STATE OF MIND IN THE DOCTRINE OF QUALIFIED IMMUNITY

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Section 1983 provides a federal cause of action against state actors who violate a person's constitutional rights while acting under the color of law.[1] Nowhere does the statute mention immunity.[2] When Section 1983 was enacted, the common law likely provided state actors with some form of immunity—if they acted objectively reasonably and in good faith.[3] Over the years, this protection from suit evolved into the qualified immunity of today. Boiled down, modern qualified immunity considers only whether the law clearly established that the defendant's conduct violated the Constitution.[4] This standard is the result of Supreme Court decisions that slowly moved away from the immunity that existed in the common law.[5] *Harlow v. Fitzgerald*,[6] where the Court laid out the new standard for immunity, marked this transition.

Not only is modern qualified immunity rooted in an unstable foundation but it also presents practical problems. By ignoring a defendant's bad faith and subjective state of mind, it is more difficult to hold bad actors accountable. And by requiring an earlier case to have exceedingly similar facts to clearly establish the law, courts offer no remedy for many plaintiffs who can show they suffered a constitutional violation. That is, qualified immunity usually decides Section 1983 cases. And as a result, the force of the remedial statute itself is diminished.

But the Court doesn't need to stick with this modern version of qualified immunity for the sake of it. Instead, the Court's own factors for when to overrule a decision point toward abandoning the modern qualified immunity test. And because the Court has been more willing in recent years to depart from its own precedent, this area of the law should be no exception. Therefore, the Supreme Court should reexamine its *Harlow* decision to both (1) follow the text and history surrounding Section 1983 and (2) alleviate some of the problems qualified immunity poses.

I. THE HISTORY AND DEVELOPMENT OF QUALIFIED IMMUNITY

The context surrounding Section 1983's enactment shows that it was designed to be a remedial statute capable of deterring the state-sanctioned violence happening during Reconstruction.[7] It was modeled after the Civil Rights Act of 1866, which

1. 42 U.S.C. § 1983.

2. *See id.*

3. *See* Gary S. Gildin, *The Neuroscience of Qualified Immunity*, 126 DICK. L. REV. 769, 780-781 (2022).

4. *Id.* at 46.

5. *Id.* at 52–55.

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

7. The debates about the Act included descriptions of violence and terror the Ku Klux Klan inflicted upon Black citizens in southern states. *See* CONG. GLOBE, 42d Cong., 1st Sess. 236, 244

criminalized certain acts committed "under [the] color of any law, statute, ordinance, regulation, or custom."[8] The violence plaguing Black Americans during Reconstruction, and the lack of accountability accompanying it, motivated the statute's enactment.[9] Specifically, proponents of the bill saw it as a way to hold accountable those members of the Ku Klux Klan whose violence went unpunished because of their connection to or direct involvement with state criminal justice systems.[10]

Indeed, the bill that became Section 1983 "consisted of several sections establishing different remedies for disorder and violence in the Southern states."[11] Its purpose was to "deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails."[12] Supporters of the bill argued that a federal remedy for state-sanctioned constitutional violations was necessary because of the inconsistent applications of justice that characterized some state law enforcement at the time.[13] To achieve this goal, the statute holds accountable state actors who, under the color of law,[14] violate the Constitution.[15] It does so by creating a cause of

(1871). Supporters of the bill explained that the Klan's "acts of lawlessness went unpunished, legislators asserted, because Klan members and sympathizers controlled or influenced the administration of state criminal justice." Briscoe v. LaHue, 460 U.S. 325, 337 (1983).

8. SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 § 1:3 (2022–2023 ed.).

9. During the debates around the Bill, members of Congress discussed the violence and intimidation Black Americans faced. *Briscoe*, 460 U.S. at 337.

10. *Id.* at 337 (citing CONG. GLOBE, 42d Cong., 1st Sess. 152, 158, 173, 201, 320–321, 322, 340, 437, 439, 443–444, 457, 458, 503, 516, 518, 653, 654, 687 (1871)).

