

PROCEDURAL LOSSES AND THE PYRRHIC VICTORY OF ABOLISHING QUALIFIED IMMUNITY

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ABSTRACT

Who decides? Failing to consider this simple question could turn attempts to abolish qualified immunity into a Pyrrhic victory. That is because removing qualified immunity does not change the answer to this question; the federal courts will always decide. For an outcome-neutral critic of qualified immunity who cares only about its doctrinal failures, this does not matter. But for the vast majority of critics who are outcome-sensitive, meaning they care about qualified immunity because of its role in police accountability, this is a troubling realization. Building on earlier work on the equilibration thesis, as well as on qualitative and quantitative analysis of both the entire federal judiciary and the recent spate of Trump appointees, this Article argues that absent qualified immunity, courts are likely to issue more merits decisions against the plaintiffs that outcome-sensitive critics care about. These merits decisions would not only be necessarily broader than a decision on qualified immunity's "clearly established" prong but may be entrenched for decades because of the current liberal-led attempts to strengthen stare decisis.

From this specific discussion, the Article takes a general lesson. As the political economy around advocates changes, they must reevaluate the tools at their disposal. Old friends may become foes and former enemies may become saviors. This lesson underlies many of the current debates about the role of various institutions, such as those surrounding court reform and the distribution of federal-state and state-local power. This Article makes this lesson explicit and extends it to the realm of constitutional litigation. In that realm, advocates and policymakers should prefer procedural losses to merits or justiciability decisions because hostile procedural doctrines can

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be modified by the political branches, while substantive and justiciability doctrines are solely the province of the courts.

Finally, by combining the question “who decides?” with the nascent literature on power-shifting, this Article suggests a way for qualified immunity’s outcome-sensitive opponents to go beyond least-bad losses to actual wins. Such individuals should focus their considerable political will on encouraging legislation that raises the floor of substantive rights and empowers the communities most affected by police violence, thereby shifting the power to decide away from the federal judiciary.

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INTRODUCTION

Courts, academics, advocates, politicians, the popular press, and the people themselves have taken up the call to abolish qualified immunity. At first glance, it seems these diverse groups speak in one voice. That they might do so is unsurprising; qualified immunity is an easily attackable doctrine.

Consider the doctrine’s frustration of the development of the law and the faults in its logical and policy underpinnings. This frustration occurs because qualified immunity is a two-pronged defense. First, and most obviously, there must be an underlying constitutional violation.¹ Second, and most frustratingly, that underlying alleged violation must have been “clearly established” at the time it occurred.²

This “clearly established” requirement has two relevant effects. First, it means that unless there is a sufficiently similar (often, nearly factually identical) binding circuit or Supreme Court case on point, then the

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

2. *Id.*

government defendant escapes liability.³ Second, because courts can choose whether to decide the defense on the first prong (whether there was a constitutional violation) or the second prong (whether that violation, assuming there was one, was clearly established),⁴ there are cases where courts never decide whether a constitutional violation occurred.⁵ Instead, they simply hold that the assumed violation was not clearly established and dismiss the case.⁶ These “clearly established” decisions allow constitutional law to remain stagnant, as courts never have to decide what the Constitution does or does not require.

And all of this frustration occurs with weak origins and is done in service of unclear gains. Qualified immunity is an entirely judge-made doctrine, grafted onto 42 U.S.C. § 1983—a statute that, on its face, contains no immunities whatsoever.⁷ And the qualified immunity of today seemingly bears no relation to the common law immunities that the Court once used to justify it.⁸ Moreover, while qualified immunity is designed to balance protecting the people’s rights with protecting government actors from vexatious litigation, it is far from clear that the doctrine accomplishes these goals. Both quantitative and qualitative empirical studies have found that qualified immunity is rarely the deciding factor at the early, pre-discovery phases of litigation that the Supreme Court has imagined.⁹

But despite their facial unanimity, I posit that for most of qualified immunity’s opponents—especially those outside of the judiciary and the academy—all of these doctrinal problems are an afterthought, at best. Instead, it seems the reason qualified immunity has become such a cause célèbre, particularly for those on the political left, is because it frustrates the remediation of civil rights claims. Not only does it frustrate those claims, it does so through a process that seems opaque and unexplainable, and in cases where the wrongdoing of government actors (especially police) seems patently obvious.

That obviousness seems especially clear to non-legally-trained persons, who are often unaware of the various liability limitations on government actors’ harmful actions. That is likely why the Federalist Society, in addition

3. See John C. Jeffries, Jr., *What’s Wrong with Qualified Immunity?*, 62 FLA. L. REV. 851, 858–59 (2010) (discussing the “extreme factual specificity” required to qualify a right as “clearly established”).

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

5. *Id.* at 243–45.

6. *Id.*

7. William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 49–51 (2018).

8. *Id.* at 51–61.

9. See Joanna C. Schwartz, *How Qualified Immunity Fails*, 12 YALE L.J. 2, 46 (2017) [hereinafter Schwartz, *How Qualified Immunity Fails*]; Joanna C. Schwartz, *Qualified Immunity’s Selection Effects*, 114 NW. U. L. REV. 1101, 1138 (2020) [hereinafter Schwartz, *Qualified Immunity’s Selection Effects*].

to its traditional debates and talks for legal observers, created a five-minute cartoon explaining the doctrine.¹⁰ And why the founders of Ben & Jerry's ice cream have done rounds of interviews in the popular press explaining why qualified immunity must end.¹¹ As the ACLU says, "qualified immunity is now in the spotlight" with the recent uprisings spurred by George Floyd's murder; they continue: "For decades, the doctrine has shielded police officers and other government employees from being held responsible for all sorts of malfeasance."¹² To the ACLU, the frustration of the law's development does not even bear mentioning. Likewise, even when the Institute for Justice discusses doctrinal stagnation, it does so through the lens of how such stagnation allows further wrongdoing.¹³ And Congresswoman Ayanna Pressley's one pager on the Ending Qualified Immunity Act focuses entirely on how "[a]cross the country, police officers continue to escape accountability when they break the law, shielded from liability by the doctrine of qualified immunity."¹⁴ In short, though qualified immunity might have many flaws, most of its opponents support ending it because of the doctrine's ability to create injustice.

But what if ending qualified immunity would not prevent these injustices?¹⁵ What if, instead, ending qualified immunity would only further entrench the very injustices opponents of qualified immunity seek to prevent? I argue that this outcome is not only possible, it is likely. That is

10. See The Federalist Society, *Qualified Immunity in America: An Overview & Conversation*, YOUTUBE (Mar. 28, 2019), <https://www.youtube.com/watch?v=sIKab8Ea2Us> [<https://perma.cc/MV2Q-UMMX>].

11. See, e.g., MSNBC, *Ben & Jerry's Co-Founder on Ending Qualified Immunity*, YOUTUBE (May 13, 2021), <https://www.youtube.com/watch?v=wbfeQiV62XE> [<https://perma.cc/PGK6-RPN7>]; CBS News, *Ben and Jerry's Creators on Fight to End Qualified Immunity*, YOUTUBE (Apr. 2, 2021), <https://www.youtube.com/watch?v=-QFLGistgOE> [<https://perma.cc/SB5F-DHRC>].

12. Ed Yohnka, Julia Decker, Emma Andersson & Aamra Ahmad, *Ending Qualified Immunity Once and for All Is the Next Step in Holding Police Accountable*, ACLU (Mar. 23, 2021), <https://www.aclu.org/news/criminal-law-reform/ending-qualified-immunity-once-and-for-all-is-the-next-step-in-holding-police-accountable/> [<https://perma.cc/LP5M-23VC>].

13. *Frequently Asked Questions About Ending Qualified Immunity*, INST. FOR JUST., <https://ij.org/issues/project-on-immunity-and-accountability/frequently-asked-questions-about-ending-qualified-immunity/> [<https://perma.cc/E7C5-MPV2>] (noting that when the court declines to rule on the constitutional merits, "[n]ot only was the officer let off the hook in that case, but the very same officer could act the same way again and would still be entitled to qualified immunity").

14. OFFICE OF CONGRESSWOMAN AYANNA PRESSLEY, *ENDING QUALIFIED IMMUNITY ACT*, <https://pressley.house.gov/sites/pressley.house.gov/files/Ending%20Qualified%20Immunity%20Act%20One%20Pager.pdf> [<https://perma.cc/VLQ2-S97L>].

15. Professor Daniel Epps has offered several reasons that abolishing qualified immunity may not have the beneficial effect opponents of the doctrine suggest. Daniel Epps, *Abolishing Qualified Immunity Is Unlikely to Alter Police Behavior*, N.Y. TIMES (June 16, 2020), <https://www.nytimes.com/2020/06/16/opinion/police-qualified-immunity.html> [<https://perma.cc/3NHZ-T72Q>]. The focus of my argument differs significantly from his, however. While Epps focuses primarily on how getting rid of qualified immunity might or might not alter police behavior, I focus on the post-qualified immunity behavior of the courts.

because proponents of ending qualified immunity have almost uniformly overlooked a, if not the, core question that impacts how the cases they most care about will be determined: who decides?¹⁶

Without qualified immunity, *federal courts* will be forced to decide constitutional cases on the merits. For someone with a neutral dedication to the development of the law, this change is all upside. Instead of dodging difficult questions of constitutional import by saying that the answer was not “clearly established,” courts will now grapple with the boundaries of the Constitution’s protections directly.

However, for those who care not (or not only) that cases are decided on the merits, but that they are decided *in a pro-civil rights plaintiff direction*, this change is fraught with danger. Quite simply, there is little reason to think that federal courts will be more open to civil rights plaintiffs without qualified immunity standing in their way. The federal courts were already full of jurists whose demographic and professional backgrounds suggested they would be pro-government. But now, there is also growing evidence that the courts are in the midst of a shift that could see them becoming increasingly hostile to the exact plaintiffs that proponents of ending qualified immunity seek to protect.¹⁷

This shift appears to be occurring because of President Trump’s appointees to the federal bench. A growing body of evidence suggests that judges appointed by President Trump are leading a charge to entrench conservative principles into the law in a way previous judges appointed by Republican presidents have not.¹⁸ Given the narrowing of constitutional protections from police behavior by past conservative judicial appointees,¹⁹ it is difficult to imagine that this area of the law would be free from the Trump appointee-led move rightward.

Even without this shift, the doctrine of qualified immunity already allows for courts to establish pro-plaintiff constitutional rules if they wish, but they

16. The most in-depth consideration of this question occurred in Professor Joanna C. Schwartz’s recent article, *After Qualified Immunity*, 120 COLUM. L. REV. 309 (2020). But even that excellent discussion did not recognize the demographics of the courts, as well as the growing literature and other signs showing just how different the judges appointed by President Trump seem to be and how those differences might portend an accelerated rightward shift in the federal courts’ civil rights jurisprudence. Nor did it substantially grapple with the interaction between abolishing qualified immunity and the current battles over stare decisis.

17. See *infra* Section II.A.3.

18. See, e.g., Zalman Rothschild, *Free Exercise Partisanship*, 107 CORNELL L. REV. (forthcoming 2022); Neal Devins & Allison Orr Larsen, *Weaponizing En Banc*, 96 N.Y.U. L. REV. 1373 (2021); Kenny Mok & Eric A. Posner, *Constitutional Challenges to Public Health Orders in Federal Courts during the COVID-19 Pandemic 3* (July 25, 2021) (unpublished manuscript) (on file with author); see also Section II.A.3.

19. See, e.g., Thomas Y. Davies, *The Supreme Court Giveth and the Supreme Court Taketh Away: The Century of Fourth Amendment “Search and Seizure” Doctrine*, 100 J. CRIM. L. & CRIMINOLOGY 933, 993 (2010).

rarely do.²⁰ While a court does not have to decide the constitutional merits if it grants qualified immunity, nothing prohibits it from doing so. Many decisions granting qualified immunity without finding a constitutional violation can therefore be read not merely as reflecting the breadth of the qualified immunity defense, but also as a tacit recognition by the courts that, at the very least, the underlying constitutional question does not strongly lean in the plaintiff's direction. Indeed, at least one past study has suggested that courts often signal that they are skeptical of the plaintiff's constitutional claim while granting qualified immunity.²¹

The reasons for avoiding a merits decision are manifold. Courts may simply wish to avoid hard cases when there is an easier path. Or qualified immunity may allow appellate panels to mask disagreements about the underlying merits behind the veneer of the clearly established inquiry. For a variety of institutional and personal reasons, appellate courts pride themselves on reaching unanimity. This helps maintain the image of the courts as a nonpartisan institution, and it helps maintain the decorum of the workplace in what could easily devolve into a hotbed of disagreement.

Regardless, a robust literature on judicial decision making suggests that whether taken alone or in combination with the judiciary's increasingly rightward tilt, a likely outcome of abolishing qualified immunity is more merits decisions against civil rights plaintiffs.²² This literature focuses on what Professor Richard H. Fallon, Jr., has called the "Equilibration Thesis."²³ That thesis says that courts attempt to reach an optimal level of rights protection, and they do so utilizing a balance of the justiciability, substantive, and procedural tools at their disposal.²⁴ Under the equilibration thesis, removing one tool from the toolbox, i.e., qualified immunity, will

20. See *id.* at 331–32 n.53 (noting that studies have found courts issuing such decisions in between 2.5% and 7.9% of post-*Pearson* decisions); see also Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1, 37 (2015) (finding that courts post-*Pearson* issue such decisions in only 3.6% of cases); Colin Rolfs, Comment, *Qualified Immunity After Pearson v. Callahan*, 59 UCLA L. REV. 468, 493 & fig.2 (2011) (2.5% of such cases); Ted Sampsell-Jones & Jenna Yauch, Essay, *Measuring Pearson in the Circuits*, 80 FORDHAM L. REV. 623, 628 (2011) (7.9% of published circuit court decisions).

21. See Schwartz, *supra* note 16, at 331–32 (noting that of thirty-six cases where qualified immunity was granted, only one involved a finding that "a jury could reasonably conclude the defendants violated the Constitution," twenty-five held that the plaintiff did not meet burden at the motion to dismiss or summary judgment stage, and ten "did not clearly rule one way or the other on plaintiffs' constitutional claims, but expressed skepticism about the cases' underlying merits").

22. See *infra* Section II.A.2 (discussing the equilibration thesis).

23. See Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—And Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 637 (2006).

24. Fallon discusses the equilibration thesis in terms of rights, justiciability, and remedies. See *id.* at 637. I shift and expand this frame slightly to include procedural doctrines because one of the ways the courts deprive a rights violation of a remedy is through procedural tools like qualified immunity.

simply lead to courts using other tools to maintain the same level of rights protection.²⁵

At first blush, this potentially increasingly hostile treatment of civil rights plaintiffs might not seem worth mentioning in the debate over abolishing qualified immunity. Whether courts hold that a plaintiff loses on immunity grounds, justiciability grounds, or on the merits, that plaintiff still loses. But in federal court, losing in different ways can have materially different effects on the future. If a plaintiff loses at the motion to dismiss stage, for example, that dismissal may be without prejudice, allowing them to refile their complaint in order to cure any identified defects.²⁶ And losing because of a jurisdictional defect may simply mean that the plaintiff must pursue their case in a different court.²⁷

Losing because a constitutional violation was not clearly established does not similarly allow *this* plaintiff to pursue their case elsewhere. But it does allow *the next* plaintiff to pursue their case in a way that a ruling on the merits forecloses. That is because a merits ruling creates precedent that forecloses a claim entirely, while a ruling on the clearly established prong is time-bound and only says that the law was not clearly established *at a particular date*. A future plaintiff could still, for example, bring a case under similar facts and get a new, favorable ruling on the merits. Or, perhaps more on the nose, every past factual scenario that led to a plaintiff losing because the law was not clearly established is still an open constitutional question that could give rise to nonfrivolous litigation once qualified immunity is abolished. But *no* case decided on the constitutional merits could similarly give rise to potentially meritorious future litigation. Those past cases have been decided and now have the power of stare decisis behind them.

And it is this precedential power that all constitutional claims would have without qualified immunity. If the courts are likely to begin issuing pro-civil rights plaintiff rulings, then the proponents of ending qualified immunity should rejoice. But if the courts will continue or increase their trend of issuing pro-government rulings, then civil rights plaintiffs as a class are likely to be put into a worse position by abolishing qualified immunity.

But this is not the only possible downside to forcing the courts to create new constitutional precedent. Outcome-based opponents of qualified immunity must also reckon with the courts' current battles over the appropriate role of stare decisis. If we assume doctrinal consistency across time for a particular judge or justice, the stare decisis battles of today could

25. See *id.* at 643.

26. See, e.g., *Lomax v. Ortiz-Marquez*, 140 S. Ct. 1721, 1724 (2020) (discussing dismissals with and without prejudice in the prison litigation context).

27. See, e.g., 28 U.S.C. § 1447(c) (stating that a removed case shall be remanded back to state court if “the district court lacks subject matter jurisdiction”).

lead to civil rights plaintiffs' most obvious judicial allies ruling against them tomorrow.²⁸ That is because traditionally liberal judges and justices (and in this context, especially justices), have begun to take positions in favor of strong forms of *stare decisis*.²⁹ They have done this seemingly in response to a newly emboldened conservative majority on the Supreme Court, which has, in the liberal justices' view, taken to overruling well-established precedent with near impunity.³⁰ These overruled precedents have often been long-held targets of conservative scorn, involving issues like campaign finance or unions,³¹ and seem to many commentators like a prelude to overruling *Roe v. Wade*.³²

As such, the question of who decides, and more specifically, who decides *at this moment*, gains even greater importance. With the liberal adoption of strong *stare decisis* principles, the answers to the constitutional questions decided now may remain the answers for decades to come, regardless of changes in the political balance of the judiciary.

This examination of qualified immunity reveals a broader lesson. As the political economy around a group shifts, that group must reevaluate the effects of the tools at its disposal. Tools that were once championed should perhaps be abandoned and vice versa. While this lesson is often tacit in current debates about the role of numerous political institutions, like the courts or distributions of power between federal and state or state and local governments,³³ this Article names it explicitly, and extends it further to the realm of constitutional litigation. It posits that when courts are hostile to certain groups, those groups should care not only about winning or losing, but about *how* they lose. In the constitutional arena, qualified immunity shows that outcome-sensitive people should prefer procedural losses to losing on either the merits or justiciability³⁴ grounds. Again, focusing on

28. Indeed, Justice Kagan has already provided an example of this exact phenomenon. *See Edwards v. Vannoy*, 141 S. Ct. 1547, 1573 n.1 (2021) (Kagan, J., dissenting) (noting that she dissented in *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), “precisely because of its abandonment of *stare decisis*”).

29. *See infra* Section II.D.

30. *See Janus v. State, Cnty., & Mun. Emps.*, 138 S. Ct. 2448, 2487 (2018) (Kagan, J., dissenting).

31. *See, e.g.*, *Citizens United v. FEC*, 553 U.S. 310 (2010) (overruling *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990)); *Janus*, 138 S. Ct. 2448 (overruling *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 224–26 (1977)); *see also* Michael Gentithes, *Janus-Faced Judging: How the Supreme Court Is Radically Weakening Stare Decisis*, 62 WM. & MARY L. REV. 83 (2020).

32. 410 U.S. 113 (1973); Thomas J. Molony, *Taking Another Look at the Call on the Field: Roe, Chief Justice Roberts, and Stare Decisis*, 43 HARV. J.L. & PUB. POL’Y 733 (2020).

33. *See infra* notes 322–27 and accompanying text (discussing the Senate, the courts, and states’ rights).

34. Justiciability rulings raise a complication that deserves far more attention than this article can give it. That complication being the role of state courts. While a federal justiciability ruling closes the doors of the federal courts, it does not automatically close state courts’ doors. *See, e.g.*, *supra* note 26 and accompanying text. Given the varying political valences of state courts across the country, moving

who decides explains why this is the case. Both merits and justiciability decisions stem from the Constitution itself, and in our system, the courts have final say over constitutional meaning. Procedural decisions, however, do not. Instead, virtually all of the courts' procedural rules can be rewritten through the political process. Procedural losses therefore carry neither the same precedential weight nor the resistance to political changes of justiciability and merits decisions. This suggests that, if a group believes that they are likely to lose in the courts on the merits, rather than championing access to the courts, they may want to increase the number of procedural tools at the courts' disposal.

Opponents of qualified immunity need not resign themselves solely to choosing how they wish to lose for the next few decades. But if destroying qualified immunity is fraught with these unappreciated pitfalls, then what should proponents of abolishing it do instead? First, those wishing to abolish qualified immunity should introspect about why they want to get rid of it. If their desire is based in a wish to rid the law of a confusing, difficult to administer, and textually and historically suspect doctrine, then they can likely ignore the warnings of this Article and continue full steam ahead. But if their push to abolish qualified immunity is based on a desire to see civil rights plaintiffs gain recompense and police officers and other government actors held accountable, then there are numerous other steps they can and should prioritize.

Perhaps the most promising answer stems from how civil rights plaintiffs are often successful in the current regime—through the actions of state and local political branches. Past studies have shown that far more civil rights plaintiffs who file lawsuits succeed through settlement than through pursuing their case through verdict and appeal.³⁵ That state and local officials' decisions, instead of federal courts, are so often the ultimate cause of the relief civil rights plaintiffs receive suggests that state and local governments may be more willing to expand the relief given to civil rights plaintiffs and to discipline bad-acting officers than the federal courts.

civil rights claims to state court may be a plus for civil rights plaintiffs. However, evaluating this claim in depth requires a state-by-state analysis that goes beyond the scope of this article. At least one study, however, has found that most states have Republican leaning supreme courts. See Samuel Postell, Luke Seeley & Heidi Jung, *Ballotpedia Courts: State Partisanship/Overview of Confidence Scoring Results*, BALLOTPEDIA (June 2020), https://ballotpedia.org/Ballotpedia_Courts:_State_Partisanship/Overview_of_Confidence_Scoring_Res ults. Further, a number of Republican legislators have attempted to “pack” their state supreme courts. See Marin K. Levy, *Packing and Unpacking State Courts*, 61 WM. & MARY L. REV. 1121, 1125 (2020) (finding that “in the last decade, there have been attempts by legislatures in at least ten states to alter the size of their courts of last resort, with two of those attempts succeeding”).

35. See Schwartz, *How Qualified Immunity Fails*, *supra* note 9, at 46 (finding that in 1,183 cases, 672 ended in settlement or a voluntary or stipulated dismissal, while only ten ended in a verdict (split or total) for the plaintiff).

Indeed, in some places this is already happening as state and local officials work to create state law-based end-runs around qualified immunity and otherwise to expand accountability measures for police.³⁶

I recognize, however, that a focus on state and local politics leaves some civil rights plaintiffs in the lurch, as some places may simply have pro-police factions too strong to overcome with even the most zealous organizing. To reach these places, those fighting to abolish qualified immunity would likely need federal reform. But the need for some federal action does not mean that the federal action should be abolishing qualified immunity. Instead, advocates at the federal, state, and local levels should focus on reforms that do not depend on the doctrinal or partisan allegiances of the federal courts. The massive political will that has created the movement to abolish qualified immunity might better be redirected toward efforts that raise the rights floor, whether by directly expanding the rights citizens have to be free from government abuse or by finding ways to directly hold police accountable for the harm that they cause.

By raising the rights floor, outcome-sensitive critics can help to clarify the law, shift power from the federal courts to more friendly spheres,³⁷ flip the stare decisis battles in their favor, and most importantly, accomplish the justice-based goals they pursue.

This Article proceeds in four parts. Part I discusses the doctrine and criticism of qualified immunity, revealing that this criticism can be broken into two separate groups, outcome-neutral and outcome-sensitive. Part II explains the Pyrrhic victory of abolishing qualified immunity. Because judges often equilibrate—balancing justiciability, procedure, and substance to reach an optimal level of rights-protection—abolishing qualified immunity may simply lead to more or broader merits losses. This seems especially likely because the federal judiciary, already an unfriendly place for civil rights plaintiffs, has recently been remade by Trump appointees who early quantitative and qualitative research suggests are more conservative and more activist than prior Republican-appointed judges. In turn, these losses may then be entrenched by the liberal-led battle for strong stare decisis. Part III explores the general lesson that can be taken from the discussion of qualified immunity: when the political economy around a group changes, that group must reevaluate the tools at its disposal. Part IV then suggests that outcome-sensitive qualified immunity opponents might avoid a Pyrrhic victory by focusing their efforts on shifting power away from the federal courts by passing rights-floor-raising legislation.

36. See, e.g., COLO. REV. STAT. § 13-21-131(3) (2021).

37. See Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. 778 (2021).

I. QUALIFIED IMMUNITY AND JUDICIAL DECISION MAKING

A. *Qualified Immunity Doctrine*

Before delving into the many problems with qualified immunity doctrine, it is necessary to explain how it has operated. Underlying qualified immunity is the idea, simple in theory and incredibly complex in practice, that government actors should not be made personally liable for a constitutional violation which they could not know they were committing.³⁸ The modern formulation of this doctrine first arose in *Harlow v. Fitzgerald*.³⁹ This modern qualified immunity doctrine is designed to protect government actors from individual liability so long as they “[did] not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”⁴⁰ The Court presumed, incorrectly it turns out,⁴¹ that by focusing on objectively reasonable actions government litigants could quickly dispatch frivolous and insubstantial claims.⁴² Instead, the “clearly established” question began to dominate.

