on credibility are not enough to create a fact issue. See *id.* at 599–600. Because many qualified immunity disputes arise in situations in which it would be difficult to rebut the officer's assertion of good faith, presumably it would be challenging for plaintiffs to survive summary judgment.

93 Baude also puts much weight on a 1915 case that offers little analysis. See Baude, *supra* note 4, at 57 (discussing *Myers v. Anderson*, 238 U.S. 368 (1915)). This case, decided nearly fifty years after Section 1983, does not seem especially helpful in understanding the original meaning of the statute.

94 365 U.S. 167 (1961).

plausible argument that *Monroe* was wrongly decided. As Justice Scalia put it, the *Monroe* Court “converted an 1871 statute covering constitutional violations committed ‘under color of any statute, ordinance, regulation, custom, or usage of any State,’ into a statute covering constitutional violations committed *without* the authority of any statute, ordinance, regulation, custom, or usage of any State.”<sup>95</sup> Likewise, Eric Zagrans has concluded that “[a]s a matter of statutory construction *Monroe* is flatly wrong.”<sup>96</sup> If these critics are right, then perhaps qualified immunity simply moves the law closer to where it should have been all along.

Borrowing from the work of Steven L. Winter, Baude offers a defense of *Monroe*—that “under color of” law is a term of art that captures unauthorized conduct too.<sup>97</sup> This position cannot be casually brushed aside; indeed, the bottom-line conclusion commanded the majority of the *Monroe* Court. But this defense may not be bulletproof. If the Court is inclined to jettison stare decisis for qualified immunity under Section 1983, it should also reexamine whether *Monroe* was correctly decided. And it is not clear *Monroe* would survive.

Consider the text. In relevant part, Section 1983 says:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , 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 . . . .<sup>98</sup>

How do ordinary laypeople read this language? Likely not like the Court did in *Monroe*. Sam Glucksberg, a linguistics expert, worked with lay citizens to identify what the phrase “under color of law” means. In his study of a dozen subjects, no one thought the language means what *Monroe* holds; indeed, eleven thought it means the exact opposite and one was uncertain. Glucksberg’s conclusion? “Clearly, the meaning of ‘under the color of law’ is not overdetermined in the direction claimed and justified by Winter. The post hoc rationalization in terms of conceptual metaphors is just that: a rationalization and not a viable linguistic or cognitive analysis.”<sup>99</sup>

To be sure, the language of the law is not always the language of ordinary people, and it is possible that ordinary people a century and a half ago understood the language differently. We understand there can be terms of art. But where a purported term of art overrides the otherwise plain lan-

95 *Crawford-El*, 523 U.S. at 611 (Scalia, J., dissenting) (quoting 42 U.S.C. § 1983 (2012)).

96 Eric H. Zagrans, “Under Color of” What Law: A Reconstructed Model of Section 1983 Liability, 71 VA. L. REV. 499, 502 (1985).

97 See Baude, *supra* note 4, at 64 (citing Steven L. Winter, *The Meaning of “Under Color of” Law*, 91 MICH. L. REV. 323, 344 (1992)).

98 42 U.S.C. § 1983.

99 SAM GLUCKSBERG, UNDERSTANDING FIGURATIVE LANGUAGE 97 (2001).

guage of a statute, it should be well established.<sup>100</sup> So was the meaning of “under color of law” well established circa the Civil War?<sup>101</sup>

Although, as Winter observes, there is historical support for *Monroe’s* reading of “under color of,” there also may be contrary evidence. For instance, the Supreme Court addressed the term shortly after Section 1983 was enacted and arguably read it narrowly. In 1880, the Court decided *Tennessee v. Davis*, which addressed a removal provision that allowed certain federal officers charged with state crimes to remove to federal court.<sup>102</sup> A federal tax collector shot a Tennessee citizen; Tennessee said it was murder, but the federal officer said it was in self-defense as part of his job. A federal statute allowed removal for federal officers if a state prosecution was brought “on account of any act done under color of his office or of any such law, or on account of any right, title, or authority claimed by such officer.”<sup>103</sup> The Court interpreted the statute to allow removal from state criminal trials “that are instituted for alleged violations of State laws, *in which defences are set up or claimed under United States laws or authority.*”<sup>104</sup>

In other words, it was arguably not enough to simply be a federal officer; the officer must be able to credibly claim that his action was *authorized* by federal law. On the strength of *Davis*, Justice Owen Roberts (joined by Justices Jackson and Frankfurter) argued in 1945 that the Court had long held that “misuse of federal authority does not come within the statute’s protection.”<sup>105</sup> In fact, following *Davis*, the Court held that in seeking removal “under color of federal authority,” “[t]he defense [the federal officer] is to make is that of his immunity from punishment by the State, because what he did was justified by his duty under the federal law, and because he did nothing else on which the prosecution could be based.”<sup>106</sup> If “under color of” does not extend to federal officials who violate federal law, why would it extend to state officials who violate state law? To be sure, Winter forthrightly addresses these cases and offers a thoughtful explanation for them.<sup>107</sup> It is enough here to observe, however, that should the Court decide to reopen these questions, the Court will have to confront this issue, following targeted, adversarial briefing.

At the same time, there is another major piece of evidence that *Monroe* is suspect: the practice of actual litigants. As a leading casebook notes: “Before

100 Cf. Note, *Textualism as Fair Notice*, 123 HARV. L. REV. 542, 551 (2009) (“[T]he principle of fair notice is designed to ensure that those who are constrained and sometimes burdened by legal rules know clearly what the rules mean.”).