11. *Id.* at 336.

12. Wyatt v. Cole, 504 U.S. 158, 161 (1992).

13. CONG. GLOBE, 42d Cong., 1st Sess. 460 (1871) (testimony of a legislator) ("The United States courts are further above mere local influence than the county courts; their judges can act with more independence, cannot be put under terror, as local judges can; their sympathies are not so nearly identified with those of the vicinage; the jurors are taken from the State, and not the neighborhood; they will be able to rise above prejudices and bad passions or terror more easily. The marshal, clothed with more power than the sheriff, can make arrests with certainty, and, with the aid of the General Government, can seize offenders in spite of any banded and combined resistance such as may be expected."); *see also Briscoe*, 460 U.S. at 338.

14. There is now no question that actionable offenses arise only from actions state actors take while acting under the color of law. *See* Adickes v. S. H. Kress & Co., 398 U.S. 144, 162–69 (1970) (quoting the lawmakers who proposed Section 1983 as expressly limiting its scope).

15. *See* Butz v. Economou, 438 U.S. 478, 502 (1978); Scott A. Keller, *Qualified and Absolute Immunity at Common Law*, 73 STAN. L. REV. 1337 (2021) (explaining that the statute created a "cause of action for money damages against state officials acting under color of state law who violate federal rights").

action for money damages.[16] So a monetary judgment is typically the only available avenue for constitutional relief against a state actor.[17]

Section 1983 does not mention any immunities.[18] It is completely silent on what immunities a defendant may be entitled to.[19] At first blush, this statutory silence might seem to suggest that the Court created immunity from scratch—that it read qualified immunity into the statute without any basis to do so.[20] But that's not the case. Instead, the Court and many scholars[21] recognize that a good faith immunity existed at the common law when the statute passed.[22]

Indeed, the "tradition of immunity was so firmly rooted in the common law . . . that 'Congress would have specifically so provided had it wished to abolish the doctrine.'"[23] *Wilkes v. Dinsman*[24] provides an example of the way the Court engaged with immunities before Section 1983. There, a marine sued his commanding officer alleging that he was unlawfully detained on board after his enlistment concluded.[25] The defendant officer argued that he detained the plaintiff under an Act of Congress allowing marines who have completed their service to be detained if doing so was essential to the public interests.[26] The Court stated that the

16. Wilson v. Layne, 526 U.S. 603, 609 (1999); *see also* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 410 (Harlan, J., concurring) ("[I]t is damages or nothing.").

17. Lawrence Rosenthal, *Defending Qualified Immunity*, 72 S.C. L. REV. 547, 548 (2020) ("[T]he availability of a damages remedy against an individual public official will often be the only way to vindicate constitutional rights.").

18. *Id.* at 553.

19. "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia." 42 U.S.C. § 1983.

20. Some scholars argue there is no basis for qualified immunity, and the doctrine is therefore unlawful. *See* William Baude, *Is Qualified Immunity Unlawful?*, 106 CAL. L. REV. 45 (2018). The precise contours of the immunity that existed at common law are beyond the scope of this article.

21. *See, e.g.*, Rosenthal, *supra* note 17.

22. Assuming, as the Court has, that a good-faith immunity existed at the common law it should exist in modern qualified immunity. *See* Michael Silverstein, *Rebalancing Harlow: A New Approach to Qualified Immunity in the Fourth Amendment*, 68 CASE W. L. REV. 495, 500–01 (2017).

23. Owen v. City of Independence, 445 U.S. 622, 637 (1980) (quoting Pierson v. Ray, 386 U.S. 547, 555 (1967)).

24. Wilkes v. Dinsman, 48 U.S. 89 (1849).

25. *See* Keller, *supra* note 15 at 18.