Only four years after *Harlow*, the Court felt the doctrine was sufficiently empowered so that “it provides ample protection to all but the plainly incompetent or those who knowingly violate the law.”⁴³ And only five years after *Harlow*, *Anderson v. Creighton*⁴⁴ would make it easy to see why the clearly established prong had made this so.

In *Anderson* the Court first explained that what counted as “clearly established law” could not be viewed at a high level of generality.⁴⁵ Instead, whether a rule was clearly established must be determined “in a more particularized” way: “The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.”⁴⁶ Though the Court warned that “[t]his is not to say that an

38. See *Pierson v. Ray*, 386 U.S. 547, 555 (1967) (reaching this conclusion in the context of an officer acting under a statute later declared unconstitutional that he, at the time, “reasonably believed to be valid”).

39. 457 U.S. 800, 818 (1982). For a discussion of the doctrine’s evolution from *Pierson* through *Harlow*, see David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. PA. L. REV. 23, 35–47 (1989).

40. *Harlow*, 457 U.S. at 818.

41. See Schwartz, *How Qualified Immunity Fails*, *supra* note 9, at 60–61 (noting that over ninety percent of the cases in her post-*Harlow* dataset “required the parties and judges to dedicate time and resources to briefing, arguing, and deciding the motions without shielding defendants from discovery and trial”).

42. *Harlow*, 457 U.S. at 819.

43. *Malley v. Briggs*, 475 U.S. 335, 341 (1986); see also *Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985) (noting that qualified immunity protects officials unless “the law clearly proscribed the actions” they took).

44. 483 U.S. 635 (1987).

45. *Id.* at 640.

46. *Id.*

official action is protected by qualified immunity unless the very action in question has previously been held unlawful,”⁴⁷ as the years progressed, that increasingly became the de facto test. In large part, that is because the Supreme Court has been quick to discipline lower courts who give clearly established law a remotely expansive reading; reversals became increasingly common, summary, and bipartisan.⁴⁸

This disciplining effect, which became especially pronounced after the turn of the millennium, was not merely informal; it was also accompanied by doctrinal expansions of the qualified immunity defense. While the Court’s “plainly incompetent” language had been around since 1986, in the 2010s it was given increasingly sharp teeth. First, in a 2011 case, *Ashcroft v. al-Kidd*,⁴⁹ the Court altered the test from *Anderson*’s invocation that “a reasonable official would understand that what he is doing violates that [clearly established] right”⁵⁰ to “every ‘reasonable official would [have understood] that what he is doing violates that right.’”⁵¹ Though the Court did not explain this alteration, “later opinions have picked up on *al-Kidd*’s modification of *Anderson*.”⁵² In the same decision, the Court for the first time described the clearly established inquiry as requiring that “existing precedent must have placed the statutory or constitutional question *beyond debate*.”⁵³ After its introduction in *al-Kidd*, “[t]he phrase ‘beyond debate,’ ... has been used in eight of the eleven subsequent Supreme Court opinions that have concluded government officials did not act in violation of clearly established law.”⁵⁴ By 2015, the Court dropped any pretense of balancing the need for redress with protecting government defendants. Its statement of the law was entirely focused on the strength of the qualified immunity defense.⁵⁵

Accompanying this linguistic shift was a flood of cases chastising the lower courts for viewing the clearly established inquiry “at a high level of

47. *Id.*

48. See Baude, *supra* note 7, at 82–88 (noting that between *Harlow* and 2018, only two cases decided by the Supreme Court held that clearly established law was violated, and that the Court has summarily reversed more qualified immunity cases than cases of any other type); Samuel R. Bagenstos, *Who Is Responsible for the Stealth Assault on Civil Rights?*, 114 MICH. L. REV. 893, 909 (2016) (noting that “[t]he Supreme Court typically decides qualified immunity by overwhelming—often unanimous—votes”).

49. 563 U.S. 731 (2011).

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

51. *al-Kidd*, 563 U.S. at 741 (2011) (alteration in original) (emphasis added) (quoting *Anderson*, 483 U.S. at 640).

52. Kit Kinports, *The Supreme Court’s Quiet Expansion of Qualified Immunity*, 100 MINN. L. REV. HEADNOTES 62, 65 (2016).

53. *al-Kidd*, 563 U.S. at 741 (emphasis added).

54. Kinports, *supra* note 52, at 66 n.16 (citing cases decided between 2011 and 2016).

55. See *id.* at 67–68 (discussing this shift); see also *Mullenix v. Luna*, 577 U.S. 7, 12 (2015).

generality.”⁵⁶ The principal innovations for the level of generality requirement were two. The first involved the factual similarity necessary for a case to clearly establish the law.⁵⁷ The courts essentially required a 1:1 match.⁵⁸ Cases abound throughout the federal judiciary in which seemingly minor factual differences lead to qualified immunity grants.⁵⁹

Accompanying this devotion to factual similarity, the Court ratcheted up the level of precedent necessary to create clearly established law. While *Harlow* left the question open of which courts might create clearly established law,⁶⁰ for a long time the courts largely coalesced around the idea that clearly established law could only come from binding federal and state precedent.⁶¹ This of course meant that federal district court opinions, many state court decisions, out-of-circuit appellate opinions, as well as non-precedential in-circuit appellate decisions, could not create clearly established law regardless of the clarity of their pronouncements.⁶² The only apparent exception to this rule was “a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful.”⁶³

But after years of operating under the presumption that binding precedent or a “robust consensus” of persuasive precedent was enough, the Court began to question both premises. Instead, it began suggesting that only Supreme Court precedent could clearly establish the law.⁶⁴

56. *al-Kidd*, 563 U.S. at 742.

57. See *Jamison v. McClendon*, 476 F. Supp. 3d 386, 406–08 (S.D. Miss. 2020) (discussing the “increasingly common” practice of courts granting qualified immunity based on seemingly minor factual distinctions from past cases).

58. See *id.*

59. See, e.g., *District of Columbia v. Wesby*, 138 S. Ct. 577, 591 (2018) (listing a litany of facts presumably necessary to find similarity); *Doe v. Woodard*, 912 F.3d 1278, 1292 (10th Cir. 2019) (finding that qualified immunity protected a social worker who searched a child’s genitals without consent while investigating child abuse despite an earlier Tenth Circuit precedent saying that a school clearly violated the Constitution by searching children through “intrusive physical examinations (including genital examinations and blood tests) without parental notice or consent”); see also *Jamison*, 476 F. Supp. 3d at 406–08, 416–17 (describing cases where the clearly established prong defeated a plaintiff’s claims at the circuit level, and then granting qualified immunity to an officer who reached into the plaintiff’s vehicle with no identifiable cause because there was no sufficiently similar binding circuit or Supreme Court precedent on point).

60. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 n.32 (1982).

61. See *Kinports*, *supra* note 52, at 69–70.

62. See *Jamison*, 476 F. Supp. 3d at 404 n.128. See also Aaron L. Nielson & Christopher J. Walker, *Strategic Immunity*, 66 EMORY L.J. 55, 86–88 (2016) (adding the further complication of published and unpublished decisions).

63. *Wilson v. Layne*, 526 U.S. 603, 617 (1999). In the Court’s typical fashion in this area, it shortly changed this requirement to a “robust” consensus. See *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011).

64. See *City & Cnty. of San Francisco v. Sheehan*, 575 U.S. 600, 617 (2015) (“[T]o the extent that a ‘robust consensus of cases of persuasive authority’ could itself clearly establish the federal right respondent alleges . . . no such consensus exists here.” (emphasis added)); *Reichle v. Howards*, 566 U.S. 658, 665–66 (2012) (“Assuming *arguendo* that controlling Court of Appeals’ authority could be a

And at the same time that the Court made qualified immunity more substantively powerful, it also gave the defense additional procedural protections. Qualified immunity's pride of place in the Court's procedural jurisprudence shone through early. Only three years after remaking the doctrine in *Harlow*, the Court held in *Mitchell v. Forsyth* that a denial of qualified immunity fell within the collateral order doctrine and so was subject to an interlocutory appeal.⁶⁵ Functionally, this has meant that government defendants can (though they rarely do) appeal denials of qualified immunity three times: the motion to dismiss stage, the summary judgment stage, and after trial.⁶⁶

More striking, however, is the amount and one-sidedness of review the Supreme Court has given qualified immunity cases. The Supreme Court's own rules state that it "rarely" reviews cases when review would amount to error correction.⁶⁷ But in the qualified immunity context, Supreme Court error correction abounds.⁶⁸ Qualified immunity also takes up an outsized part of the Court's "shadow docket," those cases it decides without full briefing and argument.⁶⁹ These summary reversals—and they are almost uniformly reversals⁷⁰—became increasingly sharp-tongued.⁷¹ One reversal in a briefed case went so far as to explicitly call out the entire Ninth

dispositive source of clearly established law in the circumstances of this case, the Tenth Circuit's cases do not satisfy the 'clearly established' standard here." (emphasis added)); *see also* Kinports, *supra* note 52, at 71 (noting this may be tied to the possibility that a circuit split could make law not clearly established even in those circuits with binding precedent on the question).

65. 472 U.S. 511, 524–30 (1985).

66. *See, e.g.*, Jamison v. McClendon, 476 F. Supp. 3d 386, 405 (S.D. Miss. 2020) (noting this outcome of *Mitchell*).

67. *See* SUP. CT. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

68. *See* Baude, *supra* note 7, at 85 (noting that "most of the Court's qualified immunity decisions are just fact-bound applications of the already-established principle that liability requires clearly established law").

69. *See id.* at 84–86.

70. It was not until 2020 that, for the first time ever, the Court summarily reversed a lower court's grant of qualified immunity. *See* Taylor v. Riojas, 141 S. Ct. 52 (2020). At the same time, it GVR'd another case granting qualified immunity based on its decision in *Taylor*. *See* McCoy v. Alamu, 141 S. Ct. 1364 (Feb. 22, 2021) (mem.). Scholars are only just beginning to grapple with what this shift may mean, and it is far from clear how drastic of a change *Taylor* may represent. *See, e.g.*, Colin Miller, *The End of Comparative Qualified Immunity*, 99 TEX. L. REV. ONLINE 217 (2021); Joanna C. Schwartz, *Qualified Immunity's Boldest Lie*, 88 U. CHI. L. REV. 605, 614 (2021) ("In 2020, the Court, in *Taylor v. Riojas*, ruled that a prior court opinion with similar facts was unnecessary to clearly establish that it was unconstitutional to confine a prisoner for six days in 'shockingly unsanitary cells' covered in feces and sewage.").

71. *See, e.g.*, White v. Pauly, 137 S. Ct. 548, 552 (2017) ("Today, it is again necessary to reiterate the longstanding principle that 'clearly established law' should not be defined at a 'high level of generality.'")

Circuit.⁷² Eventually, this special treatment of qualified immunity became so obvious that the Court openly admitted that it was treating denials of qualified immunity more favorably than other cases on its docket, “[b]ecause of the importance of qualified immunity ‘to society as a whole.’”⁷³

One last doctrinal innovation bears mentioning, as it is the crux of the problem addressed in this Article. That innovation relates to the order of solving qualified immunity’s two-step inquiry. Initially, the Court suggested that courts should first determine whether the alleged facts constituted a violation of the relevant right.⁷⁴ Only once that first step was satisfied should they proceed to engage in the clearly established inquiry.⁷⁵ Then, in *Saucier v. Katz*, the Court turned that suggestion into a mandate.⁷⁶ The reason for this was simple. Because our jurisprudential system depends on the case-by-case development of the law, courts needed to explain the contours of the constitutional right at issue lest “[t]he law might be deprived of this explanation” by “skip[ping] ahead to the question whether the law clearly established that the officer’s conduct was unlawful in the circumstances of the case.”⁷⁷ Less than a decade later, however, the Court reversed itself in *Pearson v. Callahan*,⁷⁸ again allowing courts to determine the qualified immunity two-step inquiry in whichever order they pleased.⁷⁹

The most obvious reason for this change, and one recognized explicitly by *Pearson*, was judicial economy.⁸⁰ The *Saucier* regime led to courts engaging in difficult questions of constitutional interpretation that ultimately made no difference in the case before them.⁸¹ Unsurprisingly, judges made known their displeasure with this extra burden.⁸² However, the

72. See *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011) (“We have repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality.” (internal citation omitted)).

73. See *City & Cnty. of San Francisco v. Sheehan*, 575 U.S. 600, 611 n.3 (2015) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982)).

74. See, e.g., *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 841 n.5 (1998) (“[T]he better approach to resolving cases in which the defense of qualified immunity is raised is to determine first whether the plaintiff has alleged a deprivation of a constitutional right at all.”).

75. *Id.*

76. 533 U.S. 194 (2001).

77. *Id.* at 201.

78. 555 U.S. 223 (2009).

79. *Id.* at 236.

80. See *id.* at 236–37 (“The procedure sometimes results in a substantial expenditure of scarce judicial resources on difficult questions that have no effect on the outcome of the case.”).

81. *Id.*

82. See *id.* at 234–35 (citing lower court decisions criticizing *Saucier*’s “rigid order of battle”); see also Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1275, 1277 (2006).

greater flexibility afforded by *Pearson* explicitly sacrificed the development of the law in favor of conserving judicial and litigant resources.⁸³

B. Criticism of Qualified Immunity

Criticism of qualified immunity abounds, and it comes from all directions—from Democrats to Republicans and from jurists to on-the-ground activists. Attacking qualified immunity is seemingly one of the few things that everyone can agree on in our divided times.

Ultimately, this chorus of criticism can be divided into two groups. The minority position is composed of outcome-neutral criticism. This criticism focuses on flaws in the doctrine, and it at least nominally does not care whether getting rid of qualified immunity would lead to more or fewer wins for civil rights plaintiffs.⁸⁴ I call this the minority position for two reasons. First, it is often the case that those making outcome-neutral criticisms of qualified immunity will also make outcome-sensitive criticisms, i.e., the doctrine is flawed *and* it leads to injustice.⁸⁵ But the reverse appears less common.⁸⁶ Second, the amount of outcome-neutral criticism of qualified immunity is simply dwarfed by the amount of outcome-sensitive criticism, especially once one considers popular campaigns to abolish qualified immunity.⁸⁷

The majority of qualified immunity criticism thus appears to be outcome-sensitive. Outcome-sensitive criticism targets qualified immunity not because of its doctrinal flaws, but because these critics believe that it causes injustice. Outcome-sensitive criticism became especially prevalent

83. *Pearson*, 555 U.S. at 236–37.

84. *See, e.g.*, Baude, *supra* note 7.

85. *See, e.g.*, Brief of Legal Scholars as Amici Curiae in Support of Petitioner at 16, *West v. Winfield*, 141 S. Ct. 111 (2020) (No. 19-899), 2020 WL 1307895 (arguing that qualified immunity has no basis in the history of section 1983, is not justified by policy considerations, *and* is “eroding constitutional protections against abuse of government power”).

86. *See, e.g.*, Statement, Letter from Players Coalition to Congress (June 10, 2020), <http://campaigntoendqualifiedimmunity.org/wp-content/uploads/2021/01/players-coalition-letter.pdf> [hereinafter “Letter from Players Coalition”] (framing a request for Congress to end qualified immunity solely through the lens of police accountability).

87. While the rest of this Part will discuss numerous reasons for this conclusion, a relatively simple comparison will show how likely it is this is true. Approximately 850 law review articles cite the Supreme Court’s decision to end mandatory sequencing in *Pearson*. Westlaw search, citing references of *Pearson*, Feb. 2022 (showing 844 citing references labeled law reviews). Even if we assume that every one of those articles is an outcome-neutral criticism of the doctrine co-authored by two law professors, that still would not match the number of athletes, coaches, and business leaders who were signatories to letters to Congress that do not mention doctrinal issues at all. *See* Letter from Players Coalition, *supra* note 86 (citing more than 1,400 signatories); Statement, Business Leaders in Support of Ending Qualified Immunity, <http://campaigntoendqualifiedimmunity.org/wpcontent/uploads/2021/01/business-leaders-letter-2.pdf> (citing 650 signatories).

with the rise of the Movement for Black Lives,⁸⁸ and it has gained steam as time has passed. As police officers killed Black people in unjustifiable ways, the various ways that police escaped accountability began to take hold in the popular consciousness. Qualified immunity thus became an obvious target. After the Summer 2020 uprisings, the calls to abolish qualified immunity on justice and police accountability grounds only grew louder.⁸⁹

1. The Minority: Outcome-Neutral Criticism

Outcome-neutral criticism of qualified immunity tends to fall within three categories. The first focuses on how the doctrine is specially favored, occupying a privileged place in the Supreme Court's jurisprudence with little explanation for why. The second focuses on the doctrine's legal underpinnings, primarily its lack of a tie either to the common law it purports to mimic or the statute it constricts. And the third focuses on the stated policy reasons for the doctrine and how the doctrine fails to fulfill, and at times even subverts, those goals. These criticisms are concentrated within the legal world, but within that world they come from all directions. Academics, practitioners, advocates, and all levels of the judiciary have attacked qualified immunity on these grounds.

The first outcome-neutral criticism takes the Court to task for giving qualified immunity a favored status.⁹⁰ Though the Court explained that qualified immunity has this role “[b]ecause of the importance of qualified immunity ‘to society as a whole,’”⁹¹ it has scarcely explained what this means. As Professor William Baude has explained, the genesis of that quote is *Harlow*, and the *Harlow* Court “was simply making the point that the proper performance of public officials is of concern to the public.”⁹²

But the Court has not let this lack of justification stop it. It regularly takes qualified immunity cases solely to engage in error correction, despite its own rules suggesting this is improper.⁹³ And it decides these cases without the benefit of full briefing and argument, relying instead on its “shadow docket.”⁹⁴

88. See, e.g., *Estate of Jones v. City of Martinsburg*, 961 F.3d 661, 673 (4th Cir. 2020), *as amended* (June 10, 2020) (“Although we recognize that our police officers are often asked to make split-second decisions, we expect them to do so with respect for the dignity and worth of black lives”).

89. See, e.g., Letter from Players Coalition, *supra* note 86.

90. See, e.g., Baude, *supra* note 7.

91. See *City & Cnty. of San Francisco v. Sheehan*, 575 U.S. 600, 611 n.3 (2015) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982)).

92. Baude, *supra* note 7, at 87.

93. See *id.* at 85; see also S. CT. R. 10.

94. Baude, *supra* note 7, at 85–87; see also generally William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1 (2015) [hereinafter Baude, *Shadow Docket*] (discussing the shadow docket).

Further still, the Court's treatment of qualified immunity has called into question other related areas of law, specifically the collateral order doctrine and the summary judgment standard.⁹⁵ The collateral order doctrine allows appellate review of certain district court orders prior to final judgment.⁹⁶ While the Court has recently criticized this doctrine as perhaps having "expanded beyond the limits dictated by its internal logic,"⁹⁷ in the qualified immunity context, it continues to forge ahead.⁹⁸

And the summary judgment standard familiar to every 1L across the country—that the court "view[s] the facts in the light most favorable to the non-moving party, and draw[s] all reasonable inferences in his favor"⁹⁹—has been turned on its head. While *Scott v. Harris* is commonly thought of as a civil procedure case, the question originally presented to the Court was whether Officer Scott was entitled to qualified immunity.¹⁰⁰ Instead of applying the well-worn summary judgment standard, the Court felt it could determine the facts itself because a videotape of the relevant car chase existed.¹⁰¹ Because of the videotape, the Court introduced a new wrinkle to summary judgment. Facts and inferences needed to be drawn in a non-movant's favor "only if there is a 'genuine' dispute as to those facts."¹⁰² Courts could ignore the long-standing pro-non-movant tilt for facts that it believed were "blatantly contradicted by the record, so that no reasonable jury could believe [them]."¹⁰³ Ironically, the majority made this statement even though the dissent in *Scott* had a very different view of the events captured on tape.¹⁰⁴ The lower courts have not ignored this innovation.¹⁰⁵

The second category of outcome-neutral criticism involves qualified immunity's doctrinal underpinnings. This criticism argues that qualified immunity is suspect on two fronts: First, to the extent it is meant to mimic

95. See Tobias Barrington Wolff, *Scott v. Harris and the Future of Summary Judgment*, 15 NEV. L.J. 1351, 1358–76 (2015).

96. See *Ashcroft v. Iqbal*, 556 U.S. 662, 671 (2009).

97. *Id.* at 672.

98. See, e.g., *Scott v. Harris*, 550 U.S. 372, 376 (2007) (ignoring the presence of disputed facts at summary judgment to decide the case despite *Johnson v. Jones*, 515 U.S. 304, 313 (1995), which held that there can be no interlocutory appeal of "a question of 'evidence sufficiency'"); *Plumhoff v. Rickard*, 572 U.S. 765, 772–73 (2014) (narrowing *Johnson*); see also Baude, *supra* note 7, at 84 (discussing the Court's collateral order doctrine jurisprudence in this area); Wolff, *supra* note 95, at 1368–76 (discussing *Scott*'s effect on the collateral order doctrine).

99. *Harris v. Coweta Cnty.*, 433 F.3d 807, 811 (11th Cir. 2005), *rev'd sub nom.* *Scott v. Harris*, 550 U.S. 372 (2007).

100. See Wolff, *supra* note 95, at 1358.

101. *Scott*, 550 U.S. at 378.

102. *Id.* at 380.

103. *Id.*

104. See *id.* at 389–93 (Stevens, J., dissenting).

105. See Wolff, *supra* note 95, at 1364–66.

defenses available at common law,¹⁰⁶ it does not.¹⁰⁷ Second, without this common law tie, it is a judge-made policy choice without basis in the statute it cabins, and no other reason the Court has put forward for its existence stands up to scrutiny.¹⁰⁸

The first of these arguments involves a historical analysis far beyond the scope of this Article.¹⁰⁹ But the argument can be broadly summarized to say that even though qualified immunity was originally purported to be based on a common law “good faith” defense, there was no such defense at common law either at the Founding or at the time section 1983 was passed.¹¹⁰ To the extent such a defense existed, it was not some general immunity, but part of the elements of the relevant tort.¹¹¹ But all of this is beside the point, because as several justices have recognized, qualified immunity extends *far* beyond anything resembling any common law “good faith” defense.¹¹²

Without this historical tie, other arguments for the doctrine quickly begin to fall apart. It cannot, for example, be justified by reference to statute because the statute it cabins does not make and never has made mention of *any* immunities.¹¹³ It also cannot be justified through an “equilibrium adjustment” or “two wrongs make a right” theory of constitutional decision making, whereby it is a necessary limitation on the expansion of liability brought about by *Monroe v. Pape*’s reinvigoration of section 1983.¹¹⁴ Nor can it be fully justified by the Court’s invocation of the doctrine of lenity,

106. See, e.g., *Pierson v. Ray*, 386 U.S. 547, 555–57 (1967); see also Baude, *supra* note 7; Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1801–03 (2018).

107. See Baude, *supra* note 7, at 49–61; see also *Ziglar v. Abassi*, 137 S. Ct. 1843, 1871–72 (2017) (Thomas, J., concurring).

108. See, e.g., Schwartz, *supra* note 106, at 1802; Baude, *supra* note 7, at 62–77 (explaining why qualified immunity cannot be justified under either the theory that *Monroe v. Pape* was wrongly decided or under a theory of lenity); *Ziglar*, 137 S. Ct. at 1871 (Thomas, J., concurring) (calling current qualified immunity doctrine one of “precisely the sort of freewheeling policy choices that we have previously disclaimed the power to make” (internal quotations and alteration omitted)).

109. For just such an analysis, see Baude, *supra* note 7, at 55–61.

110. See *id.* at 55–58.

111. *Id.* at 58–60.

112. *Id.* at 60–61; *Wyatt v. Cole*, 504 U.S. 158, 170 (1992) (Kennedy, J., concurring); *Ziglar*, 137 S. Ct. at 1871 (Thomas, J., concurring). Scott A. Keller has recently argued that there was significant common law “qualified” immunity for state officers in 1871, although he too recognizes that those immunities took a different form from the clearly-established-law test that dominates the modern doctrine. See Scott A. Keller, *Qualified and Absolute Immunity at Common Law*, 73 STAN. L. REV. 1337 (2021). But see William Baude, *Is Quasi-Judicial Immunity Qualified Immunity?*, 73 STAN. L. REV. ONLINE (Univ. Chicago, Pub. L. Working Paper, Paper No. 761, 2021), <https://ssrn.com/abstract=3746068> (arguing that “[a] closer examination of the doctrine of quasi-judicial immunity” Keller identifies “shows just how distant it was from the modern doctrine of qualified immunity”).

113. See 42 U.S.C. § 1983; see also Baude, *supra* note 7, at 49 & n.13 (discussing the statute’s historical development).

114. See Baude, *supra* note 7, at 62–69 (explaining that this justification is belied by the historical record and the logic of the *Monroe* dissent on which it relies).

because it far exceeds any application of that doctrine in its home within criminal law.¹¹⁵

The third category of outcome-neutral arguments are the most functional. These criticisms explain how qualified immunity does not advance its own stated policy goals and is based on numerous empirically unjustified premises.