101 Indeed, is it even clearly established *now*? See, e.g., Richard H.W. Maloy, “*Under Color of*”—*What Does It Mean?*, 56 MERCER L. REV. 565, 565 (2005) (“If one is reading this article to find out the meaning of ‘under color of’ you have come to the wrong place; *Cause I don’t know.*”).

102 100 U.S. 257 (1880).

103 *Id.* at 261.

104 *Id.* at 262 (emphasis added).

105 *Screws v. United States*, 325 U.S. 91, 145 (1945) (Roberts, J., dissenting).

106 *Maryland v. Soper*, 270 U.S. 9, 34 (1926).

107 See, e.g., Winter, *supra* note 95, at 361, 383.

*Monroe v. Pape*, § 1983 was remarkable for its insignificance. Indeed, one commentator found only 21 suits brought under this provision in the years between 1871 and 1920.<sup>108</sup> After *Monroe*, by contrast, there have been tens of thousands.<sup>109</sup> What to make of this? Is it really the case that for decades, the public understood Section 1983 to mean what *Monroe* says yet decided not to sue? Is not the most plausible explanation that the public, including lawyers who knew all about terms of art, understood the statute to mean the opposite of what *Monroe* holds?

Again, Baude has a response. He observes that most of the Bill of Rights was not understood to be incorporated for many decades after the enactment of Section 1983, so there were fewer things to sue about.<sup>110</sup> No doubt. But that does not explain why suits challenging violations of the Fourteenth Amendment itself were rare. Likewise, the First Amendment was incorporated in 1925, over thirty-five years before *Monroe* was decided, and the Fourth Amendment was incorporated in 1949, over a decade before.<sup>111</sup> Why then was *Monroe* a surprise in 1961? After all, knowledgeable observers recognize *Monroe* as a break from the past.<sup>112</sup>

Likewise, there may be another textual problem with *Monroe*'s reading of "under color"—it might create surplusage. With only a couple of exceptions, constitutional violations require state action. Thus, using the language of Section 1983, arguably only a state actor can "depriv[e]" a person of his or her "rights, privileges, or immunities secured by the Constitution and laws."<sup>113</sup> But if so, what does "under color" add? Judge Laurence Silberman thinks this is a serious problem with *Monroe*.<sup>114</sup> This is also a bigger question

108 JOHN C. JEFFRIES, JR. ET AL., *CIVIL RIGHTS ACTIONS: ENFORCING THE CONSTITUTION* 9 (3d ed. 2013) (citing Comment, *The Civil Rights Act: Emergence of an Adequate Federal Civil Remedy?*, 26 IND. L.J. 361, 363 (1951)).

109 See *id.* at 14 (observing that there were 8267 civil rights lawsuits filed ten years after *Monroe* and nearly 35,000 such lawsuits in 2010).

110 See Baude, *supra* note 4, at 66.

111 See *id.*

112 See, e.g., *id.* at 65 n.116 ("Some of us were there at the 'founding,' and I don't mean in 1871 when 42 U.S.C. § 1983 was originally enacted . . . but in 1961, when the Court decided *Monroe v. Pape*." (quoting Karen M. Blum, *Section 1983 Litigation: The Maze, the Mud, and the Madness*, 23 WM. & MARY BILL RTS. J. 913, 913 (2015))).

113 42 U.S.C. § 1983 (2012).

114 See, e.g., *Crawford-El v. Britton*, 93 F.3d 813, 830 (D.C. Cir. 1996) (Silberman, J., concurring) ("The Court's construction effectively read out of the statute the 'under color of law' limitation, making it synonymous with the Fourteenth Amendment's state action requirement."). And this may not be the only textual problem. See *id.* at 830 n.2 ("The Court's interpretation of 'under color of law' has not been its only creative interpretation of § 1983. It has allowed litigants to use § 1983 to enforce statutes that have no connection to the Fourteenth Amendment or the post-civil war civil rights legislation. The Court was not discomforted that its interpretation would result in the scope of § 1983 being vastly greater than its jurisdictional counterpart (which was the only conceivable basis for § 1983 suits until § 1331 was passed some years later). The dissent in *Thiboutot* indicated that it is 'idiotic' to interpret § 1983 in this fashion." (citation omitted) (discussing *Maine v. Thiboutot*, 448 U.S. 1, 21 n.9 (1980) (Powell, J., dissenting))).

than we can tackle here, but if *stare decisis* is going to be tossed aside, it is one that will have to be answered.<sup>115</sup>

Significantly, Baude also observes that even if *Monroe* were wrong, it would not support modern qualified immunity because there is a mismatch.<sup>116</sup> Courts do not inquire whether conduct violates state law; instead, they reject immunity for conduct that violates clearly established law, which generally is particularly egregious conduct that often also violates state law. Thus, qualified immunity may be backwards; often, the only state officials who can be successfully sued under Section 1983 are also those who can be successfully sued under state law.<sup>117</sup> Good point. Yet assuming that *Monroe* was wrongly decided, there could be many reasons why Congress did not want such a broad statute, including concern about judicial resources. As we discuss below, qualified immunity, presumably, at least keeps Section 1983 suits (somewhat) limited in number, and so perhaps more in line with what Congress potentially may have intended, even if there is some degree of mismatch.<sup>118</sup> Likewise, it is not clear how Section 1983 would be interpreted in a post-*Monroe* world. What, for instance, would it mean for a state to authorize conduct? How specific would the authorization have to be, or could a general grant of discretion suffice? Without knowing the answer to such questions, it is hard to evaluate just how much mismatch there would be.

#### E. The “Fair Notice” Counterargument

Finally, Baude discounts another counterargument: that qualified immunity protects and effectuates fair notice.<sup>119</sup> In particular, Baude observes that the Supreme Court appears more concerned about protecting officers from civil suits than accused citizens from criminal prosecution.<sup>120</sup> And from that, he argues that fair notice is not a good explanation for qualified immunity. Again, Baude’s analysis is not frivolous. But again too, it strikes us as overstated.