26. See *Wilkes*, 48 U.S. at 90.

decision whether to detain another person is entrusted to the commanding officer, "if he decide[s] that question in good faith, with pure motives, he is not answerable for any error in judgment."[27] It explained that officers were entitled to this immunity as long as "their motives are pure, and untain[t]ed with fraud of malice."[28] On the other hand, to be held liable a government actor must have been "malicious and wil[l]ful ."[29] *Wilkes* is one helpful guidepost to understand the good-faith common law immunity some officers received before Section 1983's enactment.[30]

The idea, then, is that Section 1983 should be read against this common law backdrop.[31] Congress is presumed to be aware of common law principles.[32] So the Court incorporates these common law principles into its analysis of claims under a statute unless there is evidence Congress wanted to abrogate them.[33] Because Section 1983 does not explicitly deride any immunities,[34] and there is no legislative history to suggest that's what Congress intended,[35] the Court purports to read Section 1983 "in harmony with" an immunity that existed at the common law.[36]

Accordingly, the Court has consistently incorporated immunities in Section 1983 cases.[37] In doing so, it initially stuck closely to the principle that "the tort

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27. *Id.* at 121.

28. *Id.* at 131.

29. *Id.*; *see also* Keller, *supra* note 15, at 28 (". . . *Wilkes* discussed malice as overcoming qualified immunity . . . .").

30. *See* Bruce D. Beach, *The Death of Wilkes v. Dinsman: 'Special Factors Counseling Hesitation' in Abandoning a Common Law Doctrine*, 41 BAYLOR L. REV. 179, 202 (1989) (explaining that *Wilkes* "represents the traditional common law approach to intramilitary immunity").

31. Buckley v. Fitzsimmons, 509 U.S. 259, 268 (1993); *see also* Wyatt v. Cole, 504 U.S. at 158, 164 ("If parties seeking immunity were shielded from tort liability when Congress enacted the Civil Rights Act of 1871—§ 1 of which is codified at 42 U.S.C. § 1983—we infer from legislative silence that Congress did not intend to abrogate such immunities when it imposed liability for actions taken under the color of state law.").

32. *See* ANTONIN SCALIA & BRYAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 318 (2012) ("The better view is that statutes will not be interpreted as changing the common law unless they effect the change with clarity".).

33. *Id.* ("A statute will be construed to alter the common law only when that disposition is clear.").

34. *See* § 1983; Noah Watson, *"'Yes Harm, No Foul': Recalibrating Qualified Immunity*, 64 WASH. U. J. L. & POL'Y 231, 235 (2021) ("T]he statute does not explicitly mention any immunities.").

35. *See* Briscoe v. LaHue, 460 U.S. 325, 337 (finding "no evidence that Congress intended to abrogate the traditional common law . . . immunity in § 1983 actions").

36. Malley v. Briggs, 475 U.S. 335, 339 (1986). The Court has repeatedly railed against reading § 1983 "in a historical vacuum." City of Newport v. Fact Concerts Inc., 453 U.S. 247, 258; Filarsky v. Delia, 566 U.S. 377, 383–84 (2012) ("Our decisions have recognized similar immunities under § 1983, reasoning that common law protections "'well grounded in history and reason' had not been abrogated 'by covert inclusion in the general language' of § 1983." (quoting Imbler v. Pachtman, 424 U.S. 409, 418 (1976)).

37. *See, e.g.*, Imbler, 424 U.S. at 421, 427 (holding that prosecutors are absolutely immune after conducting "a considered inquiry into the immunity historically accorded . . . at common law and the

liability created by Section 1983 cannot be understood in a historical vacuum."[38] For example, the Court held that legislators were absolutely immune from suit for actions taken during legislative proceedings.[39] To do so, it looked to the immunity that existed in sixteenth and seventeenth century Parliament, and the tradition of legislative free speech that existed in the Colonies.[40] In concluding that this absolute immunity existed even after Section 1983, the Court stated:

> Did Congress by the general language of its 1871 statute mean to overturn the tradition of legislative freedom achieved in England by Civil War and carefully preserved in the formation of State and National Governments here? Did it mean to subject legislators to civil liability for acts done within the sphere of legislative activity? . . . We cannot believe that Congress—itself a staunch advocate of legislative freedom—would impinge on a tradition so well grounded in history and reason by covert inclusion in the general language before us.[41]