Police officers, for example, do not learn about the law in the way the “clearly established” inquiry imagines.¹¹⁶ Nor is qualified immunity necessary to protect government actors from crippling large damages awards. Widespread indemnity accomplishes that.¹¹⁷ And qualified immunity does not obviously succeed in protecting the budgets of the governmental units that pay for this indemnification. Governments and police departments do not seem sensitive to the cost or outcomes of lawsuits currently, and it is not clear that qualified immunity reduces liability costs either way.¹¹⁸ Qualified immunity also fails to lead to constitutional innovation because, especially post-*Pearson*, courts do not need to, and rarely do, issue novel constitutional merits decisions when they can instead hold the right was not clearly established.¹¹⁹

Most foundationally, qualified immunity does not seem to accomplish what the Supreme Court has regularly said are the core reasons for its existence—protecting government actors from the burdens of litigation and preventing over-deterrence.¹²⁰ Instead, in only a small minority of filed cases does qualified immunity allow government actors to escape discovery, summary judgment, or even trial.¹²¹ In her review of over 1,100 section 1983 cases, Professor Joanna C. Schwartz found that “[q]ualified immunity was the basis for dismissal in 3.9% of the 979 cases in which the defense could be raised: just seven (0.7%) of cases were dismissed on qualified

115. *See id.* at 72–77.

116. *See generally* Schwartz, *supra* note 70.

117. *See generally* Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885 (2014).

118. *See* Schwartz, *supra* note 106, at 1821–26.

119. *See id.* at 1826–30.

120. *See id.* at 1808–14 (discussing the lack of support for these two claims); Schwartz, *How Qualified Immunity Fails*, *supra* note 9, at 26 (empirically testing the claim that qualified immunity protects from the burdens of litigation); *see also* *Wheatt v. East Cleveland*, No. 1:17-CV-377, 2017 WL 6031816, at *4 (N.D. Ohio Dec. 6, 2017) (“In the typical case, allowing interlocutory appeals actually increases the burden and expense of litigation both for government officers and for plaintiffs. . . . because an interlocutory appeal adds . . . usually more than twelve months of delay while waiting for an appellate decision. All of this happens in place of a trial that (1) could have finished in less than a week, and (2) will often be conducted anyway after the interlocutory appeal.”). Likewise, it seems that qualified immunity may not provide ample screening at the pre-filing stage. *See* Schwartz, *supra* note 106, at 1831–32; Alexander A. Reinert, *Does Qualified Immunity Matter?*, 8 U. ST. THOMAS L.J. 477, 491 (2011).

121. *See* Schwartz, *How Qualified Immunity Fails*, *supra* note 9, at 60 (emphasis added).

immunity grounds at the motion to dismiss stage, and thirty-one (3.2%) of cases were dismissed on qualified immunity grounds at summary judgment—either by the district court or on appeal.”¹²² As for over-deterrence, “[m]ultiple studies have found that law enforcement officers infrequently think about the threat of being sued when performing their jobs.”¹²³

2. *The Majority: Outcome-Sensitive Criticism*

The minority, outcome-neutral criticisms have many threads along various doctrinal, historical, and empirical lines. The majority, outcome-sensitive criticism has only one: injustice. For these critics, qualified immunity cannot stand because it prevents victims from being compensated and allows bad acting government officials, most commonly police, to escape accountability. Though these critics’ argument is simpler, their voices are much louder and more widespread.

I start with the proverbial top of the legal hierarchy. Across multiple cases, Justice Sotomayor, often joined by the late Justice Ginsburg, has issued scathing dissents arguing that the combination of the Court’s qualified immunity and Fourth Amendment jurisprudence was creating a “shoot first, think later” culture of impunity for police officers.¹²⁴ Lower court judges of various political stripes have also taken up their own versions of this call. For example, two Trump-appointed judges from the Fifth Circuit, Judges Don Willett and James Ho, issued concurrences and dissents decrying qualified immunity’s overprotection of government officials.¹²⁵ And Judge Carlton Reeves of the Southern District of Mississippi issued a Star Wars-laced¹²⁶ indictment of the doctrine tracing from the failed promise of Reconstruction to a clear call to the Movement

122. *Id.* at 45.

123. Schwartz, *supra* note 106, at 1811 & n.98.

124. *See, e.g.*, *Mullenix v. Luna*, 577 U.S. 7, 25–26 (2015) (Sotomayor, J., dissenting); *see also* *Kisela v. Hughes*, 138 S. Ct. 1148, 1155–62 (2018) (Sotomayor, J., dissenting); *Salazar-Limon v. City of Houston*, 137 S. Ct. 1277, 1278–83 (2017) (Sotomayor, J., dissenting from the denial of certiorari) (“Only Thompson and Salazar–Limon know what happened on that overpass on October 29, 2010. It is possible that Salazar–Limon did something that Thompson reasonably found threatening; it is also possible that Thompson shot an unarmed man in the back without justification. What is clear is that our legal system does not entrust the resolution of this dispute to a judge faced with competing affidavits. The evenhanded administration of justice does not permit such a shortcut.”).

125. *See* *Zadeh v. Robinson*, 928 F.3d 457, 474 (5th Cir. 2019) (Willett, J., concurring in part and dissenting in part); *Horvath v. City of Leander*, 946 F.3d 787, 801 (5th Cir. 2020), (Ho, J., concurring in part) (criticizing the clearly established prong and stating that “[l]aw enforcement officials and other public officials who engage in misconduct should be held accountable”).

126. *See generally* *Jamison v. McClendon*, 476 F. Supp. 3d 386 (S.D. Miss. 2020) (labeling sections of the decision “Section 1983: A New Hope,” “Qualified Immunity: The Empire Strikes Back,” and “The Return of Section 1983”).

for Black Lives and its allies.¹²⁷ In a case about a Black man driving a Mercedes who was stopped, harassed, and searched by the police for nearly two hours, he began:

Tragically, thousands have died at the hands of law enforcement over the years, and the death toll continues to rise. Countless more have suffered from other forms of abuse and misconduct by police. Qualified immunity has served as a shield for these officers, protecting them from accountability.¹²⁸

Writing for the Fourth Circuit, Judge Henry F. Floyd was even more direct:

Wayne Jones was killed just over one year before the Ferguson, Missouri shooting of Michael Brown would once again draw national scrutiny to police shootings of black people in the United States. Seven years later, we are asked to decide whether it was clearly established that five officers could not shoot a man 22 times as he lay motionless on the ground. Although we recognize that our police officers are often asked to make split-second decisions, we expect them to do so with respect for the dignity and worth of black lives. Before the ink dried on this opinion, the FBI opened an investigation into yet another death of a black man at the hands of police, this time George Floyd in Minneapolis. This has to stop. To award qualified immunity at the summary judgment stage in this case would signal absolute immunity for fear-based use of deadly force, which we cannot accept.¹²⁹

These judges were not alone.¹³⁰

But perhaps more importantly, the movement to abolish qualified immunity has extended far beyond the judiciary. Indeed, it has extended far beyond the legal academy or even the legal community generally. Instead, abolishing qualified immunity has become part of the package of demands of one of the largest civil rights movements of our time.¹³¹ And with that move to the popular consciousness, the possibility of ending qualified

127. *See id.*

128. *Id.* at 392 (footnotes omitted).

129. *Est. of Jones v. City of Martinsburg*, 961 F.3d 661, 673 (4th Cir. 2020).

130. *See Jamison*, 476 F. Supp. 3d at 408 n.165 (collecting other examples of judges decrying qualified immunity).

131. *See* THE MOVEMENT FOR BLACK LIVES, END THE WAR ON BLACK COMMUNITIES, <https://m4bl.org/policy-platforms/end-the-war-on-black-communities/> (last visited Mar. 2, 2022) (listing the End Qualified Immunity Act as a piece of “Key Federal Legislation” for their policy demands).

immunity—whether through Supreme Court action or, more likely, through the political process—has increased exponentially.

Those within the legal community may be surprised how far beyond our field the view that qualified immunity should end has spread. Once an obscure legal doctrine, a recent Cato/YouGov poll found that nearly half of the people polled had already heard of the doctrine before they were asked about it.¹³² Of those who had heard of qualified immunity, nearly seventy percent said that it should be abolished.¹³³ Of all people in the poll, sixty-three percent favored getting rid of qualified immunity, with thirty-eight percent strongly in favor.¹³⁴

This level of popular salience for a legal doctrine is surprising. By comparison, for years polling has shown that slightly more than half of Americans cannot name a single sitting Supreme Court justice.¹³⁵ And this is not merely because of polling occurring at inopportune times. One of these polls occurred during Justice Kavanaugh’s confirmation process.¹³⁶

Perhaps this polling should be unsurprising because popular press outlets have run story¹³⁷ after story¹³⁸ after story¹³⁹ on abolishing qualified immunity¹⁴⁰ through the police-accountability frame. Even the famously liberal ice cream-makers Ben Cohen and Jerry Greenfield have joined the chorus.¹⁴¹

132. Emily Ekins, *Poll: 63% of Americans Favor Eliminating Qualified Immunity for Police*, CATO INST. (July 16, 2020), <https://www.cato.org/survey-reports/poll-63-americans-favor-eliminating-qualified-immunity-police> [https://perma.cc/TEZ5-T3VT].

133. *Id.*

134. *Id.*

135. Ed Kilgore, *Most Americans Can’t Name a Supreme Court Justice*, N.Y. MAG. (Sept. 5, 2018), <https://nymag.com/intelligencer/2018/09/most-americans-cant-name-a-supreme-court-justice.html> (citing polls from 2009 and 2018 that fifty-two and fifty-four percent of respondents could not name a sitting justice).

136. *See id.*; *see also* ROBERT GREEN & ADAM ROSENBLATT, C-SPAN/PSB 2018 SUPREME COURT SURVEY – AGENDA OF KEY FINDINGS 2 (Aug. 2018), <https://static.c-span.org/assets/documents/scotusSurvey/CSPAN%20PSB%202018%20Supreme%20Court%20Survey%20Agenda%20of%20Key%20Findings%20FINAL%208%2027.pdf> [https://perma.cc/3W4H-HUL7] (citing polling conducted “from August 13–15, 2018”).

137. *See, e.g.*, Hailey Fuchs, *Qualified Immunity Protection for Police Emerges as Flash Point Amid Protests*, N.Y. TIMES (Oct. 18, 2021), <https://www.nytimes.com/2020/06/23/us/politics/qualified-immunity.html> [https://perma.cc/T2LP-VMDK].

138. *See, e.g.*, Jordan Rubin, Kimberly Robinson & Porter Wells, *Qualified Immunity, or How the Law Shields Police*, WASH. POST (Apr. 21, 2021, 1:29 PM), https://www.washingtonpost.com/business/qualified-immunity-or-how-the-law-shields-police/2020/06/09/83cf1f3e-aa7c-11ea-a43b-be9f6494a87d_story.html [https://perma.cc/MU6C-FFMR].

139. *See, e.g.*, Gene Demby, *An Immune System*, NPR (July 8, 2020, 12:06 AM), <https://www.npr.org/2020/06/12/876212065/an-immune-system> [https://perma.cc/9LJW-SH4U].

140. *See, e.g.*, Eric Schnurer, *Congress Is Going to Have to Repeal Qualified Immunity*, THE ATLANTIC (June 17, 2020, 10:35 AM), <https://www.theatlantic.com/ideas/archive/2020/06/congress-going-have-repeal-qualified-immunity/613123/> [https://perma.cc/7H8V-QHC7].

141. *See supra* note 11 and accompanying text.

Politicians too have broadly taken up the call to end qualified immunity. At the federal level, Libertarian Congressman Justin Amash put forward the Ending Qualified Immunity Act, along with thirty-nine Democratic cosponsors.¹⁴² When he introduced the bill, he said, “This pattern [of police killings] continues because police are legally, politically, and culturally insulated from consequences for violating the rights of the people whom they have sworn to serve. That must change so that these incidents of brutality stop happening.”¹⁴³ While that particular bill did not gain adherents, the House ultimately twice passed the George Floyd Justice in Policing Act, which contained provisions abolishing qualified immunity at the federal, state, and local levels. With its passage, Congressman Ritchie Torres said on the House floor, “We as a country have a choice: We can either choose police accountability, or choose qualified immunity, but we cannot choose both.”¹⁴⁴ There has been even more action on the state and local levels, where several places have already purported to abolish qualified immunity.¹⁴⁵

Civil rights and other advocacy groups have also joined the fight to end qualified immunity. Both national and state-level ACLU chapters have issued multiple calls to end qualified immunity.¹⁴⁶ Janai Nelson, now the President and Director-Counsel of the NAACP LDF,¹⁴⁷ called qualified immunity “the most significant barrier to [police] accountability” in a

142. See Ending Qualified Immunity Act, H.R. 7085, 116th Cong. (2020); Reforming Qualified Immunity Act, S. 4036, 116th Cong. (2020).

143. See John Bowden, *Amash Ready to Sue Officers*, THE HILL (June 2, 2020, 8:14 AM), <https://thehill.com/homenews/house/500611-amash-readying-legislation-allowing-victims-to-sue-officers> [<https://perma.cc/54P6-LCGA>].

144. Nick Sibilla, *House Passes New Bill to Abolish Qualified Immunity for Police*, FORBES (Mar. 4, 2021, 10:55 AM), <https://www.forbes.com/sites/nicksibilla/2021/03/04/house-passes-new-bill-to-abolish-qualified-immunity-for-police/?sh=8c242192daf4>.

145. See Matt Ford, *Are States Really Abolishing Qualified Immunity for Cops? Not Exactly.*, NEW REPUBLIC (Apr. 13, 2021), <https://newrepublic.com/article/162026/new-mexico-ended-qualified-immunity> [<https://perma.cc/7FND-WL3L>] (noting that Colorado, Connecticut, New Mexico, and New York City have passed laws purporting to abolish, or at least subvert, qualified immunity).

146. See Yohnka, Decker, Andersson & Ahmad, *supra* note 12; April Rodriguez, *Lower Courts Agree — It’s Time to End Qualified Immunity*, ACLU (Sept. 10, 2020), <https://www.aclu.org/news/criminal-law-reform/lower-courts-agree-its-time-to-end-qualified-immunity/> [<https://perma.cc/5SPU-Q42F>]; West Resendes & Somil Trivedi, *We Must Abolish Qualified Immunity to Prevent Further Police Harm — Especially for People in Mental Health Crises*, ACLU (Mar. 19, 2021), <https://www.aclu.org/news/criminal-law-reform/we-must-abolish-qualified-immunity-to-prevent-further-police-harm-especially-for-people-in-mental-health-crises/> [<https://perma.cc/K5NM-G73W>]; *No More Bad Apples: Police Accountability in Illinois Now*, ACLU ILLINOIS (Apr. 19–May 31, 2021), <https://www.aclu-il.org/en/events/no-more-bad-apples-police-accountability-illinois-now> [<https://perma.cc/GUQ5-TNLS>].

147. *Janai Nelson*, NAACP LDF: ABOUT US, <https://www.naacpldf.org/about-us/staff/janai-nelson/> [<https://perma.cc/9EDJ-TK6X>].

nationally aired interview on MSNBC.¹⁴⁸ And recent petitions for certiorari aiming to do away with qualified immunity have gained amicus support from broad, cross-ideological coalitions arguing that qualified immunity harms the public and undermines government accountability.¹⁴⁹

But this fight has spread far beyond those remotely tied to the legal or political arena. Business leaders, athletes, and artists have joined forces to create an organization called “The Campaign to End Qualified Immunity.”¹⁵⁰ That campaign counts among its supporters “more than 1,400 current and former professional athletes and coaches”¹⁵¹ as well as “more than 650 [] current and former CEO’s, founders, and leaders of businesses”¹⁵² and 450 creative artists.¹⁵³ And on Twitter, the phrase “abolish qualified immunity” has gained such prominence that the hashtag is regularly used in response to examples of police overreach.¹⁵⁴

As these examples show, these more popular calls for ending qualified immunity simply do not invoke the outcome-neutral reasons for its abolition that other critics—primarily within the academy and the judiciary—have mentioned. Instead, they focus on “the unchecked authority of the police” and want to ensure that “if those who promise to uphold the law and protect the community fail to do so, *there is a remedy available*.”¹⁵⁵ In other words,

148. See Andrea Mitchell, *NAACP LDF’s Janai Nelson: Qualified Immunity ‘the Most Significant Barrier’ to Police Accountability*, MSNBC (Apr. 22, 2021), <https://www.msnbc.com/andrea-mitchell-reports/watch/naacp-ldf-s-janai-nelson-qualified-immunity-the-most-significant-barrier-to-police-accountability-110676549917>.

149. See, e.g., Brief of the DKT Liberty Project, The Due Process Institute, The Rutherford Institute, & Reason Foundation as Amici Curiae in Support of Petitioner, *West v. Winfield*, 141 S. Ct. 111 (2020) (No. 19-899), 2020 WL 1307894; Brief of the Cato Institute as Amicus Curiae Supporting Petitioner, *West v. Winfield*, 141 S. Ct. 111 (2020) (No. 19-899), 2020 WL 1313306; Brief of Cross-Ideological Groups Dedicated to Ensuring Official Accountability, Restoring the Public’s Trust in Law Enforcement, and Promoting the Rule of Law as Amici Curiae in Support of Petitioner, *Corbitt v. Vickers*, 141 S. Ct. 110 (2020) (No. 19-679), 2019 WL 7584801. Law professors too have provided amicus briefing in support of reformulating or abolishing qualified immunity, although their arguments were, perhaps unsurprisingly, primarily outcome-neutral. See Brief of Legal Scholars as Amici Curiae in Support of Petitioner at 16, *West v. Winfield*, 141 S. Ct. 111 (2020) (No. 19-899), 2020 WL 1307895.

150. See *About the Campaign*, CAMPAIGN TO END QUALIFIED IMMUNITY, <https://campaigntoendqualifiedimmunity.org/about/> [<https://perma.cc/W88D-93GT>] (calling itself “a coalition of business leaders, creative artists, athletes, advocates and lawyers dedicated to ending qualified immunity”).

151. Statement, Letter from Players Coalition to Congress, *supra* note 86.

152. Statement, Business Leaders in Support of Ending Qualified Immunity, *supra* note 87.

153. *About the Campaign*, CAMPAIGN TO END QUALIFIED IMMUNITY, *supra* note 150.

154. See, e.g., @av11899, TWITTER (June 5, 2021), <https://twitter.com/av11899/status/1401196925823553542?s=27> [<https://perma.cc/PL4S-JB5B>] (tweeting about Breonna Taylor); @Dantes_mom, TWITTER (Sept. 19, 2020), https://twitter.com/dantes_mom/status/1307287969804451840?s=21 [<https://perma.cc/6XFN-UQC9>] (tweeting about how qualified immunity insulates prison guards); @onekade, TWITTER (Aug. 10, 2020), <https://twitter.com/onekade/status/1292969905759846401?s=21> [<https://perma.cc/GN4P-AUFX>] (tweeting about a Boston police officer who “killed a man execution style as he lay on the ground bleeding out”).

155. Statement, Letter from Players Coalition to Congress, *supra* note 86 (emphasis added).

what matters is not the illogic or inconsistency of the doctrine, but its effects on the world.

II. WHO DECIDES AND THE PYRRHIC VICTORY OF ABOLISHING QUALIFIED IMMUNITY

This Part turns to a question that has been unappreciated by these critics, but should be of vital importance to them: when qualified immunity is gone, who decides the constitutional issues that remain? The answer to that question should give outcome-sensitive critics pause. The people who will decide these cases belong to a federal judiciary that, already unfriendly to civil rights plaintiffs, has been remade during the Trump administration. Recent empirical studies, as well as a focus on these judges' early jurisprudence, suggest that these Trump appointees are different—more conservative, more activist, and less constrained by the informal norms of the judiciary—than their Republican-appointed predecessors.¹⁵⁶ What's more, they are plentiful, taking up over thirty percent of the federal appellate bench and fully a third of the Supreme Court.¹⁵⁷

Without qualified immunity, this judiciary will be forced to issue merits decisions on a range of constitutional issues. Consequently, these merits decisions, unlike decisions finding that the law was not clearly established, will be given the full precedential force of *stare decisis*. With liberal justices currently taking stances in favor of strong *stare decisis* principles in order to protect long-decided liberal precedents, it is not only possible but likely that rights-constricting constitutional decisions will be decided now and then entrenched by *stare decisis* for decades to come. I address each of these contentions in turn.

156. See *infra* Section II.A.3.

157. See John Gramlich, *How Trump Compares with Other Recent Presidents in Appointing Federal Judges*, PEW RSCH. CTR. (Jan. 13, 2021), <https://www.pewresearch.org/fact-tank/2021/01/13/how-trump-compares-with-other-recent-presidents-in-appointing-federal-judges/> [<https://perma.cc/3SGE-JPMF>] (noting that Trump appointed fifty-four circuit court judges and three Supreme Court justices); *Judicial Vacancies*, U.S. CTS., <https://www.uscourts.gov/judges-judgeships/judicial-vacancies> [<https://perma.cc/T83S-UJJE>] (noting 179 authorized court of appeals judgeships and 9 authorized Supreme Court justices).

A. *Trump Judges, Obama Judges, and the Equilibration Thesis*

1. *The Pre-Trump Judiciary*

To begin, it is necessary to set a baseline. What type of people typically sat as members of the pre-Trump judiciary, and what type of decisions did they issue?

Demographically, both pre- and post-Trump, federal judges have been disproportionately white and male.¹⁵⁸ At first glance, one might think these demographics do not matter to judicial decision making. But previous studies suggest that they very much do. Past studies have shown that judges of different races and genders view some case types differently,¹⁵⁹ view litigants of different races differently,¹⁶⁰ and that the mere presence of a Black or female judge seems to change the thinking of white and male judges on a panel in some cases.¹⁶¹

But race and gender are far from the only relevant demographics for outcome-sensitive qualified immunity opponents. Perhaps more important is pre-judicial profession. Studies have shown that, while the benefits of demographic diversity may diminish over time, experiential diversity has a broader and more long-lasting impact.¹⁶²

On this front, the news for outcome-sensitive opponents is not good. Even before President Trump made a single appointment, a wildly disproportionate number of federal judges previously litigated in favor of

158. See Danielle Root, Jake Falschini & Grace Oyenubi, *Building a More Inclusive Federal Judiciary*, CTR. FOR AM. PROGRESS (Oct. 3, 2019) (finding that “more than 73 percent of sitting federal judges are men and 80 percent are white”); *Diversity of the Federal Bench*, AM. CONST. SOC’Y, <https://www.aclaw.org/judicial-nominations/diversity-of-the-federal-bench/> [<https://perma.cc/9H9W-U8F5>] (finding that, even after President Biden’s appointments of a majority minority and female slate of 46 judges, 64.94% of active Article III judges were men and 71.5% were white). By comparison, the most recent census found that about 60.1% of Americans are white, and slightly less than half are male. *Quick Facts*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/PST045221> [<https://perma.cc/B8ZW-C8TX>].

159. See Allison P. Harris & Maya Sen, *Bias and Judging*, 22 ANN. REV. POL. SCI. 241, 248–52 (2019) (reviewing the literature on the impact of judges’ race and gender on their decision making); see also Pat K. Chew & Robert E. Kelley, *Myth of the Color-Blind Judge: An Empirical Analysis of Racial Harassment Cases*, 86 WASH. U. L. REV. 1117 (2009) (finding that African American and white judges as groups perceive racial harassment cases differently).

160. See Pat K. Chew & Robert E. Kelley, *The Realism of Race in Judicial Decision Making: An Empirical Analysis of Plaintiffs’ Race and Judges’ Race*, 28 HARV. J. RACIAL & ETHNIC JUST. 91, 122 (2012).

161. See Jonathan P. Kastellec, *Racial Diversity and Judicial Influence on Appellate Courts*, 57 AM. J. POL. SCI. 167 (2013) (analyzing the presence of a Black judge on an otherwise all-white appellate panel deciding an affirmative action case); see also Sean Farhang & Gregory Wawro, *Institutional Dynamics on the U.S. Court of Appeals: Minority Representation Under Panel Decision Making*, 20 J.L. ECON. & ORG. 299 (2004) (finding that the presence of a woman on an otherwise all-male appellate panel leads to statistically significant differences in outcomes).