Fair notice is an important principle. It is unjust to punish someone for conduct that, at the time, reasonably appeared lawful—indeed, imposing new obligations retroactively may be “*literally* Orwellian.”<sup>121</sup> It can also be

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115 Of course, “under color of” may capture federal laws that do not require state action. It might also capture the Thirteenth Amendment, which does not have a state action requirement. See, e.g., Douglas S. Miller, *Off Duty, off the Wall, but Not off the Hook: Section 1983 Liability for the Private Misconduct of Public Officials*, 30 AKRON L. REV. 325, 363–64 (1997). Yet Section 1983 was enacted pursuant to Congress’s powers under the Fourteenth Amendment. See Ku Klux Klan Act of April 20, 1871, ch. 22, 17 Stat. 13 (“An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes.”).

116 Baude, *supra* note 4, at 66–69.

117 *Id.* at 68.

118 See *infra* Section II.C.

119 *Id.* at 69–74.

120 *Id.* at 74–75.

121 *NetworkIP, LLC v. FCC*, 548 F.3d 116, 122 n.5 (D.C. Cir. 2008).

unfair to clarify a vague prohibition with retroactive effect.<sup>122</sup> Thus, using adjudication to retroactively turn a general prohibition into a specific rule may implicate due process.<sup>123</sup> Although this point is most obvious in punitive contexts,<sup>124</sup> the Court has also recognized it in ordinary civil litigation involving the imposition of civil liability.<sup>125</sup>

The fair notice principle arguably matters when it comes to qualified immunity because without such immunity, some officers would be held liable for conduct that they reasonably believed was lawful. Because the Constitution's general provisions can be abstract (at least compared to specific fact patterns), fair notice suggests that sometimes it may be more appropriate to clarify the Constitution's meaning, at least initially, in contexts that do not create civil liability.<sup>126</sup> Accordingly, qualified immunity may mitigate fair notice concerns.<sup>127</sup>

Baude does not reject the idea that fair notice is important. He does argue, however, that it is selectively applied, namely, that fair notice works differently in the criminal context. And he gives examples of criminal convictions that were upheld even where there was a circuit split on the meaning of the relevant statute, even though a circuit split often defeats liability in the qualified immunity context because it suggests that the law is not "clearly established."<sup>128</sup> Yet, he observes, the Court claims the same fair notice standard applies.<sup>129</sup> Evaluating this divergence in outcomes, Baude says the Court must be wrong about that claim.

We are not so sure. Could not the same fair notice standard lead to different outcomes in different contexts? All applications of a legal standard to new facts are in a sense retroactive, at least to a degree.<sup>130</sup> It is only when retroactivity is too much that it becomes a problem. Thus, "general state-

122 *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 157–59 (1991).

123 *See, e.g., Gates & Fox Co. v. Occupational Safety & Health Review Comm'n*, 790 F.2d 154, 156 (D.C. Cir. 1986) ("Citations of employers for occupational safety and health standard violations have frequently been overturned for lack of 'fair' or 'constitutionally adequate' warning.").

124 *See Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1328–34 (D.C. Cir. 1995).

125 *See Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 154–57 (2012).

126 *See, e.g., Nielson & Walker, supra* note 3, at 12–13 (noting that constitutional questions can be answered outside of the damages context).

127 *Cf. Edward C. Dawson, Qualified Immunity for Officers' Reasonable Reliance on Lawyers' Advice*, 110 Nw. U. L. Rev. 525 (2016).

128 Baude, *supra* note 4, at 74–77.

129 *See United States v. Lanier*, 520 U.S. 259, 270–71 (1997) ("The fact that one has a civil and the other a criminal law role is of no significance; both serve the same objective, and in effect the qualified immunity test is simply the adaptation of the fair warning standard to give officials (and, ultimately, governments) the same protection from civil liability and its consequences that individuals have traditionally possessed in the face of vague criminal statutes.").

130 *See, e.g., Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 475 (2001) (explaining that almost all acts of adjudication involve some lawmaking).

ments of the law are not inherently incapable of giving fair and clear warning.”<sup>131</sup> Instead, context matters.

Hence, in evaluating fair notice as applied to criminal convictions and qualified immunity, should not the nature of the conduct matter? Even if certain “*malum in se*” (or at least “*malum in se-ish*,” recognizing that this can be a fuzzy spectrum more than a binary divide) deeds technically might be lawful, one should take extra care before engaging in them; acts, for instance, that by their nature harm others with no obvious offsetting benefit should set off more “internal alarms.” By contrast, acts taken with a credible claim of benefiting the public potentially will not trigger the same alarms, even though such acts, in fact, sometimes may also turn out to be unlawful.

Thus, returning to Baude’s analysis, despite the existence of a circuit split, fair notice may point different ways when comparing, say, whether accepting kickbacks constitutes a federal crime (the fact pattern in *Ocasio v. United States*,<sup>132</sup> one of the cases on which Baude relies) and whether damages are appropriate when an officer allows a member of the media to enter a home as part of a ride-along program (the fact pattern in *Wilson v. Layne*,<sup>133</sup> another case on which Baude relies). Might not the former set off more internal alarms than the latter? On the other hand, damages may be appropriate where an officer leaves a prisoner hitched to a post all day even if it is a question of first impression (the fact pattern in *Hope v. Pelzer*<sup>134</sup>), while criminal liability may not be appropriate where a city attempts to use an opaque statute to punish a defendant for engaging in nonviolent protest (the fact pattern in *Bouie v. City of Columbia*<sup>135</sup>). Again, applying the same standard, might not the nature of the conduct in the former case set off more internal alarms than in the latter case? In any event, if the fair notice doctrine is sound but not consistently applied, why isn’t the right answer to apply it more consistently?