Even as the Court moved into the modern era,[42] many of its absolute immunity decisions involved a historical analysis to locate the correct immunity at common law.[43] This is evident in *Briscoe v. Lahue*.[44] There, the Court held that witnesses in criminal proceedings are entitled to absolute immunity from damages suits alleging they gave perjured testimony.[45] The foundation for this holding was again the Court's understanding of the immunity available at common law.[46] It began by analyzing the stated purposes of Setion 1983 and the context of its enactment.[47] The Court ultimately held the immunity existed because it determined that Congress did not intend to abrogate common law witness immunity.[48]

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interests behind it"); Pierson v. Ray, 386 U.S. 547, 555–56 (1967) (relying on the common law to find police officers entitled to a qualified immunity).

38. *See Fact Concerts, Inc.*, 453 U.S. at 258.

39. Tenney v. Brandhove, 341 U.S. 367, 372 (1951).

40. *Id.*

41. *Id.* at 376.

42. *Briscoe* was decided just one term after *Harlow v. Fitzgerald.*

43. *Fact Concerts, Inc.*, 453 U.S. at 259–60 (holding that municipalities are absolutely immune from punitive damages because "[b]y the time Congress enacted what is now § 1983, the immunity of a municipal corporation from punitive damages at common law was not open to serious question").

44. Briscoe v. Lahue, 460 U.S. 325 (1983).

45. *Id.* at 326–34.

46. *Id.*

47. *Id.* at 337, 339–40 (explaining that the Act was enacted "less than a month after President Grant sent a dramatic message to Congress describing the breakdown of law and order in the Southern states").

48. *Id.* (relying on both the history of the Act's enactment and its language to find no evidence Congress intended to abrogate the common law immunity).

It is therefore well-established that immunities curb the literal effect of Section 1983.[49] To reiterate, no immunity appears in the text of the statute.[50] Instead, the common law is supposed to illuminate the statute, and the Court decides Section 1983 cases with common law principles in mind.[51]

A. Early Cases

So it is against this common law backdrop that the Court began its assessment of executive branch immunity under Section 1983.[52] The Supreme Court first incorporated qualified immunity for suits arising under the statute in *Pierson v. Ray*.[53] There, fifteen Black clergymen conducted a "prayer pilgrimage," where they planned to visit places of worship across the country to promote integration and racial equality.[54] They were arrested and convicted for using a segregated rest facility at a Jackson, Mississippi bus terminal.[55] The clergymen later sued the arresting officers[56] for false arrest and imprisonment under Section 1983.[57]

The Court held that police officers are entitled to qualified immunity under Section 1983 if they acted with "good faith and probable cause."[58] In coming to this conclusion, the Court considered the consequences of exposing officers to suit without any liability.[59] It observed that "[a] policeman's lot is not so unhappy that

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49. *See* Michael M. Rosen, *A Qualified Defense: In Support of the Doctrine of Qualified Immunity in Excessive Force Cases, With Some Suggestions for its Improvement*, 35 GOLDEN GATE UNIV. L. REV. 139, 141–42 (2005) (explaining that an officer may violate a constitutional right—and therefore be subject to suit under Section 1983—but ultimately escape liability because of qualified immunity).

50. *See* 42 U.S.C. § 1983; Tower v. Glover, 467 U.S. 914, 920 (1984) ("On its face § 1983 admits no immunities.").

51. City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 258 (1981) ("One important assumption underlying the Court's decisions in this area is that members of the 42d Congress were familiar with common-law principles, including defenses previously recognized in ordinary tort litigation, and that they likely intended these common-law principles to obtain, absent specific provisions to the contrary.").