162. See Jason Iuliano & Avery Stewart, *The New Diversity Crisis in the Federal Judiciary*, 84 TENN. L. REV. 248, 264–65 (2016).

the government.¹⁶³ Of these government lawyers, the majority are former prosecutors.¹⁶⁴ The ratios of former prosecutors to former defense attorneys, and of former government lawyers to former defense attorneys, are staggering. For every former public defender on the federal bench, there are more than four former prosecutors.¹⁶⁵ When that latter designation is extended to all government-representing lawyers, the ratio climbs to *ten* government lawyers for every public defender.¹⁶⁶ Notably, President Trump exacerbated these disparities. “Indeed, Trump appointed over *twelve times* more judges who had worked exclusively as government advocates than judges with backgrounds in criminal defense or plaintiff-side civil rights litigation.”¹⁶⁷

And beyond the prosecutorial tilt of the federal judiciary is its political makeup. At the start of President Biden’s term, a bit more than half of all federal judges were appointed by a Republican president.¹⁶⁸ For reasons relating to the en banc process that will be discussed *infra*, however, it is likely more important that Republican appointees constitute a majority of active judges in seven of the twelve circuits.¹⁶⁹

163. See Clark Neily, *Are a Disproportionate Number of Federal Judges Former Government Advocates*, CATO INST. (May 27, 2021), <https://www.cato.org/study/are-disproportionate-number-federal-judges-former-government-advocates> [<https://perma.cc/EWG2-8LXV>] (“[F]ormer government lawyers—and more specifically, lawyers whose formative professional experiences include serving as courtroom advocates for government—are vastly overrepresented on the federal bench.”); see also JOANNA SHEPHERD, DEMAND JUSTICE, JOBS, JUDGES, AND JUSTICE: THE RELATIONSHIP BETWEEN PROFESSIONAL DIVERSITY AND JUDICIAL DECISIONS 6 (2021), http://demandjustice.org/wp-content/uploads/2021/02/Joanna-Shepherd-report_2021.pdf [<https://perma.cc/5869-3KX4>]; Andrew Manuel Crespo, *Regaining Perspective: Constitutional Criminal Adjudication in the U.S. Supreme Court*, 100 MINN. L. REV. 985, 992–94 (2016) (finding that between 1972 and 2016 the Supreme Court experienced a threefold increase in the number of justices who previously served as prosecutors and a ninefold increase in the years of prosecutorial experience among the justices).

164. Neily, *supra* note 163 (finding that 318 federal judges have prosecutorial experience, while only 243 have engaged in noncriminal advocacy for the government).

165. *Id.*

166. *Id.* (finding 54 public defenders on the bench compared to 546 attorneys who worked for the government). Extending the former category from public defenders to other defense attorneys and civil liberties litigators leads to a 129:546 ratio of non-government to government appointees.

167. *Id.*

168. See Gramlich, *supra* note 157.

169. *Current Federal Judges by Appointing President and Circuit*, BALLOTEDIA, https://ballotpedia.org/Current_federal_judges_by_appointing_president_and_circuit [<https://perma.cc/QF7X-YAEZ>]. The Ninth Circuit, nominally controlled by a Democratic majority, bears special mention because its en banc process differs from the other circuits. While it takes a majority vote of the active judges to take a case en banc, as it does in other circuits, the Ninth Circuit sitting en banc is only eleven judges—the Chief and ten randomly picked active judges from the court’s other twenty-eight members. Because of this, there is a significant chance that an en banc panel will be majority Republican appointees in the Ninth Circuit, whereas in the other circuits, it is the breakdown of the entire court that matters. See William Yeatman, *Ninth Circuit Review-Reviewed: Is CA9’s En Banc Process Driving Disagreement?*, YALE J. REGULATION (Dec. 10, 2020),

This political tilt would be beside the point if judges were unaffected by partisanship. But as with other demographic factors, this is not the case. Judges on both the Supreme Court and the courts of appeals show affinity for the positions taken by the party of their appointing President.¹⁷⁰ To even the most casual observer of judicial history, this should not come as a surprise. Presidents have routinely attempted to pick judges and justices who share their political outlook.¹⁷¹ And while ideological drift has occurred in some jurists post appointment, the conventional wisdom suggests that is the exception, not the rule.¹⁷²

All of this raises the question of what the political, racial, gender, and professional demographics of the judiciary mean for the civil rights plaintiffs whom outcome-sensitive critics of qualified immunity care about. To be blunt, the news is not good. While conservative jurists have not been uniformly against the protection of civil rights, much of the conservative legal project of the mid-twentieth century onward can be viewed as undoing the criminal procedure-rights revolution led by the Warren Court.¹⁷³ With

<https://www.yalejreg.com/nc/ninth-circuit-review-reviewed-is-ca9s-en-banc-process-driving-disagreement-by-william-yeatman/> [<https://perma.cc/D6SE-EHLC>] (discussing this process and the turmoil it has seemingly wrought in the Ninth Circuit).

170. See Harris & Sen, *supra* note 159, at 242 (“Multiple studies have documented that judges appointed by Republicans decide cases differently than do judges appointed by Democrats, even after accounting for personal and professional differences (including gender and race).”).

171. See, e.g., Thomas Y. Davies, *The Supreme Court Giveth and the Supreme Court Taketh Away: The Century of Fourth Amendment “Search and Seizure” Doctrine*, 100 J. CRIM. L. & CRIMINOLOGY 933, 993 (2010) (noting that “one insider has reported that President Nixon had two salient criteria for appointees: opposition to the Warren Court’s criminal procedure rulings and opposition to busing as a remedy for segregated schools”).

172. See, e.g., David A. Strauss, *It’s Time to Deal with Reality: The Myth of the Unpredictable Supreme Court Justice Debunked*, CHI. TRIB., Aug. 7, 2005, at 9; see also Lee Epstein, Andrew D. Martin & Kevin Quinn, *Replacing Justice Ginsburg* 11–12 (Sept. 21, 2020) (unpublished manuscript), <https://static1.squarespace.com/static/60188505fb790b33c3d33a61/t/60447dccc3c7b44bb68c2b7/1615101388838/ReplacingJusticeGinsburg.pdf> (noting that “significant *against*-type drift has virtually disappeared on the Roberts Court”). But see Lee Epstein, Andrew D. Martin, Kevin M. Quinn & Jeffrey A. Segal, *Ideological Drift Among Supreme Court Justices: Who, When, and How Important?*, 101 NW. U. L. REV. 1483 (2007) (using Martin-Quinn scores to identify statistically significant ideological drift among numerous Supreme Court justices). For reasons suggesting that Epstein, et al.’s Martin-Quinn analysis may not fully undermine the conventional wisdom, see Ward Farnsworth, *The Use and Limits of Martin-Quinn Scores to Assess Supreme Court Justices, with Special Attention to the Problem of Ideological Drift*, 101 NW. U. L. REV. 1891 (2007).

173. See, e.g., Davies, *supra* note 170, at 938–39, 992–1037; Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts’ Competing Ideologies*, 72 GEO. L.J. 185 (1983); Alan M. Dershowitz & John Hart Ely, *Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L.J. 1198, 1227 (1971); Louis Michael Seidman, *Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure*, 80 COLUM. L. REV. 436, 437 (1980); see also *Edwards v. Vannoy*, 141 S. Ct. 1547, 1573 n.7 (2021) (Gorsuch, J., concurring) (“The [liberal wing of the Court’s] dissent champions decisions from the 1950s, ’60s, and ’70s. But it disregards how those decisions departed from a century of this Court’s precedents and the common law before that. . . . The dissent may prefer decisions within a particular 30-year window.”).

some notable exceptions,¹⁷⁴ in example after example, conservative jurists have narrowed or undone the liberal gains of the Warren Court era.¹⁷⁵ There is little sign that this conservative battle has slowed or stopped. Combining this conservative tilt against expansive constitutional rights with the professionally developed pro-government biases of many judges makes the picture look only bleaker.

And even beyond this general tilt, the judiciary's "humanity"¹⁷⁶, i.e., its bias, seems to play a role in how it decides qualified immunity cases. Professors Aaron L. Nielson and Christopher J. Walker have found statistically significant differences in how often different circuits establish constitutional rights.¹⁷⁷ They have also found political differences in how democratic and republican-appointed judges behaved, with democratic appointees more likely to deny qualified immunity.¹⁷⁸

2. *The Equilibration Thesis*

It is against this backdrop that I discuss the right-remedy gap,¹⁷⁹ and the equilibration thesis.¹⁸⁰ The right-remedy gap is well studied, and it exists almost entirely because of the decisions of the judiciary. While the phrase "every right . . . must have a remedy"¹⁸¹ is well known, the truth is that this

174. Perhaps the most notable exception was some of Justice Antonin Scalia's criminal procedure jurisprudence. See, e.g., Stephanos Bibas, *Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants?*, 94 GEO. L.J. 183 (2005) (discussing Justice Scalia's opinions in *Crawford v. Washington*, 541 U.S. 36, 68-69 (2004), and *Blakely v. Washington*, 124 S. Ct. 2531 (2004)).

175. See Carol Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466 (1996); Davies, *supra* note 170, at 938-39 ("The [post-Warren Court] period . . . consists of the full-blown dismantling of earlier search and seizure doctrine during the Burger, Rehnquist, and Roberts Courts. This retrenchment—which is still continuing—commenced in the early 1970s when President Richard Nixon tipped the Court's balance sharply to the right by choosing four appointees who were known to be opposed to the Warren Court's criminal procedure rulings.").

176. See Aaron L. Nielson, *Reflections on the End of the Federal Law Clerk Hiring Plan*, 112 MICH. L. REV. FIRST IMPRESSIONS 22 (2013) (arguing that part of the problem with the law clerk hiring plan was it "failed to account for who federal judges are"); Nielson & Walker, *supra* note 62, at 82 (quoting Judge Richard Arnold).

177. Nielson & Walker, *supra* note 62, at 98 (discussing Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1 (2015)).

178. *Id.* at 98-99 (discussing differences among judges who authored opinions); *id.* at 117 (noting that "R[epublican appointed] authoring judges seem more likely to put immunity denials in unpublished decisions").

179. See John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 8 (1999).

180. See Fallon, Jr., *supra* note 23, at 639; Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857 (1999).

181. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) ("The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.").

phrase is, if not a lie, certainly a misconception. After Chief Justice Marshall made this pronouncement in *Marbury v. Madison*,¹⁸² the courts have been finding ways to walk it back ever since.¹⁸³

The idea behind the right-remedy gap is simple, and indeed is contained within the name. There are numerous doctrines that lead courts to recognize a plaintiff may have a right, but which nevertheless leave no remedy for the violation of that right.¹⁸⁴ Thus, these doctrines create a “gap” between the rights a person has and the remedies they might receive.

The gap is relevant here because of one of the most prominent theories of judicial behavior underlying it. That theory says that judges craft justiciability, substantive, and procedural doctrines to reach some optimal level of rights-protection for the functioning of society, and they calibrate the various tools at their disposal to reach that optimal level of protection.¹⁸⁵ This means that, for example, the absence of a procedural tool that limits a plaintiff’s ability to collect will be replaced by weakened substantive protections or vice versa.¹⁸⁶ Professor Richard H. Fallon, Jr. has called this “the Equilibration Thesis.”¹⁸⁷

That the right-remedy gap exists is beyond debate, and a key example of one of the doctrines causing it is qualified immunity.¹⁸⁸ As discussed in Part I, it is entirely possible for a court to recognize that a plaintiff had their constitutional rights violated, but then to conclude that the person has no remedy because that right was not clearly established.

Key to the decision making of outcome-sensitive qualified immunity abolitionists, then, are two questions: One, does the Equilibration Thesis have merit? Two, if it does, then what will the alternative world without the procedural barrier of qualified immunity look like? I will offer evidence that the answer to the second question is “worse” in the later parts of this Article.

182. *See id.*

183. I use the phrase “ever since” extremely literally. After pronouncing that every right must have a remedy in *Marbury*, Chief Justice Marshall proceeded to say that, despite *Marbury* having a right to his commission, he ultimately had no remedy because the statute conferring jurisdiction to sue was unconstitutional. *See id.* at 175–76.

184. *See* Fallon, Jr., *supra* note 23, at 684–85, 687–89 (discussing various examples of courts calibrating justiciability and remedial doctrines to support substantive goals).

185. *See id.* at 639. Professor Aziz Z. Huq has argued the institutional interests of the courts may be another equilibrating force. *See* Aziz Z. Huq, *Judicial Independence and the Rationing of Constitutional Remedies*, 65 DUKE L.J. 1, 6 (2015) (“One of the important, yet wholly overlooked, causes of the fault-based rationing system for constitutional remedies is the institutional independence of the judiciary.”).

186. Fallon, Jr., *supra* note 23, at 643.

187. *Id.* at 637 (describing the thesis as holding “that courts, and especially the Supreme Court, decide cases by seeking what they regard as an acceptable overall alignment of doctrines involving justiciability, substantive rights, and available remedies”).

188. *See* Richard H. Fallon, Jr., *Asking the Right Questions About Officer Immunity*, 80 FORDHAM L. REV. 479 (2011).

But as for the first question, there are decades of scholarship and evidence suggesting that the Equilibration Thesis is correct,¹⁸⁹ and that should concern outcome-sensitive abolitionists. By far the most famous example of this thesis is the Court's most famous case, *Brown v. Board of Education*.¹⁹⁰ While the Court "declared a socially revolutionary right to desegregated public education,"¹⁹¹ it also quickly limited the scope of its ruling by breaking with the tradition that a remedy must occur immediately, instead creating the now infamous requirement of "all deliberate speed."¹⁹² Other examples abound. This sort of equilibration has been observed in standing doctrine, the political question doctrine, in questions of ripeness, and in questions of racial equality more broadly.¹⁹³ Indeed, a number of scholars have argued that qualified immunity itself plays an equilibrating function.¹⁹⁴

In addition to these examples, Fallon notes that there is an obvious, intuitive case for the thesis. If judges have any view towards the real world, meaning that they care about the practical outcomes of their decisions, then they "would make decisions within formally distinct doctrinal categories with an eye toward creating the best overall body of law."¹⁹⁵

Much more ink has been and could be spilled on a discussion of the right-remedy gap, the Equilibration Thesis, and how these ideas apply to the doctrine of qualified immunity. But I will end this section with this observation: while the most famous example of equilibration is *Brown*, the most damning is *McCleskey v. Kemp*.¹⁹⁶ In that case, Warren McCleskey challenged his death sentence using strong statistical evidence that the death penalty in Georgia was applied on racially discriminatory grounds.¹⁹⁷ That evidence showed that in Georgia, "few of the details of the crime or of

189. See Fallon, Jr., *supra* note 23, at 684–85 (discussing this literature); see also Levinson, *supra* note 180, at 858 (discussing how "remedial equilibration" and not rights essentialism best explains constitutional adjudication); Schwartz, *supra* note 16, at 319–20 & n.38 (noting that "[t]he prevailing scholarly view is that courts would narrow constitutional protections absent qualified immunity").

190. 347 U.S. 483 (1954).

191. Fallon, Jr., *supra* note 23, at 688.

192. See *Brown v. Bd. of Educ. (II)*, 349 U.S. 294, 298–301 (1955).

193. See Fallon, Jr., *supra* note 23, at 639–42; see also Levinson, *supra* note 180, at 899 (discussing how the Court's "process-oriented, colorblindness approach to racial equality" allows it to dodge difficult remedies questions brought about by attention to substantive racial inequality).

194. See Schwartz, *supra* note 16, at 320 & n.38 (noting that "[t]he prevailing scholarly view is that courts would narrow constitutional protections absent qualified immunity").

195. Fallon, Jr., *supra* note 23, at 685.

196. 481 U.S. 279 (1987).

197. See *id.* at 338 (noting that the Baldus Study "compiled data on almost 2,500 homicides committed during the period 1973–1979" and had "taken into account the influence of 230 nonracial variables, using a multitude of data from the State itself" that "produced striking evidence that the odds of being sentenced to death are significantly greater than average if a defendant is black or his or her victim is white").

McCleskey's past criminal conduct were more important than the fact that his victim was white" and that, at bottom, "cases involving black defendants and white victims [were] more likely to result in a death sentence than cases featuring any other racial combination of defendant and victim."¹⁹⁸

But this was "clearly insufficient"¹⁹⁹ for the five members of the Supreme Court (all Republican appointees, former prosecutors, or both²⁰⁰) who upheld his death sentence. As that majority noted, McCleskey's "statistical proffer must be viewed in the context of his challenge to decisions at the heart of the State's criminal justice system."²⁰¹ In other words, if McCleskey's evidence was enough to undermine his death sentence, similar evidence might undermine the country's entire criminal punishment system.

The Court thus equilibrated. At the same time it recognized the important right to be free of racial discrimination, it made the proof necessary to vindicate that right a nearly impossible bar to meet. In doing so, it ensured the continued status quo of Georgia's death penalty machinery. Perhaps more importantly, it ensured the continued status quo of the criminal legal system more broadly, despite that system being suffused with racially disparate treatment and outcomes. Or as the dissent phrased it more simply, by equilibrating, the majority let its "fear of too much justice" win out.²⁰²

3. *Trump Judges, Obama Judges*

In 2018, Chief Justice Roberts (in)famously responded to a statement by then-President Trump about an "Obama judge" ruling against him by stating, "We do not have Obama judges or Trump judges, Bush judges or Clinton judges."²⁰³ Both early empirical studies and observations of Trump appointees' jurisprudence increasingly suggest that the Chief Justice was wrong. In fact, judges appointed by President Trump seem to be, as a class, different—more conservative, more activist, and less willing to be constrained by the informal bounds of judicial procedure—from even those judges appointed by other Republican presidents. For proponents of abolishing qualified immunity, this change should be concerning. That is so not only because of historical conservative hostility to civil rights plaintiffs,

198. *Id.* at 321 (Brennan, J., dissenting).

199. *Id.* at 297.

200. Justices Powell, Rehnquist, O'Connor, and Scalia were appointed by Republican presidents. Justices Rehnquist, White, and O'Connor were former prosecutors.

201. 481 U.S. at 297.

202. *Id.* at 339 (Brennan, J., dissenting).

203. Mark Sherman, *Roberts, Trump Spar in Extraordinary Scrap over Judges*, ASSOCIATED PRESS (Nov. 21, 2018), <https://apnews.com/article/north-america-donald-trump-us-news-ap-top-news-immigration-c4b34f9639e141069c08cfl1e3deb6b84> [<https://perma.cc/4KL5-3M2P>].

but because, as I have discussed in the preceding section, the federal judiciary was already a comparatively conservative place. Even judges appointed by Democratic presidents came disproportionately from government service, and especially prosecutorial, backgrounds. It is this group that those attempting to abolish qualified immunity are forcing to decide the fate of civil rights plaintiffs and police accountability.

I begin with some baseline information about the people President Trump appointed to the federal judiciary.²⁰⁴ First, they are numerous. In one term, President Trump appointed 226 federal district court, court of appeals, and Supreme Court judges and justices.²⁰⁵ Perhaps more importantly for the development of the law, a disproportionate number of those judges were appointed at the appellate level, with fifty-four court of appeals judges and three Supreme Court justices appointed.²⁰⁶ By comparison, in two terms, Barack Obama appointed only fifty-five court of appeals judges, George W. Bush appointed sixty-two, and Bill Clinton appointed sixty-six.²⁰⁷ The three Supreme Court appointments represented the most by a single president since Ronald Reagan.²⁰⁸ These judges are also predominantly white and male.²⁰⁹ Eighty-four percent of Trump's appointed judges are white, and seventy-six percent are male.²¹⁰ These demographics are comparable to those of other Republican appointees, although they are noticeably less diverse than past Democratic appointees.²¹¹ And Trump's appointees were young. On average they were "47 years old when nominated — five years younger than President Barack Obama's [nominees]."²¹² Six of these nominees were in their thirties, compared to zero nominees under forty by

204. President Biden has nominated, and the Senate has confirmed, judges at a record pace. Those judges, however, are primarily replacing other Democratic appointees. According to Russell Wheeler of the Brookings Institution, "[s]o far, the percentage of Republican appointees on the court of appeals is almost unchanged from when Biden took office." Catie Edmondson, *Senate Confirms Biden's 40th Judge, Tying a Reagan-Era Record*, N.Y. TIMES (Dec. 18, 2021), <https://www.nytimes.com/2021/12/18/us/politics/biden-judges-reagan-record.html> [<https://perma.cc/7F45-P3KE>].

205. John Gramlich, *How Trump Compares with Other Recent Presidents in Appointing Federal Judges*, PEW RSCH. CTR. (Jan. 13, 2021), <https://www.pewresearch.org/fact-tank/2021/01/13/how-trump-compares-with-other-recent-presidents-in-appointing-federal-judges/> [<https://perma.cc/3SGE-JPMF>].

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. Micah Schwartzman & David Fontana, *Trump Picked the Youngest Judges to Sit on the Federal Bench. Your Move, Biden.*, WASH. POST (Feb. 16, 2021, 11:33 AM), <https://www.washingtonpost.com/outlook/2021/02/16/court-appointments-age-biden-trump-judges-age/> [<https://perma.cc/MU2U-SQFQ>].

Obama.²¹³ Fully a third were under the age of forty-five at the time of their appointment, while President Obama and W. Bush's appointees had approximately five percent and nineteen percent, respectively, under that age.²¹⁴

Professionally, Trump's appointees largely continued the pattern of being disproportionately former prosecutors or otherwise government-representing attorneys. For example, one study found that both Obama and Trump chose people who had spent at least three years as a federal prosecutor to be slightly more than one third of their nominees, and that Obama actually nominated more former state prosecutors to the bench than Trump.²¹⁵ Similarly, a third of Obama appellate court nominees and over forty-two percent of Trump appellate nominees were former government lawyers.²¹⁶ The primary difference on this criminal legal system and government-experience background front is that Trump nominated *zero* people to the appellate courts with at least three years of experience as a federal or state public defender or legal aid lawyer.²¹⁷

While Trump's appointees' professional backgrounds were nominally similar to past judicial appointees, there was one noticeable difference. They often had glaringly sterling credentials as public conservatives.²¹⁸ Judge Don Willett, for example, apparently once said of his time on the Texas Supreme Court that he "intend[ed] to build such a fiercely conservative record on the court that I will be unconfirmable for any future federal judicial post — and proudly so."²¹⁹ Needless to say, he did not foresee President Trump, as he is now a member of the Fifth Circuit.

Another appointee was the former general counsel of the Becket Fund for Religious Liberty, which has strongly (and successfully) defended the religious right.²²⁰ Still another "sat on the board of the anti-abortion

213. *Id.*

214. Rebecca R. Ruiz, Robert Gebeloff, Steve Edir & Ben Protess, *A Conservative Agenda Unleashed on the Federal Courts*, N.Y. TIMES (Mar. 16, 2020), <https://www.nytimes.com/2020/03/14/us/trump-appeals-court-judges.html> [<https://perma.cc/ZLT9-SB24>].

215. See SHEPHERD, *supra* note 163, at 6 (noting that 15.9% of Obama district court nominees and 10.1 percent of appellate court nominees were former state prosecutors, while 17.1% of Trump district court nominees and 1.9% of appellate court nominees were former state prosecutors).

216. *Id.*

217. *Id.* 2.1% of Trump's district court nominees had federal or state public defense or legal aid experience. *Id.*

218. See Elena Mejía & Amelia Thomson-DeVeaux, *It Will Be Tough for Biden to Reverse Trump's Legacy of a Whiter, More Conservative Judiciary*, FIVETHIRTYEIGHT (Jan. 21, 2021), <https://fivethirtyeight.com/features/trump-made-the-federal-courts-whiter-and-more-conservative-and-that-will-be-tough-for-biden-to-reverse/> [<https://perma.cc/MH4D-MCR9>] (noting that by one metric "Trump's appointees to the circuit courts are more uniformly conservative than any of his recent Republican predecessors").

219. Ruiz, Gebeloff, Edir & Protess, *supra* note 214.

220. See *id.* (discussing now-Judge Kyle Duncan).

Nebraska Family Alliance and served as assistant secretary of Nebraskans for the Death Penalty” in the year he was nominated.²²¹ Seven appointees worked within the Trump administration itself.²²² Nearly a quarter of Trump’s appointees worked in Republican state attorneys general offices, which allowed them to publicly be on the “right” side of politically salient legal issues like legalizing gay marriage, immigration, or limiting access to abortion and contraception.²²³ And only eight Trump-appointed judges had no ties to the Federalist Society, a noticeable increase in membership compared to judges appointed by President George W. Bush.²²⁴

This shift to publicly credentialed conservatism was noticeable and seemingly intentional. Past nominees regularly had minimal paper trails, as the presence of strong convictions on either side of the political spectrum opened them to attack during confirmation. Indeed, this paper-trail problem even extended to writings that nominees made while on the federal bench.²²⁵ As the eminently quotable²²⁶ Judge Willett said in 2010, federal judicial nominees needed to “bob and weave, be the teeniest tiniest target you can be You want to be as bland, forgettable and unremarkable as possible.”²²⁷ The conservative players who helped the Trump administration identify judicial nominees bucked this trend.²²⁸ As John Malcolm of the

221. *Id.* (discussing now-Judge L. Steven Gras).

222. *Id.*

223. *Id.*

224. *Id.* (noting that “[n]early twice as many” Trump appointees had Federalist Society ties as W. Bush appointees).

225. *See, e.g.*, Max Fisher, *Diane Wood: Abortion Debate Hits Possible Court Nominee*, THE ATLANTIC (Apr. 15, 2010), <https://www.theatlantic.com/politics/archive/2010/04/diane-wood-abortion-debate-hits-possible-court-nominee/345949/> [<https://perma.cc/A27B-V28S>] (collecting articles debating whether Judge Diane P. Wood’s decisions on the Seventh Circuit made her an unviable Supreme Court candidate).