Solving the problem of fair notice is a bigger project than we can tackle here. And courts no doubt sometimes make mistakes. Presumably there are criminal defendants whose convictions were allowed to stand who should have been able to rely on fair notice doctrine. And courts can be too quick to award qualified immunity. But for purposes here, it is enough to observe that simply comparing the criminal context generally against the qualified immunity context generally may cloud more than it clarifies.

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In light of all of this, we submit that the right answer remains *stare decisis*, at least given the arguments to date. Qualified immunity is lawful because it is a statutory issue that the Court has already decided and reaffirmed for decades, often unanimously; Congress has enacted legislation against that

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131 *Lanier*, 520 U.S. at 271.

132 136 S. Ct. 1423 (2016).

133 526 U.S. 603 (1999).

134 536 U.S. 730 (2002).

135 378 U.S. 347 (1964).

backdrop; and the argument that it fails on originalism grounds is still underdeveloped. In all events, qualified immunity presumably more readily should apply in the *Bivens* context. And if the Court is inclined to rethink qualified immunity, it should give another look to *Monroe* and not brush aside fair notice concerns.

## II. IS QUALIFIED IMMUNITY INEFFECTIVE?

The second set of criticisms seems to dovetail nicely with the first. If, as Baude concludes, qualified immunity is unlawful as a matter of positive law, the call to eliminate the doctrine is even stronger if qualified immunity fails to advance its policy objectives. The *Harlow* Court identified four “social costs” that qualified immunity aims to minimize: (1) “the expenses of litigation,” (2) “the diversion of official energy from pressing public issues,” (3) “the deterrence of able citizens from acceptance of public office,” and (4) “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.’”<sup>136</sup>

In two distinct, important studies, Joanna Schwartz has attempted to empirically assess the effectiveness of qualified immunity relating to such concerns. In both she has found the empirical evidence in qualified immunity’s favor lacking. In the first study, Schwartz surveyed roughly eighty police departments of various sizes across the nation to better understand their indemnification policies and practices as to civil rights actions brought against their officers in their personal capacity.<sup>137</sup> Her conclusion is noteworthy:

Between 2006 and 2011, in forty-four of the country’s largest jurisdictions, officers financially contributed to settlements and judgments in just .41% of the approximately 9225 civil rights damages actions resolved in plaintiffs’ favor, and their contributions amounted to just .02% of the over \$730 million spent by cities, counties, and states in these cases.<sup>138</sup>

From these findings, Schwartz argues that “[c]ourts should now adjust civil rights doctrines so that they no longer rely on counterfactual assumptions about officers’ liability exposure.”<sup>139</sup>

The second, more recent study examines qualified immunity in the federal district courts. For this study, Schwartz focused on five district courts—the Southern District of Texas, the Middle District of Florida, the Northern District of Ohio, the Eastern District of Pennsylvania, and the Northern District of California—and “reviewed the dockets of 1,183 lawsuits filed against

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136 *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982) (alteration in original) (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949)).

137 Schwartz, *Police Indemnification*, *supra* note 5, at 889–90.

138 *Id.* at 890.

139 *Id.* at 961.

state and local law enforcement defendants over a two-year period [2011–2012] in [those] five federal district courts.”<sup>140</sup>

Among other things, Schwartz found that qualified immunity was rarely raised at the motion to dismiss stage (13.9% of cases). And those motions were granted in whole or in part only 13.6% of the time.<sup>141</sup> Perhaps most surprisingly, she reports that, of the 1183 lawsuits in the dataset, only 3.2% of cases were disposed of on qualified immunity grounds, with 0.6% of cases being dismissed at the motion to dismiss stage and 2.6% of cases being dismissed at the summary judgment stage.<sup>142</sup> Based on these findings, Schwartz concludes that “qualified immunity is not achieving its policy objectives; the doctrine is unnecessary to protect government officials from financial liability and ill suited to shield government officials from discovery and trial in most filed cases.”<sup>143</sup> “Given [these] findings,” Schwartz argues, “it is high time for the Supreme Court to reconsider that balance.”<sup>144</sup>

These are important empirical studies on the effectiveness of qualified immunity in achieving a number of its policy objectives. They warrant careful consideration and should encourage a more extensive empirical examination of the doctrine’s effects. But we are skeptical that these findings provide support for the Court to reconsider qualified immunity. Due to space constraints, we focus primarily on Schwartz’s more recent study of qualified immunity in the district courts.

#### A. *Statutory Stare Decisis*

As a threshold matter, and as discussed in Part I, reconsidering qualified immunity in the Section 1983 context implicates statutory stare decisis. This is important because courts do not generally allow policy concerns to undermine statutory stare decisis. Hence, policy arguments regarding whether qualified immunity—a judicially created doctrine designed to implement Section 1983—should play little to no role in the Court’s willingness to reconsider the doctrine.

Again, *Kimble v. Marvel Entertainment* is instructive.<sup>145</sup> In *Kimble*, which addressed whether to overrule a precedent barring post-patent expiration royalty payments, the challengers argued that a statutory precedent “rests on a mistaken view of the competitive effects of post-expiration royalties” and “suppresses technological innovation and so harms the nation’s economy,” contrary to the purpose of the precedent.<sup>146</sup> The Supreme Court dismissed

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140 Schwartz, *How Qualified Immunity Fails*, *supra* note 5, at 9.

141 *Id.* at 9–10.

142 *Id.* at 10.

143 *Id.* at 11.

144 *Id.* at 12.