52. Burns v. Reed, 500 U.S. 478, 493 (1991). In the early years of evaluating immunity under Section 1983, the Court was relatively restrained. In faithfully applying the statute, the Court began by "look[ing] to the common law and other history for guidance . . . to discern Congress' likely intent in enacting § 1983." *Id.*

53. Pierson v. Ray, 386 U.S. 547 (1967).

54. *Id.* at 552.

55. *Id.* at 549.

56. The plaintiffs also sued the local judge for damages under Section 1983 for an unconstitutional conviction. *Id.* at 551. The Court held the judge was entitled to absolute immunity. *Id.* at 553.

57. *Id.* at 550.

58. *Id.* at 557. The Court took this opportunity to double down on the availability of qualified immunity for officers acting objectively reasonably. It emphasized the fair notice aspect of qualified immunity by writing that "a police officer is not charged with predicting the future of constitutional law." *Id.*

59. *Id.* at 555.

he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does."[60] Ultimately, the Court grounded its holding in "the background of tort liability," which, "in the case of police officers making an arrest, is the defense of good faith and probable cause."[61] This good faith and probable cause standard formed the basis for an immunity comprising both an objective and subjective component.[62]

In the cases immediately following *Pierson*, the Court continued to acknowledge the common law as the basis for its qualified immunity decisions.[63] In *Scheuer v. Rhodes*, families of those who died during protests at Kent State sued the Ohio governor, other state officials, and members of the Ohio National Guard.[64] The Court took the same approach it did in *Pierson*—it located the immunity at common law and explained the policy rationales that led to the development of that immunity.[65] First, it noted that the concept of executive branch immunity stemmed all the way back to the axiom that "the 'King can do no wrong.'"[66] It next considered the policies that led to this common law creation—namely, the injustice of exposing officers exercising their discretion to liability "particularly in the absence of bad faith" and the risk that potential liability might deter a capable officer from taking swift action when it is necessary.[67] It expressed the "policy" that "it is better to risk some error and possible injury from such error than not to decide or act at all."[68]

The Court also recognized that the immunity a low-level officer receives might not always match up with that of a more senior executive branch official.[69] This is because higher-ups at times need more flexibility to make a range of decisions, while a police officer's decision-making ability was sufficiently protected by

60. *Id.*

61. *Id.* at 556–57.

62. Kenneth Duvall, *Burdens of Proof and Qualified Immunity*, 37 S. ILL. U. L. J. 135, 148 (2012) ("The dawn of the good-faith and probable cause defense, and thus the germ of qualified immunity, came in *Pierson v. Ray*.").

63. *See id.* at 149–50. Because policy considerations began to pervade its analysis, the Court did not blindly apply whatever immunity existed in the common law to the facts at hand. *See id.* at 150–51. However, in the cases before *Harlow,* it continued to recognize that the common law concept of immunity is what enabled immunities under Section 1983 to exist.

64. Scheuer v. Rhodes, 416 U.S. 232, 234 (1974).

65. *Id.* at 239–40.

66. *Id.* at 239.

67. *Id.* at 240.

68. *Id.* at 242.

69. *Id.* at 247.

immunity when he acts with "good faith and probable cause."[70] As a result, the Court left open the door for the possibility that varying degrees of qualified immunity protection might be appropriate "dependent upon the scope of discretion and responsibilities of the office."[71]

The next term, in *Wood v. Strickland*, students sued school officials under Section 1983 after being expelled for spiking the punch at an after-school meeting.[72] The Court explained that the officials were entitled to qualified immunity unless either (1) the defendant "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected," or (2) "he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student"[73] The Court acknowledged that, though the courts of appeals disagreed on the exact contours of the immunity, there was "general agreement on the existence of a 'good faith' immunity."[74] It again looked to the common law to justify its extension of immunity to school administrators, citing a series of late-nineteenth and early-twentieth century state-court cases.[75] Addressing whether the inquiry was objective or subjective, the Court explained:

As we see it, the appropriate standard necessarily contains elements of both. The official himself must be acting sincerely and with a belief that he is doing right, but an act violating a student's constitutional rights can be no more justified by ignorance or disregard of settled, indisputable law on the part of one entrusted with supervision of students' daily lives than by the presence of actual malice.[76]

Here, the Court further defined the *Scheuer* qualified immunity standard by making it explicit that an objective and subjective component were both necessary for qualified immunity.[77] But according to the dissent, the majority's reference to

70. *Scheuer*, 416 U.S. at 245–47 ("In short, since the options which a chief executive and his principal subordinates must consider are far broader and far more subtle than those made by officials with less responsibility, the range of discretion must be comparably broad.").