226. Then-Justice Willett was famous for being one of the most active jurists on Twitter. His account, with over 25,000 tweets sent, was replete with jokes, memes, and other nonlegal materials. *See* Ruiz, Gebeloff, Edir & Protess, *supra* note 214. Among his most recent tweets is a Calvin and Hobbes cartoon and a picture of three different-colored puppies captioned, “My three favorite chocolates—pawsitively: dark, white, milk.” Judge Don Willett (@JusticeWillett), TWITTER (Dec. 30, 2017, 6:18 PM), <https://twitter.com/JusticeWillett/status/947260623552999425> [<https://perma.cc/W325-YRT2>] (dog emojis omitted). Unfortunately, Judge Willett has not tweeted since his appointment to the federal bench. *See* Judge Don Willett (@JusticeWillett), TWITTER, twitter.com/justicewillett (last visited Jan. 30, 2022).

227. Ruiz, Gebeloff, Edir & Protess, *supra* note 214.

228. *See* Jeffrey Toobin, *The Conservative Pipeline to the Supreme Court*, NEW YORKER (Apr. 10, 2017), <https://www.newyorker.com/magazine/2017/04/17/the-conservative-pipeline-to-the-supreme-court> [<https://perma.cc/UGP4-GBN2>] (discussing Leonard Leo and the Federalist Society); Priyanka Boghani, *How McConnell’s Bid to Reshape the Federal Judiciary Extends Beyond the Supreme Court*, PBS FRONTLINE (Oct. 16, 2020), <https://www.pbs.org/wgbh/frontline/article/how-mcconnell-and-the-senate-helped-trump-set-records-in-appointing-judges/> [<https://perma.cc/E3UZ-SSHV>] (discussing Senator Mitch McConnell); Emma Green, *The True Victors of Trump’s Supreme Court Nomination*, THE ATLANTIC (Sept. 25, 2020), <https://www.theatlantic.com/politics/archive/2020/09/trump-supreme-court-conservative-legal->

Heritage Foundation said, they wanted “people who have the strength of their convictions.”²²⁹

Little of this would matter if there was no difference between Trump appointees and other judges once these appointees took the bench. Judges, after all, often highlight their independence and nonpolitical status,²³⁰ and it follows that pre-appointment activities might not reflect post-appointment behavior. But the early returns suggest that Trump appointees are different. And through their difference, they are remaking the courts in their image.

The first sign of this change is the newly invigorated en banc process in courts of appeal across the country.²³¹ En banc (or in banc, in some circuits), decisions are those decided by the entire court (or in the Ninth Circuit, by a panel of eleven). In the past, en banc decisions were exceedingly rare—about one percent of decided cases overall.²³² Indeed, judges from some circuits took pride in the rarity of en bancs because they viewed it as a sign of collegiality and a well-functioning court.²³³ As Professors Neal Devins and Allison Orr Larsen explain, the combination of collegiality, en banc-avoiding procedures that allow panels to overrule precedents without the need for a full en banc, and widespread adherence to judicial independence and rule of law norms, restricted judges from using en bancs as tools to enact their ideological preferences.²³⁴

Or at least, those things used to restrict judges. Devins and Larsen find a noticeable and unprecedented shift towards partisanship in en banc practice beginning in 2018—exactly when Trump appointees began to populate the courts in significant numbers. That 2018–2020 time period “contained the most evidence of partisan en banc behavior [that they had] seen over the past six decades.”²³⁵ The spike over this time period in both partisan splits

movement/616505/ [https://perma.cc/YMX5-P5DL] (discussing Justice Amy Coney Barrett’s path to the bench and the lessons the conservative legal movement learned from Robert Bork’s failed nomination and the leftward drift of Justice David Souter).

229. Ruiz, Gebeloff, Edir & Protess, *supra* note 214; *see also* Susan Davis & Kelsey Snell, *Mitch McConnell on Filling the Federal Bench: ‘This Is My Top Priority’*, NPR (May 24, 2018, 7:54 PM), <https://www.npr.org/2018/05/24/614228261/mitch-mcconnell-on-filling-the-federal-bench-this-is-my-top-priority> [https://perma.cc/QZC5-LKLE].

230. *See, e.g.*, Ruiz, Gebeloff, Edir & Protess, *supra* note 214 (quoting Judge Stephanos Bibas as saying that judges “certainly are not viewing ourselves as members of teams or camps or parties”); Sherman, *supra* note 203 (discussing a statement from Chief Justice Roberts rebutting President Trump’s statements about judges’ political ties).

231. *See generally* Neal Devins & Allison Orr Larsen, *Weaponizing En Banc*, 96 N.Y.U. L. REV. 1373 (2021).

232. *See id.* at 1376.

233. *See, e.g.*, Jon O. Newman, *In Banc Practice in the Second Circuit: The Virtues of Restraint*, 50 BROOK. L. REV. 365, 382 (1984) (“The Second Circuit’s self-discipline in holding to a minimum the number of appeals reheard in banc is, in my view, a distinct benefit to the court, the bar, and the development of the law.”).

234. *See* Devins & Larsen, *supra* note 231, at 1414–15.

235. *Id.* at 1413.

and partisan reversals was “strongly statistically significant.”²³⁶ “[T]wenty-seven percent of all en banc decisions from 2018 to 2020 were decided in nearly perfect blocs divided by appointing party.”²³⁷ While twenty-seven percent may not seem like much, this was nearly double the rate under the three preceding presidents, and seven points higher than the previous high-water mark of twenty percent in the 1980s.²³⁸

While I focus on Trump appointees in this section, I note that a single-minded attention to those appointees understates what Devins and Larsen found. It is not simply that Trump appointees vote in a highly partisan manner,²³⁹ it is that *federal judges as a class* became more partisan as Trump appointees joined the bench.²⁴⁰ Democrat-appointed judges voted more with other Democrats and Republican-appointed judges voted more with other Republicans.²⁴¹ This does not seem to be the case of a new group coming in while the old guard held strong. The new group seems to have, instead, changed everyone’s behavior.

Devins and Larsen discuss reasons that the sudden uptick in partisan en banc proceedings may or may not be the beginning of a lasting trend.²⁴² As they note, the Trump presidency may have been *sui generis*, or the courts’ dockets may have changed because of the Trump presidency, and a return to the normal tenor of politics may also cool partisan divisions on the courts.²⁴³ I do not suggest this is an impossibility.

But I do highlight one factor I have discussed that they did not fully consider, which suggests this may be lasting. It is not simply that the conservative legal movement, most often discussed through the lens of the Federalist Society, helped to cultivate and select Trump judicial nominees. Instead, it is that many of the people they selected, and who were ultimately confirmed, were different than previous nominees in that they wore their conservative bona fides like a badge of honor.²⁴⁴ To paraphrase Judge Willett, these were the people who were supposed to be “unconfirmable.”²⁴⁵ Just as with any other salient background demographic, such as former prosecutors tending to favor the government, that Trump’s appointees were

236. *Id.* at 1414 n.165.

237. *Id.* at 1415.

238. *Id.*

239. Although, as I will soon discuss, it seems that they also do this, and a number of them do it in strident tones.

240. *See* Devins & Larsen, *supra* note 231, at 1414–15.

241. *See id.* (noting that the percentage of defections, where a single judge crosses party lines to create a decision with “odd bedfellows” fell to its lowest point in their study in the 2018–2020 period).

242. *See id.* at 1428–36.

243. *See id.* at 1433–36.

244. *See* Ruiz, Gebeloff, Edir & Protess, *supra* note 214.

245. *See id.*

so deeply and publicly conservative before joining the bench suggests that this is not merely a blip, it is part of who these judges are.

And this is important because of the structure of the system that leads to an en banc. While it takes a majority of the court to vote to hear a case en banc, it does not take a majority to start the en banc process. Instead, the trigger to get the en banc ball rolling is the *call* for a vote. And that call can be made by a single judge.²⁴⁶ Once a call for a vote is made (and sometimes once it is merely suggested, given that the call for a vote often invokes a time limit to make a decision²⁴⁷), memoranda begin to circulate, and judges are forced to do the work—reading briefs and colleagues’ memos, doing independent research, writing responses—necessary to decide whether they will vote to go en banc.²⁴⁸ And of course, the calculus in deciding to go en banc may be different for a judge who has been forced to do all of that research for a vote they must make, than for the initial decision to call for an en banc vote in the first place in a culture that is incredibly en banc-averse. Thus, a single, sufficiently motivated jurist could alter the en banc culture of the entire circuit. This problem is only exacerbated when there are multiple jurists of this mold, whether they be newly appointed or simply newly empowered by their new, like-minded colleagues.

The Ninth Circuit’s judges, in an unusual bout of judicial transparency, have suggested that exactly this sort of thing has happened in their circuit.²⁴⁹ A Ninth Circuit judge who agreed to be interviewed by the Los Angeles Times noted that a new Trump appointee, Judge Daniel P. Collins, had blown through court traditions and seemed especially combative in his written challenges to his colleagues.²⁵⁰ In their words, Judge Collins “ha[d] definitely bulldozed his way around here already in a short time.”²⁵¹ But more to the point, he had also already called for en banc review of five panel decisions in his early days on the bench, including several calls before he was even assigned to a panel.²⁵²

These differences extend beyond just the en banc process. Several other studies have shown that, at least in these early days of their tenure, Trump

246. See, e.g., NINTH CIR. GEN. ORDS. 5.4(c), http://cdn.ca9.uscourts.gov/datastore/uploads/rules/general_orders/General%20Orders.pdf [<https://perma.cc/H6XP-JD45>] (noting that “[a]ny judge may call for a vote to rehear a case en banc”).

247. See, e.g., *id.* 5.5 (allowing 21 days for circulating memoranda after an en banc call).

248. Cf. Douglas H. Ginsburg & Donald Falk, *The Court En Banc: 1981–1990*, 59 GEO. WASH. L. REV. 1008, 1018 (1991) (discussing the work required of a court to prepare for a rehearing en banc).

249. Maura Dolan, *Trump Has Flipped the 9th Circuit — and Some New Judges Are Causing a ‘Shock Wave’*, L.A. TIMES (Feb. 22, 2020, 7:06 AM), <https://www.latimes.com/california/story/2020-02-22/trump-conservative-judges-9th-circuit> [<https://perma.cc/NW7Y-W6YE>].

250. *Id.*

251. *Id.*

252. *Id.*

appointees are taking more conservative positions and leading to more divisiveness generally than their Republican-appointed predecessors.

Recent studies evaluating judicial reaction to COVID-19 restrictions found that while partisanship was high across a number of politically salient challenges, Trump appointees were noticeably more likely to rule in favor of plaintiffs challenging COVID-19 restrictions on religious grounds than either Democratic appointees or other Republican appointees.²⁵³ While plaintiffs only successfully challenged COVID-19 restrictions in twenty-two percent of cases overall,²⁵⁴ plaintiffs bringing religion-based challenges were successful 65.7% of the time in front of non-Trump Republican appointees, and 82.1% of the time in front of Trump appointees.²⁵⁵ Trump appointees seem also to have been more hostile to plaintiffs challenging COVID-19-related abortion restrictions.²⁵⁶ The small number of cases in the abortion area, however, makes statistical significance difficult to discern.²⁵⁷

In another study, the New York Times evaluated the rate of dissent on panels across the country by compiling 10,025 published and signed opinions from 2017 through 2019.²⁵⁸ Of those, almost 2,000 included a Trump appointee on the panel.²⁵⁹ Predictably, the vast majority of decisions studied, regardless of the party of the president who appointed the judges on the panel, were unanimous.²⁶⁰

But the dissent rates when Trump appointees were on a panel were nevertheless striking. If all members of a panel were appointed by the same-party president, dissents occurred in about seven percent of cases.²⁶¹ When the panels became mixed with Democrat and Republican appointees, the dissent rate rose to twelve percent.²⁶² “But when a Trump appointee wrote an opinion for a panel with a lone Democrat, or served as the only

253. See generally Zalman Rothschild, *Free Exercise Partisanship*, 107 CORNELL L. REV. (forthcoming 2022). Trump appointees were relatively similar to other Republican appointees in other categories of COVID-19 challenges, although they seemed markedly more hostile to plaintiffs bringing challenges based on abortion rights. See also Kenny Mok & Eric A. Posner, *Constitutional Challenges to Public Health Orders in Federal Courts during the COVID-19 Pandemic 13–14* (July 25, 2021) (unpublished manuscript) (on file with author) (finding that 54.5% of plaintiffs bringing abortion-based challenges prevailed in front of non-Trump Republicans, while only 14.3% prevailed before Trump appointees).

254. See Mok & Posner, *supra* note 253, at 3.

255. See Rothschild, *supra* note 253.

256. See Mok & Posner, *supra* note 253, at 14 (noting 14.3% plaintiff success rate with Trump appointees versus 54.5% success rate with non-Trump Republicans and 100% with Democratic appointees).

257. *Id.*

258. Ruiz, Gebeloff, Edir & Protess, *supra* note 214.

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.*

Republican appointee, the dissent rate rose to 17 percent”²⁶³ And most relevantly for the outcome-sensitive qualified immunity abolitionist, “about half [of Trump-appointee dissents] involved civil rights or criminal matters.”²⁶⁴

Qualitative observations also suggest that outcome-sensitive qualified immunity opponents should think hard before pinning their hopes on the current federal judiciary. A series of concurrences and dissents by Judges James Ho and Andrew Oldham place this in stark relief. At first blush, the partial concurrence by Judge Ho in *Horvath v. City of Leander*,²⁶⁵ and the dissent by Judges Ho and Oldham in *Cole v. Carson*,²⁶⁶ appear to be the sorts of opinions that opponents of qualified immunity laud. Both discuss rethinking qualified immunity jurisprudence,²⁶⁷ and *Horvath* goes further, explicitly “welcom[ing] a principled re-evaluation of our [qualified immunity] precedents under both prongs.”²⁶⁸ But a closer look quickly reveals that Judges Ho and Oldham imagine a very different future from outcome-sensitive qualified immunity opponents.

The dissent in *Cole* flips the typical outcome-sensitive criticism on its head, suggesting the possibility of the exact sort of equilibration outcome-sensitive critics should fear. While most outcome-sensitive critics worry about qualified immunity making a plaintiff’s recovery impossible, Judges Ho and Oldham specifically criticize the majority for creating a qualified immunity that is too “one-sided” *against* the police.²⁶⁹ The dissent is a defense not only of the police officers in that case—who, in the majority’s telling, shot a suicidal teenager pointing a gun to his own head with no warning, and then lied about what happened when they were sued²⁷⁰—but also of police more generally. As they discuss the “social costs”²⁷¹ of not granting immunity, they highlight the “widespread news of low officer morale and shortages in officer recruitment.”²⁷² Unspoken is that the lowered morale is, in part, because of the public repudiation of police shootings like the one in that case.

What Judge Ho’s *Cole* dissent says implicitly, his *Horvath* concurrence makes explicit. Qualified immunity can go because the courts can (and should) simply restrict substantive constitutional rights.²⁷³ As Judge Ho

263. *Id.*

264. *Id.*

265. 946 F.3d 787, 794 (2020) (Ho, J., concurring in part and dissenting in part).

266. 935 F.3d 444, 473 (2019) (en banc) (Ho & Oldham, JJ., dissenting).

267. *Id.* at 477; *Horvath*, 946 F.3d at 795.

268. *See Horvath*, 946 F.3d at 795.

269. *See Cole*, 935 F.3d at 478–79.

270. *See id.* at 447–50.

271. *See id.* at 478 (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982)).

272. *Id.* at 478 n.2.

273. *Horvath*, 946 F.3d at 801.

stated plainly: “Much of the chilling problem, however, stems from misuse of the first prong of the doctrine. Simply put, courts find constitutional violations where they do not exist.”²⁷⁴ In his view, “if courts simply applied the *first* prong of the doctrine in a manner more consistent with the text and original understanding of the Constitution, we might find that the second prong is unnecessary to prevent chilling”²⁷⁵ Tellingly, the example Judge Ho uses for this substantive contraction is the Fourth Amendment, specifically the use of force.²⁷⁶ At the same time, Judge Ho does not want to contract all substantive constitutional rights. His *Horvath* concurrence is a fierce defense of religious First Amendment rights.²⁷⁷ These sorts of fiercely conservative opinions are not limited to Judges Ho and Oldham, or to only the Fifth Circuit.²⁷⁸

This brings me to the most important difference in the federal courts after the Trump presidency: the Supreme Court. Even if Democrats could rebalance the lower courts,²⁷⁹ the possibility of shifting the Supreme Court in the upcoming years is much less likely.²⁸⁰ In the most famous example

274. *Id.*

275. *Id.*

276. *Id.* at 801–02 (quoting *Tennessee v. Garner*, 471 U.S. 1, 12 (1985) for the proposition that “common law ‘allowed the use of whatever force was necessary to effect the arrest of a fleeing felon’”); *id.* at 802 (chastising a prior majority of the court for not granting qualified immunity to an officer who, in Judge Ho’s words, “stop[ped a] mass shooting[.]” (quoting *Winzer v. Kaufman County*, 940 F.3d 900, 901 (5th Cir. 2019) (Ho, J., dissenting from denial of reh’g en banc))). *But see* *Winzer v. Kaufman County*, 916 F.3d 464, 467–69 (5th Cir. 2019), *cert. denied*, 141 S. Ct. 85 (2020) (describing officers firing seventeen shots from over 100 yards away at a Black man wearing a blue jacket on a bicycle with a toy cap gun when the armed person they had been looking for had been repeatedly identified as wearing a brown shirt and had no bicycle).

277. *See Horvath*, 946 F.3d at 794–99. Perhaps presciently, *Horvath* was a case about mandatory vaccination requirements. *See id.* at 789 (“Brett Horvath was employed as a driver/pump operator by the City of Leander Fire Department. In 2016, the Fire Department began requiring TDAP vaccinations, to which Horvath objected on religious grounds.”).

278. *See, e.g., Trump v. Mazars USA, LLP*, 940 F.3d 710 (D.C. Cir. 2019) (Rao, J., dissenting) (arguing for unprecedented limits on Congress’ investigation powers); *On Fire Christian Ctr., Inc. v. Fischer*, 453 F. Supp. 3d 901 (W.D. Ky. 2020) (Walker, J.) (beginning an opinion striking down COVID-19 restrictions on churches with, “On Holy Thursday, an American mayor criminalized the communal celebration of Easter. That sentence is one that this Court never expected to see outside the pages of a dystopian novel, or perhaps the pages of *The Onion*.”); *County of Butler v. Wolf*, 486 F. Supp. 3d 883 (W.D. Pa. 2020) (Stickman, J.) (citing *Lochner v. New York*, 198 U.S. 45 (1905), approvingly); *see also* Paul Gowder, *The Dangers to the American Rule of Law Will Outlast the Next Election*, 2020 CARDOZO L. REV. DE NOVO 126 (2020); Jon D. Michaels, *Baller Judges*, 2020 WIS. L. REV. 411, 414, 426–30 (2020) (discussing the rise of disproportionately conservative “baller” judges, who think that “cases are occasions—opportunities, really—for shaping, revising, challenging, and ultimately defending first-order principles”).

279. This is a dubious assumption given the high percentage of seats that President Trump filled. *See Mejía & Thomson-DeVeaux, supra* note 218.

280. This of course assumes that the Supreme Court maintains its current nine-member composition. *But see generally* Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CALIF. L. REV. 1703 (2021).

(or infamous depending on your perspective) of this shift, the Supreme Court had upheld numerous government restrictions attempting to stop the spread of COVID-19 against First Amendment challenges with 5–4 votes including Chief Justice Roberts in the majority.²⁸¹ But those votes quickly became 5–4 decisions striking down those challenges when Justice Ginsburg passed away and was replaced by Justice Amy Coney Barrett.²⁸² While there is of course no guarantee that Justice Barrett will vote against civil rights plaintiffs or criminal defendants in every case,²⁸³ it is notable that just in the 2017–2019 Supreme Court terms, there were six “liberal” civil rights and criminal procedure cases with 5–4 votes and Justice Ginsburg in the majority.²⁸⁴ There is thus a real possibility that cases like those could be decided differently for the foreseeable future.

But the Supreme Court’s influence extends far beyond the relatively small number of cases it decides. Far more important can be the signals it sends to the lower courts. Its qualified immunity jurisprudence shows this well. When the Supreme Court became more hostile to denials of qualified immunity, the lower courts took keen attention. They noted not just the outcomes of the cases, but the slight shifts in language of the legal standard,²⁸⁵ and the posture in which those cases were decided. Lower courts routinely noted that the Supreme Court not only reversed appellate courts that denied qualified immunity, but did so with summary reversals and GVRs.²⁸⁶

281. See, e.g., *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020); *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603 (2020); see also Note, *Constitutional Constraints on Free Exercise Analogies*, 134 HARV. L. REV. 1782, 1786–87 (2021) (discussing these cases).

282. See *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020); *S. Bay United Pentecostal Church v. Newsom (South Bay II)*, 141 S. Ct. 716 (2021).

283. See, e.g., *United States v. Terry*, 915 F.3d 1141 (7th Cir. 2019) (Barrett, J.) (reversing the denial of a motion to suppress evidence from an unreasonable search of a man’s home).

284. See WASH. U. LAW, SUPREME COURT DATABASE, <http://supremecourtdatabase.org/analysis.php> (using “Set Data Parameters” select the following specifications: Range of Terms – 2017-2020 terms; Justices Involved – Ginsburg, Ruth Bader; Vote Type – voted with majority or plurality; Vote Direction – liberal; Issues – civil rights and criminal procedure; Vote Coalition, Set Majority Votes – 5).

285. See *supra* Section I.A.

286. See, e.g., *Cole v. Carson*, 935 F.3d 444, 473 (2019) (en banc) (Ho, J., dissenting) (listing cases in which the Supreme Court summarily reversed denials of qualified immunity); *Slater v. Deasey*, 943 F.3d 898, 898–99 (9th Cir. 2019) (Collins, J., dissenting) (“By repeating—if not outdoing—the same patent errors that have drawn such repeated rebukes from the high Court, the panel here once again invites summary reversal.”); *Jamison v. McClendon*, 476 F. Supp. 3d 386, 408 (S.D. Miss. 2020) (“No one wants to be reversed by the Supreme Court, and the Supreme Court’s summary reversals of qualified immunity cases are ever-more biting. . . . Other appellate judges see these decisions, read the tea leaves, and realize it is safer to find debatable whether it was a clearly established Constitutional violation to force a prisoner to eat, sleep, and live in prison cells swarming in feces for six days.”). Interestingly, the case *Jamison* refers to was summarily reversed by the Supreme Court for granting qualified immunity after the Summer 2020 uprisings. See *Taylor v. Riojas*, 141 S. Ct. 52 (2020).

This and other similar procedural signaling tactics are not only applicable to qualified immunity. They are available to, and have been used by, the Court across the substantive spectrum.²⁸⁷

Finally, I note that one possible theory of the early behavior of Trump appointees is that, especially prior to the appointment of Justice Barrett, they were flaunting their conservative bona fides on the bench to get noticed for an eventual Supreme Court selection.²⁸⁸ This is, in many ways, the opposite side of the same argument about other, previous potential appointees—that they avoided controversial writings in order to avoid tainting their nomination prospects.²⁸⁹

The assumption underlying this theory is that the audition is now, or soon will be, over. But the demographics of these appointees belie that assumption. President Trump appointed a disproportionate number of very young judges.²⁹⁰ With an average age at appointment of forty-eight, many of Trump's appellate appointees could be “auditioning” for years to come.²⁹¹ Indeed, it is imminently possible that many of these judges will be sufficiently young to be considered confirmable to the Supreme Court for multiple future presidential terms beyond President Biden's. If we take fifty-five as a cutoff age (how old Justices Breyer, Alito and Sotomayor were at their appointment),²⁹² then numerous Trump appointees would remain eligible for elevation for at least two presidential terms after the end

287. See, e.g., Baude, *Shadow Docket*, *supra* note 94, at 6–8 (discussing the effect of unreasoned granted stays in a number of marriage equality cases on lower courts facing the same issues); *Latta v. Otter*, No. 14-35420, 2014 WL 12618172, at *1 (9th Cir. May 20, 2014) (mem.) (Hurwitz, J., concurring) (“I concur in the order granting the stay pending appeal. But I do so solely because I believe that the Supreme Court, in *Herbert v. Kitchen*, has virtually instructed courts of appeals to grant stays in the circumstances before us today.” (citation omitted)).

288. See, e.g., Ian Millhiser, *What Trump Has Done to the Courts, Explained*, VOX (Sept. 29, 2020, 10:32 PM), <https://www.vox.com/policy-and-politics/2019/12/9/20962980/trump-supreme-court-federal-judges> [<https://perma.cc/UH3S-3CTZ>] (discussing how “then-10th Circuit Judge Neil Gorsuch looked like he was openly campaigning for a promotion” in the wake of Justice Scalia's death).

289. See Ruiz, Gebeloff, Edir & Protess, *supra* note 214 (quoting then-Justice Willett making this argument).

290. See *id.* (“Thirty-three percent [of President Trump's appointees] were under forty-five when appointed, compared with just five percent under Mr. Obama and 19 percent under Mr. Bush.”).

291. See Moiz Syed, *Charting the Long-Term Impact of Trump's Judicial Appointments*, PROPUBLICA (Oct. 30, 2020), <https://projects.propublica.org/trump-young-judges/> [<https://perma.cc/9GFK-AS5S>].