145 *Kimble v. Marvel Entm’t, LLC*, 135 S. Ct. 2401 (2015) (addressing whether to overrule *Brulotte v. Thys Co.*, 379 U.S. 29 (1964)).

146 *Id.* at 2412.

this line of argument, concluding that it “may give Congress cause to upset [the statutory precedent], but does not warrant this Court’s doing so.”<sup>147</sup>

To the extent Schwartz’s empirical work casts doubt on the wisdom of qualified immunity in the Section 1983 context, those policy arguments thus should be directed to Congress, not the Court. We are not confident such arguments would be well received on Capitol Hill. To the contrary, Schwartz’s finding that local governments—not individual officers—pay for virtually all civil lawsuits against police officers would likely discourage Congress from narrowing or limiting immunities in those cases. Indeed, as Schwartz finds, the forty-four large police department respondents reported that they spent \$730 million total on settling some 9225 lawsuits between 2006 and 2011.<sup>148</sup> As is, that is a heavy financial burden on financially strapped municipalities. The political talking points against changing the law to potentially *increase* those costs on local governments write themselves.

### B. Methodological Limitations

Turning to the findings of the district court level study, it is worth noting a number of the methodological limitations that caution against generalization. In noting these limitations, we do not suggest the study is not a path-breaking contribution—it is. But it is pathbreaking because it is *pioneering*, not because it is *definitive*. Quite properly, Schwartz meticulously details these methodological limitations.<sup>149</sup>

First, she notes the temporal (two years) and geographic (five districts) limitations and how the courts in her sample “may not represent the full range of court and litigant behavior nationwide.”<sup>150</sup> Like Schwartz, we are cautious to draw any crosscutting conclusions. The wisdom of this cautious approach is reinforced by Schwartz’s finding of “marked differences in [her] data across districts,” which “suggest a considerable degree of regional variation.”<sup>151</sup> Who knows what a more comprehensive study would reveal?

Second, the study is also limited in scope as to the subject matter: the cases involve constitutional claims against state and local *police* and not the wide range of *other* state and local officers who are sued under Section 1983. This may be a wise limitation for an exploratory study, especially as Supreme Court guidance on qualified immunity has often been given in the law enforcement context.<sup>152</sup> But does this study cover the whole field? Perhaps not. Indeed, Schwartz carefully details the potential ramifications of this choice in study design:

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147 *Id.* *But see id.* at 2419 (Alito, J., dissenting) (“A proper understanding of our doctrine of *stare decisis* does not prevent us from reexamining *Brulotte*.”).

148 Schwartz, *Police Indemnification*, *supra* note 5, at 890.

149 *See* Schwartz, *How Qualified Immunity Fails*, *supra* note 5, at 19–25.

150 *Id.* at 23.

151 *Id.*

152 *See id.* at 22 (“Of the twenty-nine qualified immunity cases that the Supreme Court has decided since 1982, almost half have involved constitutional claims against state and local law enforcement.”).

It may be that the types of constitutional claims often raised in cases against law enforcement—Fourth Amendment claims alleging excessive force, unlawful arrests, and improper searches—are particularly difficult to resolve on qualified immunity grounds in advance of trial. Fourth Amendment claims may be comparatively easy to plead in a plausible manner (and so could survive a motion to dismiss), and such claims may be particularly prone to factual disputes (making resolution at summary judgment difficult). If so, perhaps qualified immunity motions in cases raising other types of claims would be more successful. On the other hand, John Jeffries has argued that it may be particularly difficult to clearly establish that a use of force violates the Fourth Amendment because Fourth Amendment analysis requires a fact-specific inquiry about the nature of the force used and the threat posed by the person against whom force was used, viewed from the perspective of an officer on the scene.<sup>153</sup>

Before calling for a blanket elimination of qualified immunity, we agree that “[f]urther research should explore whether qualified immunity plays a different role in cases brought against other government actors, or cases alleging different types of constitutional violations.”<sup>154</sup>

This potential for varying levels of effectiveness, based on the type of asserted constitutional rights or types of defendants at issue, also underscores the problems inherent in the Supreme Court revisiting the doctrine. It would be a curiously creative act of interpretation for the Court to eliminate qualified immunity under Section 1983 in some constitutional or factual contexts, but leave it undisturbed in others. Such subject matter reform, however, is not that unusual in the *legislative* context. The Prison Litigation Reform Act, with its substantial limits on Section 1983 actions in context of prison conditions, comes immediately to mind.<sup>155</sup> This is another reason why reform should be a congressional question.

Third, the data publicly available on civil rights cases impose some limitations. For instance, as Schwartz notes, the “data [she used] almost certainly underrepresent the role qualified immunity plays at or after trial,” but Bloomberg Law—the source of her data—“does not include oral motions or court decisions issued without a written opinion.”<sup>156</sup> Nor does Schwartz’s study detail whether the plaintiffs were represented, the kind of attorney involved in the case, or specific agency implicated.<sup>157</sup> But those factors may be important to understand *why* the defendant may not have raised qualified immunity. For instance, there may have been other, easier grounds for disposing of the case.

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153 *Id.* at 24 (citing Jeffries, *supra* note 1, at 859–61).

154 *Id.*

155 Prison Litigation Reform Act of 1995, 110 Stat. 1321–71 (codified as amended at 42 U.S.C. § 1997e); *see also, e.g.*, *Woodford v. Ngo*, 548 U.S. 81, 84 (2006) (holding that under the Prison Litigation Reform Act “proper exhaustion of administrative remedies is necessary”).

156 *See* Schwartz, *How Qualified Immunity Fails*, *supra* note 5, at 29–30.