71. *Id.* at 247.

72. Wood v. Strickland, 420 U.S. 308, 310–11 (1975).

73. *Id.* at 308, 322.

74. *See id.* at 315.

75. *Id.* at 318 n.9. It relied on these state-court decisions to hold that school administrators were entitled to qualified, rather than absolute immunity, because "the judgment implicit in this common-law development is that absolute immunity would not be justified because it would not sufficiently increase the ability of school officials to exercise their discretion in a forthright manner . . . ." *Id.* at 320.

76. *Id.* at 321.

77. *See* Case Comment, Harlow v. Fitzgerald*: The Lower Courts Implement the New Standard for Qualified Immunity Under Section 1983*, 132 U. PA. L. REV. 901, 909–10 (1984) (suggesting that

actions in "ignorance or disregard of settled, indisputable law"[78] required state actors to know too much.[79] If officials could still be held liable for violating constitutional rights they were not aware of, their immunity would be substantially weakened.[80] Specifically, the dissent worried that judges or juries might find a particular constitutional right to be "settled" that most scholars would agree is instead up for debate.[81] These worries would end up paving the way for the creation of modern qualified immunity, which defines "settled" law with an extremely narrow lens.[82]

Applying *Scheuer* and *Rhodes* a few years later, the Court explained the test for immunity "focuses not only on whether the official has an objectively reasonable basis for that belief, but also on whether '[t]he official himself [is] acting sincerely and with a belief that he is doing right.'"[83] There, the Court addressed the question of whether a plaintiff must show the defendant acted in bad faith to prevail or whether a defendant may alternatively plead good faith as an affirmative defense.[84] It concluded that, because qualified immunity is a defense to suit, it is a defendant's burden to show he acted in good faith.[85] That is in part because a plaintiff may not know from the outset whether a defendant did so.[86] Accordingly, as the Court continued to sharpen qualified immunity's edges, the burden remained with the defendant to plead the qualified immunity defense, and this defense incorporated the defendant actor's state of mind.[87]

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though the Court aimed to clarify the standard, the Court's incorporation of an objective component actually "muddied the analysis").

78. *Wood*, 420 U.S. at 321.

79. *Id.* at 328–29 (Powell, J., dissenting).

80. *Id.*

81. *Id.* at 329.

82. *See* Case Comment, Harlow v. Fitzgerald*: The Lower Courts Implement the New Standard for Qualified Immunity Under Section 1983*, *supra* note 77, at 911–12 ("Thus, the extent of protection afforded to public officials by *Wood*'s objective analysis depended upon the degree of uncertainty that judges found in the law applicable to each particular case. Almost all legal issues, of course, could be labeled as unclear by judges wishing to do so.").

83. Gomez v. Toledo, 446 U.S. 635, 641 (1980) (quoting *Wood*, 420 U.S. at 321).

84. *Id.* at 635–36.

85. *Id.* at 640.