292. Breyer, *Stephen Gerald*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/breyer-stephen-gerald> [<https://perma.cc/U8HQ-ZFV6>]; Alito, *Samuel A., Jr.*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/alito-samuel-jr> [<https://perma.cc/F26Q-LV3G>]; Sotomayor, *Sonia*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/sotomayor-sonia> [<https://perma.cc/8JCA-SVG2>].

of Trump's presidency,²⁹³ and some would remain so until 2037.²⁹⁴ And the concern that an extended, multi-decade, audition for the Supreme Court may take place is present regardless of whether one believes "Trumpism" will continue. President Trump's judicial picks were among the few unifying parts of his administration for Republicans of all stripes.²⁹⁵

B. *The Problem of Merits Decisions*

This entire discussion of the professional and ideological conservatism of the federal courts, and the possibility their conservatism has recently increased, would be irrelevant if cases decided both with and without qualified immunity had the same effect. After all, the ideological disposition of the courts is, at this moment, an unchangeable background fact. What can be changed, and what opponents of qualified immunity are fighting to change, is whether those courts can use qualified immunity to dismiss cases against executive branch officials.

"The prevailing scholarly view is that" absent qualified immunity, courts would equilibrate by narrowing substantive constitutional protections.²⁹⁶ Numerous scholars have discussed why this might be, primarily suggesting the courts' desire to protect individual government actors from money damages.²⁹⁷ The equilibration thesis supports this prevailing view, suggesting the judiciary is likely to respond to the removal of qualified immunity by contracting substantive rights.²⁹⁸ I believe that is especially so given the current demographics of the judiciary.

That prevailing view, moreover, is supported by what happened during the *Saucier*, mandatory sequencing, regime.²⁹⁹ Contrary to the argument that mandatory sequencing helped to "promote[] the articulation of new constitutional rights," Professor Nancy Leong found that the opposite occurred.³⁰⁰ As the federal courts were forced to decide issues on the

293. See, e.g., *Rao, Neomi Jehangir*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/rao-neomi-jehangir> [<https://perma.cc/A5A5-K7DD>]; *Ho, James C.*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/ho-james-c> [<https://perma.cc/4M5R-S2GG>]; *Park, Michael Hun*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/park-michael-hun> [<https://perma.cc/Q2DF-KW7Y>].

294. See, e.g., *Walker, Justin Reed*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/walker-justin-reed> [<https://perma.cc/AJ5B-B6DQ>]; *Rushing, Allison Jones*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/rushing-allison-jones> [<https://perma.cc/AW68-4E5J>].

295. See Davis & Snell, *supra* note 229 (quoting Senator Mitch McConnell's pitch to anti-Trump Republican midterm voters as saying "I would remind those in America who are right of center that this has been a fabulous year and a half . . . We mentioned the courts, comprehensive tax reform. If you are a right-of-center person, there hasn't been a better period than this in at least three decades").

296. Schwartz, *supra* note 16, at 319–20 & n.38.

297. See *id.*

298. See Fallon, Jr., *supra* note 23, at 704–05.

299. Nancy Leong, *The Saucier Qualified Immunity Experiment: An Empirical Analysis*, 36 PEPP. L. REV. 667 (2009).

300. *Id.* at 670.

constitutional merits, there was “a sharp increase in the percentage of cases in which courts explicitly held that no constitutional violation had occurred.”³⁰¹ This increase was both statistically significant and facially dramatic—“from 46.2% . . . pre-*Siegert* to 84.9% . . . in 2006–2007.”³⁰²

Beyond this, I suggest that there is another way that a judiciary engaging in equilibration could worsen the outlook for civil rights plaintiffs. Even if courts keep the same level of functional rights protection as exists today, i.e., every constitutional case that would win today would win in the post-qualified immunity future and every losing case would continue to lose,³⁰³ the state of the world will be worse for civil rights plaintiffs because of the change in *type* of decision the courts will issue absent qualified immunity.³⁰⁴

Quite simply, a decision on the merits that a particular right does not exist—a determination that courts would be forced to make absent qualified immunity—has a different and worse effect on future civil rights plaintiffs than one which relies on qualified immunity to decide that a particular right is not clearly established. This is because decisions that a right is not clearly established are time-bound. Such a decision does not mean the right *can never be* clearly established; it simply means that the right is not clearly established *yet*.

To use a concrete example, if Plaintiff 1 brought a section 1983 suit against a police officer on June 12, 1966, arguing that their Fifth Amendment rights were violated because their statement was used against them in a criminal case,³⁰⁵ but they had not been clearly and unequivocally told they had the right to remain silent—in other words, that they were not told their *Miranda* warnings—Plaintiff 1 would lose because the right was not yet clearly established. But if Plaintiff 2 sued based on the same facts

301. *Id.*

302. *Id.* at 689–90.

303. To be clear, this caveat about equal protection of rights refers to the present and near-term future, or more specifically, to the next several years wherein it would be difficult if not impossible to remake the courts into the sufficiently liberal force that outcome-sensitive qualified immunity opponents would desire. If courts would hold the level of rights constant across the entire future, then it would obviously make no difference whether courts in the present issue decisions on the merits or on clearly established grounds.

304. On an initial glance, an exception to this argument would seem to be the current circuit split over whether granting an officer qualified immunity necessarily foreclosed a deliberate indifference claim against a municipality. See Petition for Writ of Certiorari, *Stewart v. City of Euclid*, 141 S. Ct. 2690 (2021) (No. 20-951), at (i). But even there, the holding against the municipality is time-bound, as a later established right could lead to a claim, even while past claims failed.

305. See *Chavez v. Martinez*, 538 U.S. 760 (2003).

occurring on June 14, 1966, the day after *Miranda v. Arizona*³⁰⁶ was decided, they could win damages.³⁰⁷

Note that this does not mean that Plaintiff 1's case (assuming it is decided by a court of appeals or the Supreme Court) has no precedential effect. It has the same precedential effect as any other case of the deciding court. The difference is that the holding of Plaintiff 1's case is limited to being a declaration about the state of the law *on a particular date*.

But decisions on the constitutional merits do not have this temporal dimension. To use the previous example, imagine Plaintiff 1 filed suit in a world without qualified immunity and still lost. Because there was no qualified immunity, this means that Plaintiff 1 lost on the merits—there is no right to be given the *Miranda* warnings. That merits decision would have full precedential effect, and so both Ernesto Miranda and Plaintiff 2 also lose.

Another way to think of this problem is to consider what the phrase “clearly established” is short for. The full phrase is “clearly established at the time an action occurred.”³⁰⁸ In other words, the relevant question is not about the current or future state of the law, but about the state of the law at some point in the past.

Ultimately, whether one considers the move from procedural decisions on the clearly established prong to merits decisions on the substantive constitutional law good or bad likely depends on what one believes those decisions will be. For outcome-sensitive qualified immunity critics, if they believe that the courts will issue more pro-civil rights plaintiff decisions than are currently issued, then this move is likely a net positive.³⁰⁹ Plaintiffs who would have lost under the clearly established prong will now win on the merits, and those wins will be cemented with the full force of stare decisis.

306. 384 U.S. 436 (1966) (decided June 13, 1966).

307. This example shows one of several ways that plaintiffs can go from clearly established-prong losses to merits victories. Here, the intervening pro-civil rights plaintiff decision comes in a criminal case, where qualified immunity does not apply. Another possibility is that the legislature might remove qualified immunity at some future date when the courts are friendlier. The third possibility is a series of three cases: P1 loses on the clearly established prong; P2 also loses on the clearly established prong, but friendlier courts now declare the right clearly established; P3-plus then win their cases on the merits.

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

309. I say “likely a net positive” because it is possible that the courts might issue more, but small, pro-civil rights plaintiff decisions, while issuing few large and sweeping anti-plaintiff decisions. This possibility—many small victories outweighed by few large defeats—is another way that courts might equilibrate to reach their “optimal” level of rights protection.

Earlier in this piece, I offered numerous reasons to be skeptical of this belief.³¹⁰ That discussion suggests that, if anything, the courts seem poised to issue even fewer pro-civil rights decisions than they currently do.³¹¹

But even if one does not accept that negative view, if courts after qualified immunity issue decisions that are *equally* as rights protective as they do now, the state of the world is *worse* from the outcome-sensitive critic's point of view without qualified immunity. Because decisions on the merits are not time-bound, they are necessarily broader than decisions based on the clearly established prong. An adverse decision on the clearly established prong leaves the possibility for other, future plaintiffs to continue the fight another day. An adverse merits decision does not.

C. Justiciability

Beyond this, there is also the possibility that courts will respond to the elimination of qualified immunity not by reducing substantive constitutional protections, but by reducing the scope of justiciable claims.

While a full examination of the courts' possible justiciability-based responses is beyond the scope of this Article, other work in this area suggests that, if anything, conservative decisions that a class of cases is nonjusticiable may be even worse than a constitutional merits decision. For example, Professor Fred O. Smith, Jr., has argued that *Younger v. Harris*, and the abstention doctrine that bears its name,³¹² has helped to insulate the state and local criminalization of poverty from federal review.³¹³ And the Court's decision that partisan gerrymandering claims are nonjusticiable in *Rucho v. Common Cause*,³¹⁴ helped to protect conservative majorities in state legislatures across the country; majorities that have since gone on to

310. See Section II.A. Additionally, it should not be lost on outcome-sensitive qualified immunity opponents that, once the populist heat of the Summer 2020 protests died down, the Court returned to its firm invocation, and indeed strengthening, of qualified immunity after briefly suggesting that it might head the other direction in *Riojas*. See, e.g., *Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4 (2021) (per curiam) (summarily reversing a denial of qualified immunity with the additional suggestion that "controlling Circuit precedent" may not "clearly establish[] law for purposes of §1983"); *City of Tahlequah v. Bond*, 142 S. Ct. 9 (2021) (per curiam) (summarily reversing the lower court's denial of qualified immunity).

311. See Section II.A.0.

312. 401 U.S. 37 (1971). *Younger* holds "that federal courts must generally abstain from enjoining state criminal proceedings, even where the plaintiff alleges that the state criminal charges are unconstitutional." Fred O. Smith, Jr., *Abstention in the Time of Ferguson*, 131 HARV. L. REV. 2283, 2287 (2018).

313. See Smith, Jr., *supra* note 312, at 2287 ("Perhaps predictably, then, when a plaintiff files suit alleging that a local or state government's fines, fees, bail, or collection methods violate the Federal Constitution, some governmental defendants lean on *Younger* abstention as a means of ending the litigation without a judicial ruling on the underlying merits of the plaintiff's claim.").

314. 139 S. Ct. 2484 (2019).

pass legislation to achieve purportedly conservative ends like legalizing running over protestors with one's car³¹⁵ and banning the teaching of Critical Race Theory or classroom discussions of sexual orientation and gender identity throughout the state.³¹⁶

On a more basic level, justiciability decisions are likely to be at least as harmful as merits decisions from the outcome-sensitive perspective because both share two important characteristics. First, neither is time bound. Therefore, the same problems discussed above regarding the necessary breadth of merits decisions as compared to procedural clearly established-prong decisions apply to decisions relying on justiciability doctrines. Second, they do not change the answer to the question at the heart of this piece: "who decides?" Like merits decisions, justiciability doctrines stem from the Constitution, usually Article III's "case or controversy" requirement or related separation of powers concerns.³¹⁷ This means that, as with merits decisions, control over them remains firmly in the hands of the judiciary.³¹⁸

These two subparts have suggested why merits or justiciability decisions might make the state of the world worse for civil rights plaintiffs than decisions based on the clearly established prong. The next section will discuss another reason for this worsened state of the world: this may be among the worst times in the courts' history for a slate of adverse merits decisions to occur because of the combination of a newly empowered conservative court and the raging liberal battle to strengthen stare decisis.

315. See Cameron Peters, *State-level Republicans Are Making it Easier to Run Over Protesters*, VOX (Apr. 25, 2021, 2:08 PM), <https://www.vox.com/2021/4/25/22367019/gop-laws-oklahoma-iowa-florida-floyd-blm-protests-police> [<https://perma.cc/ZY4Z-G7CF>].

316. See *Map: Where Critical Race Theory Is Under Attack*, EDUC. WK. (June 11, 2021), <https://www.edweek.org/leadership/map-where-critical-race-theory-is-under-attack/2021/06> [<https://perma.cc/8KT5-RC3D>] (noting that since January 2021, "35 states have introduced bills or taken other steps that would restrict teaching critical race theory or limit how teachers can discuss racism and sexism" and "[f]ourteen imposed these bans and restrictions through legislation or other avenues"); Jaclyn Diaz, *Florida's Governor Signs Controversial Law Opponents Dubbed 'Don't Say Gay'*, NPR (Mar. 28, 2022, 2:33 PM), <https://www.npr.org/2022/03/28/1089221657/dont-say-gay-florida-desantis> [<https://perma.cc/TB8E-FSCG>].

317. See, e.g., *Raines v. Byrd*, 521 U.S. 811, 818 (1997) (explaining that standing stems from Article Three, Section Two's "'case' or 'controversy'" requirement); *Rucho v. Common Cause*, 139 S. Ct. 2484, 2494 (2019) (explaining that the political question doctrine exists for some claims "'because the question is entrusted to one of the political branches or involved no judicially enforceable rights'" (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 277 (2004) (plurality opinion))).

318. As I noted *supra* note 34, if the federal courts rely on justiciability decisions that could shift decision-making power to state courts. As both Professor Smith's work and the political valence of many state courts suggests, however, it is not clear that this is a "win" for outcome-sensitive qualified immunity abolitionists. See *id.*; see also generally Smith, Jr., *supra* note 312.

D. *The Uncertain Role of Stare Decisis*

Stare decisis, literally “to stand by things decided,”³¹⁹ is the principle that courts will follow their earlier decided cases, thereby deciding a case with the same facts today as it was decided yesterday.³²⁰ This principle is fundamental to our system of adjudication, but it is not iron clad.³²¹ A legal principle established today does not have to be followed for all time. With a sufficiently good reason, it can be abandoned.³²² But when and why the principle of stare decisis can be broken is a hotly debated question on both the theoretical and case-by-case levels.³²³ And as numerous scholars and commentators have observed, there is currently a rapidly escalating cold war over the role of stare decisis in the Supreme Court.³²⁴

Largely assumed to be at the heart of that war is *Roe v. Wade*,³²⁵ though other liberal precedents play a role too.³²⁶ With each shift of the Court’s swing vote, first from Justice Kennedy to Chief Justice Roberts, and then again from Chief Justice Roberts to a case-by-case rotation of Justices Gorsuch, Kavanaugh, and Barrett, the possibility that *Roe* and other long-

319. *Stare decisis*, BLACK’S LAW DICTIONARY (11th ed. 2019).

320. For a discussion of stare decisis, see *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2134 (2020) (Roberts, C.J., concurring).

321. *See id.* at 2134–35.

322. *Id.*

323. *See, e.g.*, *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020) (featuring a majority, two concurrences, and a dissent which discuss stare decisis in depth); Frederick Schauer, *Stare Decisis—Rhetoric and Reality in the Supreme Court*, 2018 SUP. CT. REV. 121 (2018) (arguing “that the time is ripe for a careful consideration of the extent to which, if at all, the Supreme Court is constrained by its earlier decisions, and the extent to which, if at all, the Court should in fact be so constrained”).

324. *See, e.g.*, Melissa Murray, *Race-ing Roe: Reproductive Justice, Racial Justice, and the Battle for Roe v. Wade*, 134 HARV. L. REV. 2072–88 (2021); Mark Joseph Stern, *Everyone Is Mad at Elena Kagan*, SLATE (Apr. 22, 2020, 2:46 PM), <https://slate.com/news-and-politics/2020/04/elena-kagan-supreme-court-conservatives-precedent.html> [<https://perma.cc/8FRC-ENCP>]; Gentithes, *supra* note 31; Melissa Murray, *The Symbiosis of Abortion and Precedent*, 134 HARV. L. REV. 308 (2020); Thomas J. Molony, *Taking Another Look at the Call on the Field: Roe, Chief Justice Roberts, and Stare Decisis*, 43 HARV. J.L. & PUB. POL’Y 733 (2020); Kate Andrias, *Janus’s Two Faces*, 2018 SUP. CT. REV. 21 (2018).

325. 410 U.S. 113 (1973). *See, e.g.*, Molony, *supra* note 324, at 735 (noting prior to the death of Justice Ginsburg and appointment of Justice Barrett, that, “how Chief Justice Roberts would vote if presented with a request to reconsider the 1973 decision has been subject to much prognostication”); *see also Franchise Tax Bd. v. Hyatt*, 139 S. Ct. 1485, 1506 (2019) (Breyer, J., dissenting) (“Today’s decision can only cause one to wonder which cases the Court will overrule next.”). Indeed, the cold war may become a hot one soon, as the Court recently granted certiorari on a case directly challenging *Roe*. *See Dobbs v. Jackson Women’s Health Org.*, 141 S. Ct. 2619 (2021) (mem.) (granting certiorari on the question “[w]hether all pre-viability prohibitions on elective abortions are unconstitutional,” (citing Petition for Writ of Certiorari, *Dobbs*, 141 S. Ct. 2619 (No. 19-1392), at *i)).

326. *See, e.g.*, *Janus v. State, Cnty., & Mun. Emps.*, 138 S. Ct. 2448 (2018) (overruling *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977)); *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019) (declining to overrule *Auer v. Robbins*, 519 U.S. 452 (1997)); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945).

disfavored liberal precedents would be overturned seems to rise. And indeed, on the path to *Roe*'s potential end, several other decades-old precedents have already fallen.³²⁷

Fundamentally outnumbered, the liberal justices have seemingly decided that their best chance at preserving as many existing precedents from conservative attack is to take a firm stance on the side of stare decisis. This strategy has not been without success. In multiple decisions, including at least one abortion case,³²⁸ members of the liberal wing of the Court have either joined conservative justices' opinions on the basis of stare decisis, or gotten conservative justices to join their stare decisis-based opinions, whether majority or dissent.³²⁹ But by adopting this tactic, the liberal wing has tied themselves to the mast of past precedents and, more importantly for the outcome-sensitive qualified immunity critic, of new precedents as well.³³⁰

Leading the vanguard in this battle to strengthen stare decisis is Justice Kagan. Even before the Trump administration, Justice Kagan had written opinions strongly defending stare decisis. For instance, in *Kimble v. Marvel Entertainment, LLC*,³³¹ in addition to a number of excellent Spider-Man references,³³² Justice Kagan explained at length the value of strong stare decisis, even and especially for what a party or judge might view as wrongly decided decisions.³³³ Overturning a case requires far more than just an argument that a prior case was wrong, it requires a "special justification,"

327. See, e.g., *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020) (overruling *Apodaca v. Oregon*, 406 U.S. 404 (1972)); *Franchise Tax Bd.*, 139 S. Ct. 1485 (overruling *Nevada v. Hall*, 440 U.S. 410 (1979)); *Knick v. Twp. of Scott*, 139 S. Ct. 2162 (2019) (overruling *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985)); *Janus*, 138 S. Ct. 2448; *S. Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018) (overruling *Nat'l Bellas Hess, Inc. v. Dep't of Revenue*, 386 U.S. 753 (1967)).

328. See *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2134–35 (2020) (Roberts, C.J., concurring). As commentators noted, Chief Justice Roberts's concurrence was not exactly a liberal win. See Ian Millhiser, *Why Conservative Chief Justice Roberts Just Struck Down an Anti-Abortion Law*, VOX (June 29, 2020, 12:14 PM), <https://www.vox.com/2020/6/29/21306895/supreme-court-abortion-chief-justice-john-roberts-stephen-breyer-june-medical-russo> [<https://perma.cc/6FUN-3TCS>] ("Roberts didn't save abortion rights, he told future litigants how to bury them.").

329. See, e.g., *Ramos*, 140 S. Ct. at 1425 (Alito, J., dissenting) (joined by Chief Justice Robert and Justice Kagan); *Kisor*, 139 S. Ct. at 2424–25 (Roberts, C.J., concurring in part) (agreeing with the majority "that overruling [*Auer* and *Seminole Rock*] is not warranted"); *Wayfair*, 138 S. Ct. at 2101 (Roberts, C.J., dissenting) (joined by Justices Breyer, Sotomayor, and Kagan).

330. See *Edwards v. Vannoy*, 141 S. Ct. 1547, 1574 n.1 (2021) (Kagan, J., dissenting) (noting that though she dissented in *Ramos* because it overturned precedent, as a now-decided case *Ramos* was to be accorded the protection of stare decisis).

331. 576 U.S. 446 (2015).

332. *Id.* at 450 ("The parties set no end date for royalties, apparently contemplating that they would continue for as long as kids want to imitate Spider-Man (by doing whatever a spider can)."); *id.* at 465 (concluding the majority opinion with "[I]n this world, with great power there must also come—great responsibility." (quoting STAN LEE & SEVE DITKO, *AMAZING FANTASY* NO. 15: "SPIDER-MAN" 11 (1962))).

333. See *id.* at 455–61.

like other legal developments that undermine the old decision or the legal test established proving unworkable.³³⁴

But no discussion of the Court's current stare decisis battles would be complete without mentioning *Janus v. AFSCME*. After a multi-year march towards this outcome,³³⁵ in *Janus* the Court's conservatives finally overruled *Abood v. Detroit Board of Education*, which had allowed public employers to mandate that their non-union-member employees pay "fair share" fees to a union for the cost that union undertook representing non-member employees in negotiations and labor contract administration.³³⁶

Less relevant here than *Janus*'s merits is Justice Kagan's strong dissent defending the principle of stare decisis. Joined by the Court's entire liberal wing, Justice Kagan chastised the majority's abandonment of stare decisis principles, all "[b]ecause . . . [the majority] wanted to pick the winning side in what should be—and until now, has been—an energetic policy debate."³³⁷ *Abood* was not undermined by more recent legal developments, "[t]hat claim fails most spectacularly . . . *Abood* coheres with the *Pickering* [*v. Board of Education*, 391 U.S. 563, (1968)] approach to reviewing regulation of public employees' speech."³³⁸ *Abood* had not proven unworkable; it created only a few disputes in the Supreme Court in the intervening forty years, and seemingly no circuit splits.³³⁹ But even if not for this relative calm, reliance interests should have won the day. "22 States, the District of Columbia, and Puerto Rico—plus another two States for police and firefighter unions" had "enacted statutes authorizing fair-share provisions."³⁴⁰ And "[m]any of those States have multiple statutory provisions, with variations for different categories of public employees. . . . Every one of them will now need to come up with new ways—elaborated in new statutes—to structure relations between government employers and their workers."³⁴¹ Likewise, the Court's decision undid "thousands of current contracts covering millions of workers [which] provide[d] for

334. *See id.* at 456–60.

335. *See Janus v. State, Cnty., & Mun. Emps.*, 138 S. Ct. 2448, 2487 (2018) (Kagan, J., dissenting) ("Today, the Court succeeds in its 6-year campaign to reverse *Abood*."); Andrias, *supra* note 324, at 25–28 (tracing the origins of this attack to the Great Recession).

336. *See Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 224–26 (1977), *overruled by Janus*, 138 S. Ct. 2448; *see also* Andrias, *supra* note 324, at 22–24 (discussing *Abood*).

337. *Janus*, 138 S. Ct. at 2501.

338. *Id.* at 2498.

339. *See id.* at 2498–99 ("And that tranquility is unsurprising: There may be some gray areas (there always are), but in the mine run of cases, everyone knows the difference between politicking and collective bargaining.").

340. *Id.* at 2499.

341. *Id.*

agency fees,”³⁴² despite the fact that historically “[c]onsiderations in favor of *stare decisis* are at their acme in cases involving property and contract rights.”³⁴³

But beyond this case-specific takedown, Justice Kagan also defended the principle of strong *stare decisis* more generally. *Stare decisis*, she noted, is “a foundation stone of the rule of law”³⁴⁴ that “‘promotes the evenhanded, predictable, and consistent development’ of legal doctrine.”³⁴⁵ And perhaps most saliently for the current debates, *stare decisis* “‘contributes to the actual and perceived integrity of the judicial process,’ by ensuring that decisions are ‘founded in the law rather than in the proclivities of individuals.’”³⁴⁶ In contravention of these foundational principles, “[t]he majority has overruled *Abood* for no exceptional or special reason, but because it never liked the decision.”³⁴⁷

And so through *Janus*, it is clear that the Court’s liberal wing is stalwartly committed to strong *stare decisis* principles. But most importantly for the outcome-sensitive qualified immunity critic, their commitment has controlled their votes even in cases where they may have substantive disagreements with the underlying merits.

A recent dissent by Justice Kagan made this often-implicit point explicit. In *Ramos v. Louisiana*, Justice Kagan joined a dissent written by Justice Alito, arguing that the Court should continue upholding the constitutionality of non-unanimous jury trials, despite their lengthy history as a white supremacist tool.³⁴⁸ But in order to undo this tool of racial terror, the Court needed to overrule a decades-old precedent, *Apodaca v. Oregon*.³⁴⁹ Thus, despite the headline-grabbing subject matter, a significant amount of the Court’s attention was squarely on *stare decisis*. Both Justices Sotomayor and Kavanaugh wrote separate concurrences specifically addressing their view of how *stare decisis* applied in the case, and of the five opinions filed, all but Justice Thomas’s discussed *stare decisis* at length.³⁵⁰ Though a cross-ideological group of justices voted to overturn

342. *Id.*

343. *Id.* (alteration in original) (quoting *Payne v. Tennessee*, 501 U.S. 808, 828 (1991)).