157 This information is publicly available, but Schwartz is saving it for subsequent work. *Id.* at 23 n.72.

Fourth, Schwartz also made some judgment calls in her coding methodology. For instance, she understandably excluded from her rate of qualified immunity grants any case where the district court found no constitutional violation, and she also excluded any case where the qualified immunity grant was made in the alternative.<sup>158</sup> Notably, she only counted cases dismissed on the grounds of qualified immunity “if the entire case has been dismissed as a result of the motion,” meaning that if there were other claims against individual defendants or a claim against a municipal defendant, the case would not have been dismissed.<sup>159</sup> We understand why judgment calls are necessary; it is challenging to code qualified immunity cases, which are not always simple. Even so, these are significant limitations when it comes to evaluating qualified immunity’s effectiveness, especially because qualified immunity is a defense to *claims* rather than *cases*.

Finally, the findings from the study can be framed in a number of ways—some of which may suggest that qualified immunity is doing more work than what is suggested by the statistic that “just thirty-eight (3.9%) of the 979 cases in which qualified immunity could be raised were dismissed on qualified immunity grounds.”<sup>160</sup> Schwartz acknowledged there could be three different denominators for the reporting of her findings: the 440 qualified immunity motions in 368 cases, the 979 cases in which qualified immunity could have been raised, or the “complete universe” of 1138 cases in her dataset.<sup>161</sup> In framing the findings, she generally focuses on the middle category, though sometimes on the broader third category that included cases that were dismissed before the defendant responded and where qualified immunity could not have been raised because, for instance, the complaint either sought injunctive relief or just municipal liability.<sup>162</sup>

But these numbers can be framed in a number of other ways. For instance, officials raised qualified immunity as a defense in roughly two in five cases in which they possibly could have raised it (37.6%, or 368 of 979 cases). In the remaining cases they may have decided not to raise it for any number of reasons. They may have had other grounds for dismissal, such as a failure to state a claim or precedent on point that says the alleged wrong is not a constitutional violation. Likewise, under the facts set out in the complaint, they may have concluded that qualified immunity did not apply because the constitutional rights, as alleged, were clearly established.

Moreover, when government officials raised qualified immunity (including in some cases multiple times), such motions were only denied in their entirety about one third of the time (31.6%–29.9%) at the motion to dis-

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158 *Id.* at 41–42, 42 n.99.

159 *Id.* at 42.

160 *Id.* at 2.

161 *Id.* at 45.

162 The study includes the ninety-nine cases where qualified immunity was not potentially implicated (because complaint either sought injunctive relief or just municipal liability) and the 105 cases where the court dismissed the cases before defendants responded. *See id.* at 27 tbl.1.

miss/pleadings stage and 32.2% at the summary judgment stage.<sup>163</sup> To be sure, this is an aggressive framing. The district courts in the sample only granted qualified immunity motions in full 12.0% of the time; in the other nondenial instances the district courts granted qualified immunity only in part, found no constitutional violation, dismissed the lawsuit on other grounds, and so forth.<sup>164</sup> But if you consider all of the decisions that granted qualified immunity in full or in part or in the alternative, it totals 29.3% of the qualified immunity motions filed.<sup>165</sup>

Significantly, our analysis of the data is in tension with the potential takeaway that only thirty-eight cases in the entire sample were disposed of on qualified immunity grounds.<sup>166</sup> Even accepting that count (and it could be higher<sup>167</sup>), focusing on the thirty-eight cases ignores settlements, voluntary dismissals, and all other means of dismissal. Of the 1183 cases in the sample, about four in ten cases (490) settled, and about another three in ten (355) were voluntary or stipulated dismissals, court-ordered dismissals before the defendant filed a response, or dismissals as sanctions or failure to prosecute.<sup>168</sup> Hence, as Schwartz notes, the “data do not capture how frequently qualified immunity influences plaintiffs’ decisions to settle.”<sup>169</sup> We return to that point in Section II.C.

In sum, and framed in the light most favorable to qualified immunity, government officials sought qualified immunity in two in five cases in the sample, and courts only denied such qualified immunity in three in ten instances when it was sought. As Howard Wasserman has observed, these findings cast empirical doubt on the more conventional criticism of qualified immunity that it “slam[s] the courthouse doors” for civil rights and constitutional claims.<sup>170</sup> But the data also show that qualified immunity does not leave the doors wide open, as some may mistakenly read Schwartz’s study to suggest. A qualified immunity grant rate (in full, part, or the alternative) of around 29.3% strikes us substantial.

### C. *Ineffective or Very Effective?*

At the end of the day, the observations noted in Section II.B perhaps constitute minor quibbles. Schwartz has raised questions concerning the role of qualified immunity in the district courts that merit further empirical exploration. More significantly, however, even if you were to read Schwartz’s

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163 *Id.* at 36 tbl.6, 38 tbl.7, 39 tbl.8.

164 *Id.* at 36 tbl.6.

165 *Id.*

166 *Id.* at 2.

167 *Id.* at 36 tbl.6 (suggesting the number may be more than fifty).

168 *Id.* at 46 tbl.12.

169 *Id.* at 47.

170 Howard M. Wasserman, *The Empirical Truth About Qualified Immunity*, JOTWELL (Feb. 23, 2018), <https://courtslaw.jotwell.com/empirical-truth-qualified-immunity/> (reviewing Schwartz, *How Qualified Immunity Fails*, *supra* note 5).

findings in the light most favorable to the policy case against qualified immunity, we are not sure how much they actually inform that inquiry.