86. *Id.*

87. *Id.*

B. Harlow v. Fitzgerald

Harlow v. Fitzgerald[88] marked a major departure from the Court's approach to qualified immunity.[89] The question before the Court in *Harlow* was the immunity available to senior aides and advisors to the President.[90] A former Air Force official had sued White House aides for conspiracy to violate his constitutional rights.[91] He claimed they had him fired because he planned to report unsavory purchasing practices.[92] The Court first began its analysis by recognizing the common law as the source for government official immunity.[93] Then working to define the qualified immunity available in this case, the Court relied on policy considerations and the social costs of a weakened immunity.[94] Those costs included: (1) litigation expenses, (2) diversion of energy from official duties, (3) deterrence of citizens from public office, and (4) a chilling effect of public functions.[95]

Weighing these costs, the Court eliminated the subjective component of qualified immunity.[96] Though its precedent included an objective and subjective component for qualified immunity, the *Harlow* Court declined to be bound by it.[97] Although the Court laid out several social costs justifying its decision, it was particularly concerned with creating an immunity standard that led to the swift resolution of insubstantial claims.[98] The majority believed that because an officer's state of mind or good faith was a fact question, it might be capable of resolution only by a jury or factfinder.[99] Though certain "social costs" accompanied Section 1983 suits generally, there were "special costs to 'subjective' inquiries"—namely the broad discovery required to show a defendant's state-of-mind and the inability for cases to be resolved at the summary judgment stage when a plaintiff alleges

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

89. *See* Thomas E. O'Brien, *The Paradox of Qualified Immunity: How a Mechanical Application of the Objective Legal Reasonableness Test Can Undermine the Goal of Qualified Immunity*, 82 TEX. L. REV. 767, 772 (2004) (explaining that "determining qualified immunity on the basis of purely objective factors was first articulated by the Supreme Court in *Harlow v. Fitzgerald*.").

90. *Harlow*, 457 U.S. at 802.

91. *Id.* at 804.

92. *Id.*

93. *Id.* at 806.

94. *Id.* at 813–14.

95. *Id.* at 814.

96. *Id.* at 818.

97. *Id.* at 815–16.

98. *Id.* at 814–15 (accepting the argument that "the dismissal of insubstantial lawsuits without trial . . . requires an adjustment of the 'good faith' standard established by our decisions").

99. *Id.* at 816. The Court explicitly relied on Federal Rule of Civil Procedure 56 as a basis in its reasoning, explaining that disputed facts must be resolved by a jury. *Id.*

bad faith.[100] So the Court held that "allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery."[101] It thus set forth the modern version of qualified immunity that considers only the existence of clearly established law, regardless of an officer's subjective beliefs.[102]

Under the modern version of qualified immunity, a police officer or other executive branch official is not liable—even if he violated the constitution—if he did so in the absence of "clearly established law."[103] For law to be clearly established, "existing precedent must have placed the statutory or constitutional question beyond debate."[104] So an officer will be stripped of qualified immunity and exposed to trial only when the precedent is "clear enough that every reasonable official" would understand that his conduct violates the law.[105]

The purported goal of *Harlow*'s change to the immunity standard was to minimize the number of insubstantial suits that proceeded past the early stages of litigation and ultimately went to trial.[106] Discerning a defendant's subjective intent often requires discovery and makes it more likely a case will require a trial.[107] These policy concerns drove the *Harlow* decision.[108] But they were then, as they are now, unrelated to the text of the statute and unrelated to the immunity that existed at the common law.[109]

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100. *Id.* at 816–17.

101. *Id.* at 817–18.

102. To be sure, Justice Brennan's concurrence attempted to curb the elimination of the subjective component. He explained that the standard should not protect those who actually *know* they are violating the law so that "the clever and unusually well-informed violator of constitutional rights will not evade just punishment for his crimes." *Id.* at 821 (Brennan, J., concurring). It appears then that Justice Brennan might have held accountable those who act with the specific intent to deprive a citizen of her rights.

103. *See, e.g.*, Kisela v. Hughes, 138 S. Ct. 1148, 1152 (2018).

104. Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011).

105. District of Columbia v. Wesby, 138 S. Ct. 577, 590 (2018).

106. *Harlow*, 457 U.S. at 816–18.

107. See *id.*

108. Silverstein, *supra* note 22, at 502–03.

109. *See* Allen H. Denson, *Neither Clear Nor Established: The Problem with Objective Legal Reasonableness*, 59 ALA. L. REV. 747, 755 (2008) ("The culmination of this emphasis on policy-based qualified immunity and the subsequent abrogation of the 'good faith' approach adhered to since *Pierson* occurred when the court decided *Harlow v. Fitzgerald*.").