344. *Id.* at 2497 (quoting *Kimble v. Marvel Enter.*, 576 U.S. 446, 455 (2015)).

345. *Id.* (quoting *Payne*, 501 U.S. at 827).

346. *Id.* (citation omitted) (quoting *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986)).

347. *Id.* at 2501.

348. *See Ramos v. Louisiana*, 140 S. Ct. 1390, 1425–26 (2020) (Alito, J., dissenting); *see also id.* at 1394 (majority opinion) (noting that Louisiana and Oregon’s systems of non-unanimous juries originated with laws explicitly designed to “establish the supremacy of the white race” and “to dilute the influence of racial, ethnic, and religious minorities on Oregon juries” respectively).

349. 406 U.S. 404 (1972), *abrogated by Ramos*, 140 S. Ct. at 1390.

350. *See Ramos*, 140 S. Ct. at 1404–08 (discussing a view of *stare decisis* as applied to *Apodaca*); *see also id.* at 1408–10 (Sotomayor, J., concurring); *id.* at 1410–20 (Kavanaugh, J., concurring in part); *id.* at 1432–40 (Alito, J., dissenting).

Apodaca, Justice Kagan, subsequent developments would make clear, was not willing to take that step.

Only a year later, the question of *Ramos*'s full force came back to the Court. In *Edwards v. Vannoy*,³⁵¹ the Court had to decide whether its decision in *Ramos* that non-unanimous jury verdicts were unconstitutional would be retroactive, so that people previously convicted by a non-unanimous jury might seek habeas corpus relief.³⁵² The Court answered no.³⁵³

In many ways, this answer was unsurprising. The general rule is that new criminal procedure decisions are not retroactive,³⁵⁴ and under *Teague v. Lane*,³⁵⁵ in order to gain retroactivity a new rule of criminal procedure must be a "watershed" one.³⁵⁶ But the Court has never identified such a "watershed" rule since deciding *Teague* in 1989.³⁵⁷

What was surprising was the majority's decision to overrule *Teague*'s watershed exception entirely.³⁵⁸ As Justice Kagan's dissent noted, no party asked the Court to take that step, and other than finally closing the door on what the majority viewed as an illusory promise, it is not clear why the majority felt the need to do so.³⁵⁹ Naturally, the majority's decision provoked another strong opinion from Justice Kagan defending *stare decisis*.

Key for outcome-sensitive qualified immunity critics is footnote one of Kagan's dissent.³⁶⁰ After the majority took the odd step of criticizing Justice Kagan for dissenting in *Ramos*, only to turn around and issue a full-throated defense of that decision the next term,³⁶¹ Justice Kagan wrote a simple footnote explaining her *Ramos* vote: "I dissented in *Ramos* precisely because of its abandonment of *stare decisis*. . . . Now that *Ramos* is the law, *stare decisis* is on its side. I take the decision on its own terms, and give it all the consequence it deserves."³⁶² In other words, despite her apparent

351. 141 S. Ct. 1547 (2021).

352. *Id.* at 1551.

353. *Id.* at 1552.

354. *Id.*

355. 489 U.S. 288 (1989).

356. *See id.* at 311–12.

357. *See Edwards*, 141 S. Ct. at 1551–52.

358. *Id.* at 1560 ("It is time—probably long past time—to make explicit what has become increasingly apparent to bench and bar over the last 32 years: New procedural rules do not apply retroactively on federal collateral review. The watershed exception is moribund.")

359. *See id.* at 1574 (Kagan, J., dissenting).

360. *See id.* at 1573 n.1.

361. *Id.* at 1561–62 ("Moreover, with respect, Justice KAGAN dissented in *Ramos*. To be sure, the dissent's position on the jury-unanimity rule in *Ramos* was perfectly legitimate, as is the dissent's position on retroactivity in today's case. And it is of course fair for a dissent to vigorously critique the Court's analysis. But it is another thing altogether to dissent in *Ramos* and then to turn around and impugn today's majority for supposedly shortchanging criminal defendants.")

362. *Id.* at 1573 n.1 (Kagan, J., dissenting).

substantive disagreement with *Apodaca*'s merits, she voted to uphold it because of her commitment to stare decisis.³⁶³

What this means for the future is hard to tell. It is possible that if the partisan lean of the Court changes, so too will the various justices' allegiances to stare decisis.³⁶⁴ But as other scholars have noted, these explicit, *Edwards*-like examples of stare decisis-based judicial consistency are rare, but not unprecedented.³⁶⁵

Outcome-sensitive qualified immunity opponents therefore must be ready for the possibility that by getting rid of qualified immunity at this moment—when the courts are more conservative than they have been in decades—they may entrench the decisions made today far into the future because of strong, bipartisan stare decisis principles. This entrenchment is possible even if the partisan lean of both the lower and Supreme Courts shifts significantly. That is because, as in *Ramos*, outcome-sensitive critics may lose a predicted liberal, rights-expanding vote because that judge or justice has previously committed to strong stare decisis principles.

Here, again, the demographics of the Court are worth noting. Even if we assume that each justice will voluntarily retire at age eighty-three,³⁶⁶ Justice Sotomayor will be on the bench for another seventeen years, and the strongest defender of stare decisis, Justice Kagan, will be on the bench for another twenty-two years.

While this discussion of stare decisis may seem speculative, three possibilities raise the likelihood of stare decisis-based harm. The first is that the liberals' gambit might work. It seems well within the realm of possibility that the conservative justices might join the liberals in a vote to nominally uphold *Roe* because of stare decisis, while simultaneously minimizing it through other cases.³⁶⁷ Especially if this happens, stare decisis seems likely

363. I admit that one interpretation of Justice Kagan's *Ramos* vote was that it was an attempt to have her cake and eat it too. Because hers was not the swing vote, she could have joined Justice Alito's dissent to show that her adherence to stare decisis was not ideological, while also knowing that her vote would not create a legal outcome—allowing non-unanimous juries—that *Edwards* suggests she disfavored. While I cannot rule out this possibility, both the length and breadth of the liberal justices', and particularly Justice Kagan's, stare decisis project suggests that Justice Kagan's *Ramos* vote may have held even if it would have changed the outcome of that case.

364. See Schauer, *supra* note 322, at 129–32 (recounting the evidence that substance often wins out over stare decisis).

365. See *id.* at 133–34 (collecting examples).

366. This was Justice Breyer's age shortly after OT 2020.

367. This remains a possibility even after *Whole Woman's Health v. Jackson*, 594 U.S. ___ (2021). The Court could nominally uphold *Roe* while nevertheless altering the standard in such a way that it largely obliterates the substantive rights *Roe* protects. Cf. *Trump v. Hawaii*, 138 S. Ct. 2392, 2447–48 (2018) (Sotomayor, J., dissenting) (noting that the majority formally repudiated *Korematsu v. United States*, 323 U.S. 214 (1944), while simultaneously relying on reasoning that had “stark parallels” to that case). Admittedly, however, the recently leaked draft opinion in *Dobbs v. Jackson Women's Health Organization*, 141 S. Ct. 2619 (2022) (No. 19-1392), does not take this more subtle path, instead preferring to vociferously overrule *Roe* and *Casey* as being as wrongly decided as past cases like *Plessy*

to become entrenched among both the liberal and conservative wings of the courts as the cost of maintaining even a minimal abortion right.

Second, if strong stare decisis becomes entrenched for this or some other reason, it may become yet another background part of the law that goes broadly unquestioned. Think, for instance, of the many once hotly contested but now nearly unquestionable aspects of our legal system. Ideas like broad judicial review,³⁶⁸ or the roles of Native American tribal law and Federal Indian law within our broader system,³⁶⁹ have only recently begun to be rethought after decades or centuries of assumed stasis.

Third, and perhaps most importantly, this stare decisis problem does not solely arise two-plus decades from now when the Court's composition might change. It may well occur in the intervening years as well. Stare decisis is often both vertical—preserving legal decisions through time—and horizontal—requiring that the same legal question be answered the same way when it arises in different issue-areas. Here, that means that constitutional law made in civil rights suits does not solely stay within the realm of section 1983; it can also affect criminal defendants' rights. If, motivated to equilibrate by a fear of bankrupting officers, the courts decide on the merits that some government practice does not violate the Constitution, that decision would hold equal precedential weight in both civil rights suits and criminal prosecutions. Without qualified immunity, civil rights litigation may become another avenue in which the judiciary hastens the constriction of criminal defendants' rights. Indeed, it was this sort of interaction between the civil rights arena and criminal law that was explicitly part of the Court's decision to grant absolute immunity to prosecutors in *Imbler v. Pachtman*.³⁷⁰ *Imbler* also illustrates how this rights

v. *Ferguson*. See Josh Gerstein & Alexander Ward, *Supreme Court Has Voted to Overturn Abortion Rights, Draft Opinion Shows*, POLITICO (May 2, 2022, 8:32 PM), <https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473> [<https://perma.cc/R8QQ-Y36U>]. This Article went to print shortly after that draft opinion leaked, and at that time it was not clear whether the leak (or simply further internal deliberations) might spur the Court to take a more moderating path. Either way, I note that this is ultimately another example of why outcome-sensitive qualified immunity opponents should remain sensitive to the question, “who decides?”

368. See generally NIKOLAS BOWIE, PRESIDENTIAL COMM'N ON SUP. CT. OF U.S., THE CONTEMPORARY DEBATE OVER SUPREME COURT REFORM: ORIGINS AND PERSPECTIVES (June 30, 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/06/Bowie-SCOTUS-Testimony.pdf>.

369. See, e.g., Elizabeth A. Reese, *The Other American Law*, 73 STAN. L. REV. 555, 622–33 (2021); Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1845–76 (2019).

370. See *Imbler v. Pachtman*, 424 U.S. 409, 427–28 (1976) (“In all of these [post-trial procedures] the attention of the reviewing judge or tribunal is focused primarily on whether there was a fair trial under law. This focus should not be blurred by even the subconscious knowledge that a post-trial decision in favor of the accused might result in the prosecutor's being called upon to respond in damages

constriction may operate as a vise, crushing rights from two sides. In addition to civil rights precedents being imported into the criminal realm, *Imbler* explains that judges may worry that in addition to any consequences that occur within a criminal trial, i.e., excluding evidence, from finding a constitutional violation, they may also be motivated to narrow constitutional rights to avoid the near certainty that an officer's personal liability will flow from that constitutional violation found in the criminal trial.³⁷¹

Beyond this problem of a right's scope, stare decisis problems may also arise quickly because, as dedicated Court watchers know, it is wrong to assume that the six Republican appointees will vote as a block in all cases. Instead, each has issue-areas where they will routinely depart from their conservative fellows.³⁷² Most relevant here, there may well be numerous conservative criminal procedure precedents that several conservative justices, following in Justice Scalia's footsteps, would strike down. But even if several conservative justices wished to strike down on the merits, for example, the third-party doctrine,³⁷³ strong stare decisis might allow those cases to live for another day.

Finally, there is an overarching criticism of the preceding analysis in this Article that warrants attention. If there is a rightward shift in the judiciary that has been accompanied by an erosion of judicial norms of collegiality, and merits decisions are materially different from procedural ones, why have conservative judges and justices not already taken advantage of the discretion *Pearson* affords them to make merits decisions? While a fulsome answer to this question likely requires quantitative and qualitative empirical analysis beyond the scope of this Article, both prior empirical work in this area and the equilibration thesis suggest a few possibilities. The first possibility is that, in fact, judges are already doing this. Professor Schwartz's work suggests that the majority of cases in which qualified immunity is at issue are already decided on grounds other than qualified

for his error or mistaken judgment." Thank you to Sonja Starr for helping me to see this problem of stare decisis's "horizontal" scope.

371. See *id.*

372. See, e.g., Mark Joseph Stern, *Why Gorsuch Keeps Joining the Liberals to Affirm Tribal Rights*, SLATE (May 20, 2019, 3:51 PM), <https://slate.com/news-and-politics/2019/05/neil-gorsuch-supreme-court-tribal-rights-sonia-sotomayor.html> [<https://perma.cc/BD9J-A8GR>]; *Flowers v. Mississippi*, 139 S. Ct. 2228 (2019) (Kavanaugh, J.) (upholding a *Batson* challenge over dissent by Justices Thomas and Alito); *Virginia v. Black*, 538 U.S. 343, 388–400 (2003) (Thomas, J., dissenting) (arguing that cross burning has no expressive content that would be protected under the First Amendment).

373. See, e.g., *Carpenter v. United States*, 138 S. Ct. 2206, 2261–64 (2018) (Gorsuch, J., dissenting) (criticizing this doctrine); see also *United States v. Jones*, 565 U.S. 400, 417–18 (2012) (Sotomayor, J., concurring) ("More fundamentally, it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties.").

immunity.³⁷⁴ It is not obvious that Trump appointees have accelerated this trend, or, given the relative paucity of cases decided on qualified immunity grounds in the first place,³⁷⁵ whether they would need to accelerate it to fulfill their underlying substantive goals. This is especially so because, as Professor Leong found, the vast majority of “new constitutional law” made by judges in this area was pro-government even before any Trump appointee took the bench.³⁷⁶

Second, if the equilibration thesis is correct that judges shape formally distinct doctrines to create an optimal level of functional rights protection, then a clearly established prong decision may be “close enough,” even if a rights-constricting merits decision would be optimal. That is because a clearly established prong decision creates the same effect on the ground as a merits decision, even though it does not foreclose future challenges in the same way.

Moreover, though I have argued that Trump appointees seem to care less about judicial cultural norms like collegiality and consensus, I do not mean to suggest that they do not care about these norms at all. The cost to collegiality might simply be too high if Trump appointees decided to pick every fight possible. But even if they wished to pick all of the fights, it might be practically impossible. As Judge Douglas H. Ginsburg once wrote, “[i]n all the courts of appeals, the judges must value collegiality, if only because an individual circuit judge has little authority when acting alone; any substantive decision requires the concurrence of at least two judges.”³⁷⁷ Practically, this means that even the most aggressive judge must consider “the cost, in time and aggravation, of having to respond to a dissenting opinion—and the further risk that [they] will lose [their] majority in the panel (or upon rehearing en banc).”³⁷⁸ Concurring with a merits ruling (or forcing a liberal colleague who wished to avoid the merits to dissent) in every case decided on clearly established grounds could thus undermine the standing of a judge among their colleagues. Perhaps that is because taking this extreme step seems presumptuous,³⁷⁹ but perhaps for the more tangible

374. See Schwartz, *How Qualified Immunity Fails*, *supra* note 9, at 46.

375. See *id.* (finding fewer than fifty cases in a dataset of over 1,100 cases were decided by qualified immunity at any stage of litigation).

376. Leong, *supra* note 299, at 692–93. Professor Schwartz also found that a number of cases in her dataset featured decisions that both found no constitutional violation and made an explicit clearly established prong holding. Schwartz, *How Qualified Immunity Fails*, *supra* note 9, at 41–42 & n.99 (noting thirty-three such cases).

377. Ginsburg & Falk, *supra* note 248, at 1017.

378. *Id.*

379. See, e.g., Dolan, *supra* note 249 (noting statements from several Ninth Circuit judges to this effect about one new colleague).

reason that it would increase everyone's workload with no change in a case's outcome.³⁸⁰

Ultimately, I do not argue that stare decisis will definitively work against outcome-sensitive qualified immunity critics. It is entirely possible that the judges and justices of the federal judiciary will equilibrate and find ways to escape their past allegiance to strong stare decisis. Instead, I merely argue that outcome-sensitive critics should seriously consider this possibility because the downside risk is not small. As I have discussed, not only might stare decisis work against outcome-sensitive critics because of the current composition of the courts, but it might entrench rights-constricting outcomes decided now even in the face of a more liberal Supreme Court decades into the future.

III. SHIFTING POLITICAL ECONOMIES AND PREFERRING PROCEDURAL LOSSES

This discussion of the potential perils of abolishing qualified immunity illuminates a more general point: as the political economy around them shifts, advocates and policymakers must also shift how they view the various tools at their disposal. Tools once thought anathema to their positions may suddenly become useful, while prized possessions may need to be discarded in their new situation.

This is a lesson most commonly thought of through the lens of political institutions. For instance, while the current Senate is decried by liberals as undemocratically conservative,³⁸¹ as recently as the 1990s the conventional wisdom was that the Senate was institutionally prone to be the more liberal chamber.³⁸² It is only recent demographic shifts that have led the Senate to its current conservative-stronghold status.³⁸³ Similarly, the valence of federal-state and state-local relations may also shift wildly depending on the

380. See, e.g., Ginsburg & Falk, *supra* note 248, at 1017. *Pearson's* move away from mandatory sequencing was likewise motivated in part by a desire to avoid "substantial expenditure of scarce judicial resources on difficult questions that have no effect on the outcome of the case." 555 U.S. 223, 236–37 (2009).

381. See, e.g., Ian Milhiser, *America's Anti-Democratic Senate, in One Number*, Vox (Jan. 6, 2021, 10:00 AM), <https://www.vox.com/2021/1/6/22215728/senate-anti-democratic-one-number-raphael-warnock-jon-ossoff-georgia-runoffs> ("Because smaller states tend to be whiter and more conservative than larger states, this malapportionment gives Republicans an enormous advantage in the fight for control of the Senate. Once Warnock and Ossoff take their seats, the Democratic half of the Senate will represent 41,549,808 more people than the Republican half.").

382. See Bernard Grofman, Robert Griffin & Amihai Glazer, *Is the Senate More Liberal than the House? Another Look*, 16 LEGIS. STUD. Q. 281, 282, 291–93 (1991).

383. See Lee Drutman, *The Senate Has Always Favored Smaller States. It Just Didn't Help Republicans Until Now.*, FIVETHIRTYEIGHT (July 29, 2020, 7:00 AM), <https://fivethirtyeight.com/features/the-senate-has-always-favored-smaller-states-it-just-didnt-help-republicans-until-now/> [<https://perma.cc/2Z2V-GVXF>].

political economy at issue.³⁸⁴ While “states’ rights” was once used to protect Jim Crow, now it is the mantle of sanctuary cities.³⁸⁵ And indeed, the current discussions about the role of the courts in our society also fit within this paradigm. While liberals broadly viewed a strong Supreme Court as a blessing in the wake of *Brown v. Board of Education*,³⁸⁶ recent attacks from the Left argue that *Brown*, and the Warren Court-era more generally, was a progressive exception to a long-line of conservative jurisprudence.³⁸⁷

This Article extends this lesson from political institutions to the three types of doctrine that control litigation: procedure, justiciability, and substance. I posit that when courts are hostile to a group’s position on constitutional issues, and so unlikely to rule for them on the merits, that group should prefer procedural losses. The reason for this comes back to the question at the heart of this Article: procedural losses allow you to change who decides.

When dealing with constitutional claims, both merits decisions and justiciability decisions have common origins. They both stem from the Constitution itself. A decision on the merits will obviously stem from whatever constitutional provision is at issue. But perhaps less obviously, justiciability decisions stem from Article III, whether its “case or controversy” requirement³⁸⁸ or the general separation of powers and

384. See, e.g., Adam Davidson, *Managing the Police Emergency*, 100 N.C. L. REV. (forthcoming April 2022) (arguing that emergency managers can be used for radical police reform despite their history as a conservative tool to usurp power from disproportionately liberal, minority cities); Rachel A. Harmon, *Federal Programs and the Real Costs of Policing*, 90 N.Y.U. L. REV. 870, 939–40 (2015) (arguing that federal policing programs systematically undervalue the harm they cause in comparison to local policing); Heather K. Gerken, *The Loyal Opposition*, 123 YALE L.J. 1958, 1963–64 (2014) (advocating for the benefits of federalism despite its historical ties to slavery and Jim Crow).

385. See Ilya Somin, *Making Federalism Great Again: How the Trump Administration’s Attack on Sanctuary Cities Unintentionally Strengthened Judicial Protection for State Autonomy*, 97 TEX. L. REV. 1247, 1249 (2019).

386. 347 U.S. 483 (1954).

387. See, e.g., Doerfler & Moyn, *supra* note 280, at 10; BOWIE, *supra* note 368, at 5–9; see also Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1368 (1988) (arguing that the conflict between the nation’s espoused commitment to equality with a racial regime of explicit inequality created a unique opening for the civil rights movement in the courts). *But see generally* JUSTIN DRIVER, *THE SCHOOLHOUSE GATE: PUBLIC EDUCATION, THE SUPREME COURT, AND THE BATTLE FOR THE AMERICAN MIND* (2018) (arguing for a more favorable view of the Court in the education context); Emma Kaufman, *The New Legal Liberalism*, 86 U. CHI. L. REV. 187, 189 (2019) (reviewing *The Schoolhouse Gate* and arguing that “the schoolhouse is an unusually hopeful . . . venue for a study of federal courts”).

388. U.S. CONST. art. III, § 2.

federalism concerns that give rise to tools like the political question and abstention doctrines.³⁸⁹

What this common origin means is that, given our system of judicial review, the courts will always have the final say over whether a merits or justiciability decision stands going forward. Even if Congress attempts to override one of these decisions, the Court may well invalidate it as beyond Congress's power.³⁹⁰

Both justiciability and merits decisions thus provide a single answer to the question who decides: the courts.³⁹¹ Therefore, any attempt to override these sorts of decisions must rely on both changing the political composition of the courts *and* overcoming the effects of *stare decisis*. Given the courts' current composition and judges' life tenure, it is entirely possible that the courts might remain broadly conservative for decades even if a tsunami of progressive change occurs in the political branches. For any outcome-sensitive group, this fact should be highly troubling, as even massively successful political organizing might be for naught if the courts invalidate political wins on grounds that the political branches cannot supersede.

But, as the qualified immunity example shows, procedural decisions are different. In the procedural context either the courts or the political branches can override a past decision. Ultimately this increases the optionality for those wishing to implement change in the future. After a procedural loss at *t*₀, if, at *t*₁, the courts become friendly while the political branches are not, advocates can use litigation as the lever of change. But if the political branches are more favorable at *t*₁, then advocates can push for legislative fixes.³⁹²

Practically, this means that if litigants come to believe a merits win is out of reach, they should push the courts to decide their cases on procedural grounds. Policymakers, meanwhile, should consider how altering the courts' procedural toolbox will change both the number and type of decisions the courts make. In our current political economy, this creates the odd scenario where groups who have traditionally advocated for broad

389. See, e.g., *Baker v. Carr*, 369 U.S. 186, 210 (1962); *Pennzoil Co. v. Texaco*, 481 U.S. 1, 11 n.9 (1987) (noting that the “various types of abstention . . . reflect a complex of considerations designed to soften the tensions inherent in a system that contemplates parallel judicial processes”).

390. See *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (invalidating the Religious Freedom Restoration Act because the power to determine what constitutes a constitutional violation rests with the courts).

391. I bracket here the issue of Congress's ability to determine much of the courts' jurisdiction. While Congress's ability to restrict the courts' jurisdiction in many areas has gone largely unquestioned, the courts appear increasingly willing to assert constitutional reasoning to determine what cases they can and cannot hear. See, e.g., *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2207–14 (2021).

392. See, e.g., 28 U.S.C. § 2074 (requiring the Supreme Court to transmit proposed procedural and evidence rules to Congress); *Dietz v. Bouldin*, 579 U.S. 40, 45 (2016) (noting that the courts' “exercise of an inherent power cannot be contrary to any express grant of or limitation on the district court's power contained in a rule or statute”).

access to the courts may instead wish to maintain or increase the procedural tools available for courts to avoid merits decisions.

At least at the level of an individual case, lawyers have broadly internalized some version of this lesson, that there are times when it is better to avoid a merits decision. But they do not seem to have internalized that procedure is the superior tactic to justiciability. For example, a common tactic is to attempt to moot a case.³⁹³ But as *New York State Rifle & Pistol Association*³⁹⁴ shows, even attempts to moot a case can backfire. There, while the city and state of New York managed to moot the case and avoid a merits decision by passing a state law superseding the previously offending city law, three justices were prepared to narrowly interpret what makes a case moot in order to reach the merits.³⁹⁵ New York's attempt to avoid a case, then, could have resulted in negative changes to both the substantive law and to mootness doctrine, neither of which a legislature could later fix.

To be clear, I do not mean to say that civil rights litigants should stop engaging in litigation for the foreseeable future. Instead, I intend to highlight three things. First, as the political economy around us changes, we must reevaluate which tools are beneficial and which are detrimental. A procedural tool like qualified immunity that was once maligned may now be the best of one's (admittedly bad) options.

Second, how one loses matters. A loss on procedural grounds may well have fewer detrimental effects than either a justiciability or merits loss.