After all, the findings only shed light on qualified immunity's *formal* role in the disposition of cases actually filed in federal district court. They tell us very little about qualified immunity's *functional* effect in narrowing potential monetary liability in civil rights actions, in encouraging cases to settle, or in otherwise disposing of civil actions under Section 1983. Schwartz notes this limitation as well:

[Q]ualified immunity may be influencing the litigation of constitutional claims in ways that cannot be measured through the examination of case dockets. For example, my study does not measure how frequently qualified immunity causes people not to file lawsuits. It also does not capture information about the frequency with which plaintiffs' decisions to settle or withdraw their claims are influenced by the threat of a qualified immunity motion or decision.<sup>171</sup>

There is, of course, a large literature warning against attempts to draw inferences about the legal system from a selection of trial or appellate opinions.<sup>172</sup> In the somewhat analogous context of heightened pleading standards on civil litigation, for instance, Jonah Gelbach has "argued that perceived changes in the pleading standard can be expected to cause parties to change their behavior—whether plaintiffs file suit, and whether defendants challenge filed actions with Rule 12(b)(6) motions, and whether parties to a dispute are able to settle."<sup>173</sup> In other words, qualified immunity's core effectiveness might well not be in district courts formally utilizing the defense to dispose of Section 1983 lawsuits. Instead, its main influence could be in discouraging plaintiffs to file Section 1983 lawsuits at all or encouraging plaintiffs to settle before discovery or trial and/or for far less than they would in a world without qualified immunity.

This empirical inquiry is further complicated by the Civil Rights Act's fee-shifting provision that the Supreme Court has interpreted to require an attorney's fees award for most prevailing plaintiffs in a Section 1983 action (but for no defendant, unless the lawsuit is deemed frivolous).<sup>174</sup> When

171 Schwartz, *How Qualified Immunity Fails*, *supra* note 5, at 24–25 (footnote omitted).

172 See, e.g., Theodore Eisenberg & Michael Heise, *Plaintiphobia in State Courts Redux? An Empirical Study of State Court Trials on Appeal*, 12 J. EMPIRICAL LEGAL STUD. 100 (2015); Theodore Eisenberg & Stewart J. Schwab, *What Shapes Perceptions of the Federal Court System?*, 56 U. CHI. L. REV. 501 (1989); George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984).

173 Jonah B. Gelbach, *Can We Learn Anything About Pleading Changes from Existing Data?*, 44 INT'L REV. L. & ECON. 72, 72 (2015) (defending his approach in Jonah B. Gelbach, Note, *Locking the Doors to Discovery? Assessing the Effects of Twombly and Iqbal on Access to Discovery*, 121 YALE L.J. 2270 (2012)).

174 See 42 U.S.C. § 1988(b) (2012). Compare *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968) (holding that a prevailing Section 1983 plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust"), with *Fox v. Vice*, 563 U.S. 826, 833 (2011) (holding that "§ 1988 authorizes a district court to award attorney's fees to a defendant 'upon a finding that the plaintiff's

teaching constitutional litigation, one of us (Professor Walker) regularly brings in local government attorneys and civil rights plaintiffs' attorneys to share their real world experience with the class. Each year, with each attorney, a recurring theme emerges: qualified immunity and attorneys' fees drive Section 1983 litigation. They affect whether lawsuits are brought at all and whether disputes are settled pre-filing, at the pleading stage, or before the close of discovery. The risk of an attorneys' fees award drives defendants to settle claims that are unlikely to succeed on the merits. Qualified immunity, by contrast, provides defendants with greater leverage in settlement negotiations, even for claims that have a significant likelihood of success.

These are mere anecdotes from a number of experienced civil rights attorneys in Columbus, Ohio. They must be tested empirically to assess qualified immunity's effect on discouraging lawsuits and encouraging settlements. But Schwartz is right: "Exploration of these issues [regarding settlement and filing] is critical to a complete understanding of the role qualified immunity plays in constitutional litigation."<sup>175</sup> Without this information, one cannot conclude that qualified immunity is ineffective at limiting Section 1983 litigation.

#### D. *Contrasting Perspectives from the Circuit Courts*

Our skepticism about the policy case against qualified immunity is informed by our own empirical work. Our inquiry focused not on the substantive controversies surrounding qualified immunity, but, instead, on the procedural controversy created by the Supreme Court's decision in *Pearson v. Callahan*: the risk of "constitutional stagnation" because under *Pearson* qualified immunity allows courts to avoid reaching constitutional questions by concluding that any constitutional rights implicated are not clearly established.<sup>176</sup> And, unlike Schwartz's study on the district courts, ours looked at the application of qualified immunity in the circuit courts.

To assess *Pearson*'s effect on how circuit courts apply qualified immunity, we reviewed every circuit court decision—published and unpublished—that cited *Pearson* from 2009 through 2012. Our dataset contains 844 relevant cases, including 1460 separate claims of qualified immunity.<sup>177</sup> The big picture findings from our study are revealing: the circuit courts denied qualified immunity 28% of the time by finding that the constitutional right was clearly established at the time of the violation.<sup>178</sup> By contrast, 27% of the time the courts opted not to reach the constitutional question, declaring that any right was not clearly established.<sup>179</sup> Of the remaining claims (45%), the

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action was frivolous, unreasonable, or without foundation'" (quoting *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978)).

175 Schwartz, *How Qualified Immunity Fails*, *supra* note 5, at 25.

176 *Pearson v. Callahan*, 555 U.S. 223, 232 (2009); *see also* Nielson & Walker, *supra* note 3, at 11–15 (discussing this procedural conundrum in greater detail).

177 Nielson & Walker, *supra* note 4, at 30–31.

178 *Id.* at 34 & fig.1.