Third, the equilibration thesis suggests that judges will seek to reach what they perceive as an optimal level of rights protection no matter the tools in their toolbox. It does not, however, suggest that optimal level is zero. As such, there are bound to be some cases where the courts will want to rule in a pro-civil rights plaintiff direction on the merits, and only the highest non-merits hurdles will stop them. Indeed, we have seen exactly this phenomenon in the Court's most recent forays into qualified immunity. There, they have reinvigorated the idea that some government actions are so abhorrent that general constitutional principles should alert an official to the unconstitutionality of their act.³⁹⁶ That the courts appear likely to take this sort of "bad facts make good law" direction may be dissatisfying, but it

393. See, e.g., *N.Y. State Rifle & Pistol Ass'n v. City of New York*, 140 S. Ct. 1525 (2020). Alternately, parties will often attempt either to settle the case or, if they are the plaintiff, voluntarily dismiss it. See FED. R. CIV. P. 41. At times, parties have gone to extreme lengths to achieve a voluntary dismissal. See, e.g., *Alzokari v. Pompeo*, 973 F.3d 65, 68 n.6, 71 n.11 (2d Cir. 2020) (detailing the "dubious circumstances" suggesting government misbehavior that led to the vacation of a district court order in exchange for the relief plaintiff sought and voluntary dismissal of his case).

394. *N.Y. State Rifle & Pistol Ass'n*, 140 S. Ct. 1525 (2020).

395. See *id.* at 1527–44 (Alito, J. dissenting).

396. See *Taylor v. Riojas*, 141 S. Ct. 52, 53–54 (2020).

appears to merely be an extension of how many lawyers in this area already select their cases.³⁹⁷

IV. CHANGING WHO DECIDES BY RAISING THE RIGHTS FLOOR

Thus far, I have focused overwhelmingly on how outcome-sensitive critics of qualified immunity, as well as other outcome-sensitive groups, might best lose. I now turn instead to how they might win.

Outcome-sensitive opponents of qualified immunity focus on an outcome of abolishing qualified immunity, the near certainty of which I do not dispute: there will be a non-zero number of civil rights plaintiffs who will win their cases in a future without qualified immunity, who would lose those cases today because of qualified immunity's clearly established prong. And though I argue here that the effect of Trump appointees on civil rights plaintiffs will be net negative, I would not suggest that no Trump appointee will ever turn out to be a strong proponent for civil rights in a given case. Indeed, there are already several examples of that occurring, including from the "unconfirmable" Judge Willett.³⁹⁸

Further, I note that it is possible that, for reasons unrelated to the court-decided outcomes qualified immunity opponents focus on, abolishing qualified immunity may be a net plus even if the negative possibilities described here come to pass. That is because removing qualified immunity may expand the number and type of civil rights cases that are brought, or change how much those cases can be settled for,³⁹⁹ and it may also serve as a signaling device to police that deters bad behavior.⁴⁰⁰

397. See Schwartz, *Qualified Immunity's Selection Effects*, *supra* note 9, at 1138 ("[S]everal attorneys reported that concerns about judges' and juries' predispositions against police misconduct suits cause them to select cases with facts so egregious and evidence so strong that the cases are not vulnerable to dismissal on qualified immunity grounds.").

398. See, e.g., *Doe v. Mckesson*, 945 F.3d 818, 844 n.56 (5th Cir. 2019) (Willett, J., concurring in part and dissenting in part), *cert. granted, vacated*, 141 S. Ct. 48 (2020); *Wright v. City of Euclid*, 962 F.3d 852, 882 (6th Cir. 2020) (Bush, J.) (reversing the district court's grant of summary judgment on *Monell* and other claims after "the City of Euclid's law-enforcement training included jokes about Rodney King—who was tased and beaten in one of the most infamous police encounters in history—and a cartoon with a message that twists the mission of police").

399. While I posit these possibilities as a hopeful outcome, I note that they are just that: possibilities. In interviews with over thirty civil rights lawyers, only approximately one third regularly declined cases because of qualified immunity, and another third never declined a case because of it. See Schwartz, *Qualified Immunity's Selection Effects*, *supra* note 9, at 1138–47.

400. *But see* Schwartz, *supra* note 16, at 351–60 (concluding changes in deterrence of government officials is unlikely). Another possibility is that abolishing qualified immunity might advance a sort of "jurisprudence in exile," in which progressive jurists are forced to write dissents from constitutional decisions that show what an alternative, progressive constitutionalism might look like. *Cf.* William E. Forbath, *The New Deal Constitution in Exile*, 51 DUKE L.J. 165, 165–66 (2001) (discussing both conservative and liberal conceptions of the "Constitution-in-Exile"). While this is possible, it seems unlikely. Qualified immunity does not prevent jurists from crafting this jurisprudence in either their dissents or concurrences. See, e.g., *Utah v. Strieff*, 579 U.S. 232, 252–54 (2016) (Sotomayor, J.,

What the preceding parts of this Article have instead highlighted is that this is not a one-sided ledger. In a world without qualified immunity, there may well be *more* losers than there are today,⁴⁰¹ and the losses may have worse, more lasting effects.⁴⁰²

But this is not an Article that intends to sap hope from those wishing and fighting for change. Instead, it is an attempt to prevent a Pyrrhic victory—wherein advocates spend years of political and personal energy only to find themselves in a world with the same problems, albeit wrapped in a new, stickier bow.⁴⁰³

Initially, several scholars have suggested alternative or additional steps to take to accomplish the justice-oriented goals of outcome-sensitive qualified immunity critics. Professor Fred O. Smith, Jr., for example, has suggested lowering the fault standard necessary for liability against a municipality and empowering state attorneys general to initiate suits alleging a pattern or practice of constitutional violations, akin to those now undertaken by the Department of Justice.⁴⁰⁴ Professor Katherine Mims Crocker suggests that, in addition to eliminating qualified immunity, we should also focus on the removal of sovereign immunity.⁴⁰⁵ The question at the heart of this article—who decides?—suggests yet another, more direct, path for reform if abolishing qualified immunity is not the panacea some think it to be: raising the rights floor by statute.⁴⁰⁶

Many of the original, legal community-centric critics of qualified immunity targeted their criticisms toward the Supreme Court,⁴⁰⁷ but this was not an inevitable choice. In a way, their choice makes sense: what the Court

dissenting) (explaining how the Court’s jurisprudence around police stops “risk[s] treating members of our communities as second-class citizens”); *United States v. Diaz*, 967 F.3d 107, 111 (2d Cir. 2020), *cert. denied*, 141 S. Ct. 1424, 209 L. Ed. 2d 150 (2021) (Calabresi, J., concurring) (explaining his continuing belief that “[t]he notion that the Sex Offender Registration and Notification Act [] and its equivalents are not punitive seems to me to be quite mistaken”).

401. See, e.g., Leong, *supra* note 299, at 689–90.

402. Professor Justin Driver has recently suggested another reason that abolishing qualified immunity may backfire that I do not discuss here. While its opponents focus on police, qualified immunity shields a much broader set of government employees, including educators, and the effects of the doctrine in these differing situations warrant scrutiny. See Justin Driver, *Schooling Qualified Immunity*, EDUC. NEXT (Mar. 23, 2021), <https://www.educationnext.org/schooling-qualified-immunity-should-educators-be-shielded-from-civil-liability/> [<https://perma.cc/F7QR-NNEC>].

403. See *supra* Sections II.B, C (discussing merits decisions and the liberal allegiance to strong stare decisis principles).

404. See generally Fred O. Smith, Jr., *Beyond Qualified Immunity*, 119 MICH. L. REV. ONLINE 121 (2021).

405. See generally Katherine Mims Crocker, *Qualified Immunity, Sovereign Immunity, and Systemic Reform*, 77 DUKE L.J. (forthcoming 2022).

406. To be clear, much in the same way that some places have used new state causes of action to circumvent section 1983, see, e.g., COLO. REV. STAT. § 13-21-131(3) (2021), these new statutes would be new causes of action not tethered to federal constitutional principles.

407. See, e.g., Schwartz, *supra* note 16.

created, the Court can destroy.⁴⁰⁸ For a time, it looked like this might be a successful strategy. Multiple justices had criticized the doctrine, and it had come under increasing scrutiny in the intervening years.⁴⁰⁹ But at the end of the 2019 Term, while issues of police misconduct swirled throughout the country, the Court considered a group of petitions that directly challenged the doctrine and declined to hear the cases.⁴¹⁰ Newer, outcome-sensitive advocates have changed strategy, focusing instead on local, state, and federal legislatures.⁴¹¹ Though far from an overwhelming victory, they have found success at all three levels.⁴¹²

When one considers the reality of qualified immunity litigation, this legislature-based success should not be surprising. The greatest decider of qualified immunity cases is not the clearly established prong, it is settlement.⁴¹³ This means that it is through negotiation with someone in the local, state, or federal government's executive or legislative branches that most of these civil rights suits are decided. That these loci of government would be more open to reconsidering the doctrine than the Court, which with few exceptions has largely been hostile to any attempt to narrow or undo it, is therefore not shocking.

That is especially so when one considers the complexity and expense of actually litigating qualified immunity. A government lawyer, just as much as a civil rights attorney, must research the relevant law and could go through as many as three appeals if a case is ultimately decided at trial. Especially if comparatively few cases are ultimately decided by qualified

408. See, e.g., *Pearson v. Callahan*, 555 U.S. 223, 233–34 (2009) (explaining in the context of overruling *Saucier*'s two-step process that “[a]ny change should come from this Court, not Congress” because “the *Saucier* rule is judge made and implicates an important matter involving internal Judicial Branch operations”).

409. See Schwartz, *supra* note 16, at 311–14.

410. See Nina Totenberg, *Supreme Court Will Not Reexamine Doctrine that Shields Police in Misconduct Suits*, NPR (June 15, 2020, 9:55 AM), <https://www.npr.org/2020/06/15/876853817/supreme-court-will-not-re-examine-doctrine-that-shields-police-in-misconduct-sui> [https://perma.cc/XU25-QFH].

411. See Kimberly Kindy, *Dozens of States Have Tried to End Qualified Immunity. Police Officers and Unions Helped Beat Nearly Every Bill.*, WASH. POST (Oct. 7, 2021, 6:00 AM), https://www.washingtonpost.com/politics/qualified-immunity-police-lobbying-state-legislatures/2021/10/06/60e546bc-0cdf-11ec-aea1-42a8138f132a_story.html [https://perma.cc/47SB-DQT9] (“After [George] Floyd’s death, an eclectic mix of organizations — from the American Civil Liberties Union and Sierra Club to several libertarian groups including the Cato Institute — came together to fight for a ban on qualified immunity. Dozens of state legislatures took up the issue last year.”).

412. See *id.* (noting that Colorado passed a statute effectively banning the defense and the House passed the George Floyd Justice in Policing Act, which limited the defense); Tyler Kendall, *New York City Limits Qualified Immunity. Making It Easier to Sue Police for Misconduct*, CBS NEWS (Mar. 27, 2021, 8:00 AM), <https://www.cbsnews.com/news/nyc-qualified-immunity-police-misconduct/>.

413. See Schwartz, *How Qualified Immunity Fails*, *supra* note 9, at 46 & t.12 (finding that 490 of 1,183 cases were disposed of by settlement or Rule 68 judgment, and another 182 were decided by voluntary or stipulated dismissal).

immunity, and even fewer decided by it at the motion to dismiss stage, government attorneys may well view removing the option of qualified immunity as a net gain.⁴¹⁴ Undoubtedly, it is this sort of convergence of interests that has helped the push to abolish qualified immunity become as popular and powerful as it is.

But the outcome-sensitive qualified immunity opponent is ultimately not concerned with interest convergence,⁴¹⁵ they are concerned with increasing the accountability of police and recompense for the police's victims. Given that, those petitioning their legislatures should not focus on ending qualified immunity, they should focus on the legislature's power to raise the rights floor.

Using statutes to raise the rights floor accomplishes directly what abolishing qualified immunity can only hope to do indirectly. This directness has three potential benefits, each with its own independent merit. First, it can help clarify the law for the people who must follow it. Second, it shifts power away from the federal courts to more favorable spheres. Third, and relatedly, it flips the power of *stare decisis* into critics' favor by taking advantage of the "superpowered" form of *stare decisis* that applies to statutes.⁴¹⁶

On this first benefit, one of qualified immunity's great sins is its lack of clarity and subsequent unpredictability. Even under the generous assumption that police and other government actors are trained as to what "clearly established" law is,⁴¹⁷ the complexity of the doctrine—not to mention the complexity of the underlying constitutional law—make it nearly impossible for a person to apply that law to an active, real-time situation.⁴¹⁸ By contrast, a rights-floor raising statute can be written in clear terms, with clear requirements and clear repercussions. For example: *Lethal force may only be used in X, Y, or Z situations. A violation of this statute requires the violator to pay \$20,000 or 10 percent of any damages*

414. Indeed, it is not hard to imagine that, despite the time and expense necessary to litigate it, a government lawyer may feel ethically obligated to raise qualified immunity in their role as a zealous advocate given that it is such a potentially strong defense. That is so even if, statistically speaking, it is rarely the explicit reason a case is disposed of. (Though as past scholars have noted, qualified immunity may well impact settlement even if it is not the named reason for the case's dismissal. *See, e.g., id.* at 47 (noting the possibility that "qualified immunity influences plaintiffs' decisions to settle").

415. *See generally* Derrick A. Bell, Jr., Comment, *Brown v. Board and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980) (developing the interest convergence thesis of change).

416. *Kimble v. Marvel Enter.*, 576 U.S. 446, 458 (2015); *id.* at 456 ("What is more, *stare decisis* carries enhanced force when a decision, like *Brulotte*, interprets a statute. Then, unlike in a constitutional case, critics of our ruling can take their objections across the street, and Congress can correct any mistake it sees.").

417. *But see generally* Schwartz, *supra* note 70.

418. The one exception to this may be high-level government officials, who often have teams of lawyers advising them.

determined by a jury, whichever is less. The officer will be indemnified by their employing government entity for the remainder of the damage award.⁴¹⁹

Floor-raising statutes—especially broadly sweeping ones like the hypothetical above—may seem unlikely. But in some places narrower floor-raising statutes have already been passed in response to the Summer 2020 uprisings, and examples of broad floor-raising statutes are not hard to find throughout history. The clearest examples of recent, narrow floor-raising statutes are those that prohibit the use of chokeholds or knee-on-neck maneuvers like the one Derek Chauvin used to kill George Floyd.⁴²⁰ And multiple broad floor-raising statutes have been passed by Congress, often directly in response to the Supreme Court’s failure to enshrine rights in the Constitution. Perhaps most saliently, this occurred in the religious freedom context with the Religious Freedom Restoration Act⁴²¹ in response to *Employment Division v. Smith*,⁴²² in the gender equality context with the Lily Ledbetter Fair Pay Act in response to *Ledbetter v. Goodyear Tire &*

419. This hypothetical statutory language is inspired by Colorado’s recent attempt at increasing police accountability. See COLO. REV. STAT. § 13-21-131(3) (2021).

420. See, e.g., Kimberly Kindy, Kevin Schaul & Ted Mellnik, *Half of the Nation’s Largest Police Departments Have Banned or Limited Neck Restraints Since June*, WASH. POST (Sept. 6, 2020, 10:47 PM), <https://www.washingtonpost.com/graphics/2020/national/police-use-of-force-chokehold-carotid-ban/> [<https://perma.cc/7S6P-LSRH>].

421. While RFRA was struck down as applied to the states as being beyond Congress’s enforcement powers under section five of the Fourteenth Amendment, see *City of Boerne v. Flores*, 521 U.S. 507 (1997), that should be less of a problem in the policing context for several reasons. First, Congress will likely be well within the bounds of its Spending Clause powers in this area because of its regular infusions of money into state and local policing budgets. See, e.g., *Holt v. Hobbs*, 574 U.S. 352, 357–58 (2015) (discussing the passage of RLUIPA in response to *City of Boerne*). Second, Congress could also likely rely on its Commerce Clause power for the same reasons it was able to rely on it in *Katzenbach v. McClung*, 379 U.S. 294 (1964). Policing has a long history as being a tool of racial oppression in this country, to the point where in its most extreme manifestations, as in *Katzenbach*, minorities will avoid neighborhoods, municipalities, and entire counties because of the behavior of law enforcement there. Colloquially, these places are called “sundown towns,” and they operate through a combination of the overt behavior of law enforcement to exclude minorities and through law enforcement acquiescence to private actions. See, e.g., Tim Sullivan & Noreen Nasir, *AP Road Trip: Racial Tensions in America’s ‘Sundown Towns’*, ASSOCIATED PRESS (Oct. 14, 2020), <https://apnews.com/article/virus-outbreak-race-and-ethnicity-violence-db28a9aaa3b800d91b65dc11a6b12c4c> [<https://perma.cc/CNZ2-XALN>] (“The rules of a sundown town were simple: Black people were allowed to pass through during the day or go in to shop or work, but they had to be gone by nightfall. Anyone breaking the rules could risk arrest, a beating or worse.”); James W. Loewen, *Sundown Towns by State*, <https://sundown.tougaloo.edu/content.php?file=sundowntowns-whitemap.html> [<https://perma.cc/6GFL-DMTG>] (compiling a list of the known and suspected sundown towns, both current and historical, across the United States); Davidson, *supra* note 384 (discussing the sociological harms caused by policing).

422. 494 U.S. 872 (1990).

Rubber Co.,⁴²³ and in the civil rights context in response to a number of decisions by the Rehnquist Court.⁴²⁴

The second benefit to a floor-raising statute is power shifting, specifically shifting power from the federal courts. As this Article has discussed, there is ample evidence that the federal courts will continue to move in an increasingly hostile direction for those victims of policing on whom outcome-sensitive qualified immunity critics most focus.⁴²⁵

A nascent literature building on the tactics of modern activists asks the question, “who decides?” through this frame of power shifting. It suggests that outcome-sensitive critics should be skeptical of abolishing qualified immunity as a way to materially alter outcomes because it does nothing to shift the locus of power.⁴²⁶ Federal judges will still control whether police are held accountable and whether their victims receive recompense. Instead, eliminating qualified immunity merely alters the tools available to the same people—the courts—who currently hold that power.

As Professor Jocelyn Simonson has explained, “[a] focus on power in police reform asks whether directly impacted people have real influence on the scope and policies of policing in their neighborhoods, counties, cities, and states.”⁴²⁷ Ignoring the role of power can lead to perverse outcomes. For example, marginalized communities’ attempts to participate in processes meant to garner their input, like community board meetings, can instead have the effect of “reinscribing rather than dismantling existing power imbalances.”⁴²⁸

A rights-floor-raising statute can shift power in numerous ways. Most obviously, it will be the result of the democratic process, and so can have the input of the most affected communities through that process. Federal court decisions, obviously, do not have this benefit. More than this, power shifting can be built into the statute itself. For example, a statute might redefine the eligible members of the jury pool to be only those from the communities most affected by the police tactics at issue. More drastically, a statute might shift the adjudicatory mechanism away from the judiciary entirely, instead empowering an independent body of community members

423. 550 U.S. 618 (2007).

424. See Neal Devins, *Congressional Response to Judicial Decisions*, in *ENCYCLOPEDIA OF THE SUPREME COURT OF THE UNITED STATES* (2008); see also Bethany Blackstone, *An Analysis of Policy-Based Congressional Responses to the U.S. Supreme Court’s Constitutional Decisions*, 47 *LAW & SOC’Y REV.* 199 (2013).

425. See *supra* Section II.A.

426. See Simonson, *supra* note 37, at 811–30 (discussing the ways movement actors have focused their goals on power shifting).

427. *Id.* at 803.

428. *Id.* at 807 & n.112.

to decide claims under it. This latter proposal may sound radical, but it directly subverts the current system of police investigating and imposing discipline on themselves. Likewise, communities might decide the substantive standards under which police operate. These are only a few of the multitude of possibilities, but the key to each is shifting power from the judiciary to more directly affected people.

Power shifting may be especially important in this context because of the federal judiciary's inherently and purposefully insulated nature. While scholars have long argued that policing and the criminal legal system more broadly are antidemocratic,⁴²⁹ the antidemocratic nature of that system is not constitutionally mandated. For the federal judiciary, it is, and for good reason. Article III's protections on the judiciary's independence help to free it from all manner of political gamesmanship and control, thereby empowering it to take potentially unpopular steps, such as constitutionally mandating and enforcing racial integration.⁴³⁰

But that independence is not an unmitigated good. It also ensures that the judiciary does not need to respond to the voices of the subjugated groups who are harmed by its rulings. For that reason, if the courts are providing a lower level of protection for those people than seems necessary, shifting power away from the courts may be the only way to ensure subjugated people are adequately protected by the law.

The necessity, or merely the benefit, of power shifting, however, does not mean that the federal courts are useless. Law still matters. While judges may follow their ideology when the law has play in the joints—and in constitutional law there is ample play in the joints—there are few judges who will flout a clearly written legal command.

That is so even, and perhaps especially, for the conservative members of the Supreme Court who fashion themselves strict textualists. Recent rights-expanding decisions in the areas of gender and sexual equality, immigration, and criminal law have turned on strict adherence to statutory language.⁴³¹ Each of these decisions has been written or joined by at least one of the Court's more conservative members. For example, Justice Gorsuch's opinion in *Niz-Chavez v. Garland* engaged in an extended discussion of the

429. See *id.* at 805–07; Davidson, *supra* note 384.

430. See, e.g., *Alexander v. Holmes Cnty. Bd. of Educ.*, 396 U.S. 19, 20 (1969) (per curiam) (ordering school districts “to terminate dual school systems at once and to operate now and hereafter only unitary schools”).

431. See *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020) (reading Title VII of the Civil Rights Act of 1964 to protect against discrimination on the basis of gender or sexuality); *Niz-Chavez v. Garland*, 141 S. Ct. 1474 (2021) (reading 8 U.S.C. § 1229b's mandate for “a notice to appear” to require the government to deliver the required information in a single document); *Borden v. United States*, 141 S. Ct. 1817 (2021) (holding that 18 U.S.C. § 924(e)'s language (“[t]he phrase ‘against another,’ when modifying the ‘use of force’”) precluded crimes with a recklessness *mens rea* from qualifying for that statute's sentencing enhancements).

word “a.”⁴³² By fashioning clear, rights-floor raising statutes, outcome-sensitive critics can use this trend towards textualism to their advantage.

Third, by shifting the courts’ focus to a clear floor-raising statute instead of relying on constitutional provisions, outcome-sensitive critics can flip the stare decisis battle into their favor. To be sure, today’s liberal justices are fighting to ensure strong stare decisis principles across the board, as *Roe* and numerous other liberal precedents are based on constitutional principles. It is well established, however, that stare decisis is stronger when courts are interpreting most statutes than when they interpret the Constitution.⁴³³ The basic idea behind this is simple. Because a constitutional decision can be altered only by a constitutional amendment, the courts feel freer to alter course if they appear to have gone off track.⁴³⁴ A decision interpreting a statute, however, can be overturned by a normal act of the legislature, and so there is less need for court intervention.⁴³⁵ Therefore, shifting the courts’ attention from the Constitution to a clearly written statute has the additional benefit of wrapping strong, textualist interpretations of that statute in the cloak of one of the strongest forms of stare decisis.

More fundamentally, and most importantly, by focusing on floor-raising legislation, outcome-sensitive critics can ensure that the goals they actually care about are met. The basic premise underlying the outcome-sensitive criticism of qualified immunity is a simple one that seems fundamental to a well-running society: government actors are meant to help the citizenry, not hurt them. And when those who are entrusted with the power of the state hurt the people under their protection, they should be held accountable, and their victims should be made whole. Outcome-sensitive critics, and outcome-neutral critics too, should not lose sight of this basic principle.

CONCLUSION

The question at the heart of this article is simple, but it has many ramifications. Focusing on “who decides?” forces those wishing to abolish qualified immunity to grapple with their internal differences—separating the outcome-sensitive and outcome-neutral factions—and perhaps should lead them to abandon their quest to gainsay the doctrine. With Trump-empowered conservative federal courts as the decision-maker, the

432. Compare *Niz-Chavez*, 141 S. Ct. at 1480–82 (Gorsuch, J., joined by Thomas, Breyer, Sotomayor, Kagan, and Barrett, JJ.), with *id.* at 1491–93 (Kavanaugh, J., dissenting).

433. See *Kimble v. Marvel Enter.*, 576 U.S. 446, 456, 461 (2015) (making this point and stating that an exception to this strong statutory stare decisis is the Sherman Act).

434. *Id.* at 456.

435. *Id.*

equilibration thesis suggests civil rights plaintiffs may well face more losses on the merits or on justiciability grounds with the procedural tool of qualified immunity removed. And these losses are likely to be both broader than qualified immunity losses and made stickier by current stare decisis battles.

From this exploration of qualified immunity comes a broader lesson: as the political economy around them shifts, advocates and policymakers must reevaluate the tools at their disposal. Old friends may be new foes and vice versa. In constitutional litigation, keeping once-scorned procedural tools like qualified immunity may lead the courts to inflict less, more easily reversible harm, because procedure can largely be controlled by the political branches while justiciability and substance cannot.

But outcome-sensitive qualified immunity opponents should not despair. With the ample political capital they have amassed, they can instead push legislatures to pass rights-floor-raising statutes. By raising the rights floor, outcome-sensitive critics can help to clarify the law, shift power from the federal courts to more friendly spheres, flip the stare decisis battles in their favor, and most importantly, accomplish the justice-based goals they righteously pursue.