179 *Id.* at 33–34 & fig.1.

courts exercised *Pearson* discretion to reach the constitutional question. In that subset of cases, 92% of the time the circuit courts found no constitutional violation, with courts recognizing that a constitutional right had not been previously established in only 8% of cases.<sup>180</sup>

From this study of qualified immunity in the circuit courts, an arguably different picture emerges regarding the effectiveness of qualified immunity. With respect to only fifty-two claims (in forty-three separate cases) did the circuit courts actually find a constitutional violation yet shield the officers from monetary liability due to qualified immunity.<sup>181</sup> But in another 27% of the claims, the circuit courts leveraged qualified immunity to bar the suit without having to decide the constitutional question. To be sure, if qualified immunity did not exist, in many of these cases the circuit courts may still have ruled for the government officials on the merits of the constitutional claim. But post-*Pearson* qualified immunity pretermitted that inquiry.

We do not mean to prove too much here. These findings do not provide compelling evidence that qualified immunity reduces Section 1983 litigation. But they also do not support the policy case against qualified immunity. To the contrary, the circuit court signal to the district courts (and potential Section 1983 plaintiffs) is important: 30% of the time the circuit courts said qualified immunity mattered—either because there was a constitutional violation of a right that was not clearly established or because the lack of any clearly established right allowed the court to decline to answer the constitutional question. The effects of such circuit court signaling merits further empirical exploration.

#### CONCLUSION

In this Essay, we have explored two arguably new attacks against qualified immunity: Baude's argument that the doctrine finds no support in positive law and Schwartz's empirical claim that qualified immunity fails to achieve its policy objectives. At least in their current formulations, we are not persuaded that either argument supports the call for the Supreme Court to abandon qualified immunity. This conclusion rests heavily on statutory *stare decisis*, but also on questions about the historical and empirical evidence presented to date.

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180 *Id.* at 35 & fig.2. In revisiting our prior empirical study for this Essay, and to assist Schwartz in creating the appendix to her contribution to this issue, *see* Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797 (2018), we realized that one claim in our dataset had been miscoded as a "pure *Saucier*" decision when, instead, it should have been coded as a denial of qualified immunity. In other words, there are only fifty-two pure *Saucier* decisions in our dataset, as opposed to fifty-three. The percentages here have been adjusted to take this coding error into account.

181 In her contribution to this issue, Schwartz includes an appendix that lists the holdings from these forty-three judicial decisions in our dataset that include the fifty-two pure *Saucier* claims where the circuit courts found to be constitutional violations yet not clearly established. *Schwartz, supra* note 178, at 1840–51.

Yet we have styled this Essay as a *qualified* defense of qualified immunity. That is because the doctrine's current formulation is not perfect. As we have explored elsewhere, one major area for improvement concerns addressing the unintended effects of the Court's 2009 decision in *Pearson v. Callahan*.<sup>182</sup> In *Pearson*, the Court rejected a rigid requirement that courts must first address whether a constitutional right was violated and, if so, only then address whether that right was clearly established. After *Pearson*, where the right is not clearly established, courts have discretion to either dismiss the claim without going further or decide the constitutional question for the benefit of future litigants.

Our empirical study on qualified immunity in the circuit courts reveals that *Pearson* discretion has led to greater disparities among the circuit courts on whether and how they reach constitutional questions.<sup>183</sup> This is disconcerting because such circuit-court disparities "may portend geographic distortions in the development of constitutional law."<sup>184</sup> Our data also suggest that judges who hold certain substantive views may be more willing to decide constitutional questions than judges who hold different substantive views, which could lead to an uneven development of constitutional law.<sup>185</sup> Indeed, *Pearson* discretion may well encourage strategic judicial behavior in that judges may exercise their discretion not to reach a constitutional question (or to bury the decision in an unpublished opinion) in order to avoid disagreement on a three-judge panel.<sup>186</sup> We also found that circuit courts seldom (8% of the time) provided *any* reason for why they had decided (or not) to exercise their *Pearson* discretion to decide a constitutional question in a given case.<sup>187</sup>

To address these concerns, we have suggested a number of reforms. First and foremost, to encourage greater uniformity the Supreme Court should "require lower courts—both trial and appellate courts—to give reasons for exercising (or not) their *Pearson* discretion to reach constitutional questions."<sup>188</sup> Second, the Court should adjust its certiorari review to "pay more attention to panel composition than [it] do[es] today and less attention to whether an opinion is published—at least in the qualified immunity context."<sup>189</sup> Finally, the Court should police *Pearson* discretion informally by,

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182 555 U.S. 223 (2009).

183 See Nielson & Walker, *supra* note 3, at 39–42, & figs.3 & 4 (detailing circuit disparities).

184 *Id.* at 6.

185 See *id.* at 43–49, 46 fig.5, 47 fig.6.

186 See Nielson & Walker, *supra* note 6, at 95–116 (exploring these findings in greater detail).

187 See Nielson & Walker, *supra* note 3, at 49–51, 50 fig.7, 51 fig.8 (detailing the lack of reason giving in our dataset).

188 *Id.* at 52; see also *id.* at 52–65 (drawing on principles from administrative law and making the case for this reason-giving requirement); Nielson & Walker, *supra* note 6, at 119 (same).

189 See Nielson & Walker, *supra* note 6, at 119; see also *id.* at 119–21 (detailing the reason-giving requirement recommendation).

among other things, “speak[ing] critically of using discretion in strategic ways.”<sup>190</sup>

In other words, the Supreme Court, as an exercise of its supervisory powers, should continue to refine its procedural approach to qualified immunity. But we are not convinced by the arguments raised to date that the Court should substantively reconsider the doctrine.<sup>191</sup> Absent dramatic new information, until and unless Congress says otherwise, qualified immunity should remain our law.

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190 *Id.* at 121.

191 *See* *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1872 (2017) (Thomas, J., concurring).