Harlow is the jumping off point for modern qualified immunity.[110] The unique facts and procedural posture of the case, however, are unlike most modern qualified immunity cases. First, the plaintiffs in *Harlow* did not sue under Section 1983.[111] Instead, because the defendants were federal agents, they sued under the line of cases set forth in *Bivens* that extended a similar remedy against federal officials.[112] *Bivens* actions are a judicial creation—they aren't tethered to the text of Section 1983 or the history surrounding its enactment.[113] But the Court quickly applied the version of qualified immunity announced in *Harlow* to both *Bivens* and Section 1983 cases.[114] As a result, a case detached from the text, history, or purpose of Section 1983 became its seminal authority.

Second, the defendants in *Harlow* were high-ranking officials.[115] That is not the case for most qualified immunity cases, which often involve lower-level state employees.[116] The social costs of holding senior White House officials liable for money damages might be greater than for the vast majority of defendants.[117] Most Section 1983 defendants are people like police officers or public school teachers and administrators.[118] The reasoning in *Harlow*, however, has been applied to all types of executive branch defendants, expanding to create an often impermeable shield for these state actors.[119] As a result, today's qualified immunity standard is

110. *See id.* at 756; *see also* Silverstein, *supra* note 22, at 502 ("*Harlow* announced the qualified-immunity standard still in force today. The Supreme Court has clarified the standard since the decision, but it has not deviated from the balance struck by *Harlow*.").

111. *See* Harlow, 457 U.S. at 805.

112. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 389 (1971). A *Bivens* action allows individuals to sue federal—rather than state—officials for damages for constitutional violations. CHARLES ALAN WRIGHT & ARTHUR R. MILLER, 33 FEDERAL PRACTICE AND PROCEDURE § 8388 DAMAGES AGAINST OFFICIALS—BIVENS ACTIONS (April 2022 ed.).

113. *See* MURPHY, *supra* note 112.

114. *See* Davis v. Scherer, 468 U.S. 183, 195 (1984) (applying *Harlow*'s qualified immunity standard to a § 1983 claim only two terms later).

115. *See Harlow*, 457 U.S. at 802-03.

116. *See, e.g.*, District of Columbia v. Wesby, 138 S. Ct. 577 (2018); Kisela v. Hughes, 138 S. Ct. 1148 (2018).

117. There is also a valid argument that, at common law, high-ranking officials like these enjoyed an absolute immunity, rather than a common law immunity. *See* Keller, *supra* note 15 at 1337. If so, the fortified protection in *Harlow* makes sense for the defendants in the case. What makes less sense, however, is the extension of *Harlow*'s holding to all qualified immunity defendants.

118. *See* Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L. J. 2, 22 (2017) ("Most § 1983 cases against state and local law enforcement allege Fourth Amendment violation—excessive forces, false arrest, and wrongful searches.").

119. *See* Anderson v. Creighton, 483 U.S. 635, 661–62 (1987) (Stevens, J., dissenting) ("The suggestion that every law enforcement officer should be given the same measure of immunity as a Cabinet officer or a senior aide to the President of the United States is not compelling.").

completely divorced from the statute it is supposed to accompany and that statute's aim to deter state officials from violating the constitution.[120]

II. STARE DECISIS CANNOT PROTECT MODERN QUALIFIED IMMUNITY

This Court should therefore reexamine *Harlow v. Fitzgerald* and put forth a new form of qualified immunity, one more faithful to the "good faith" immunity that predated *Harlow*. Though the Court generally upholds and continues to apply its past decisions, *Harlow* should be one of many exceptions to that rule.

There are plenty of good reasons courts tend to stick with their settled decisions. *Stare decisis* is the principle that courts should usually adhere to their precedent.[121] Sticking to past decisions protects reliance interests.[122] And the Supreme Court has often expressed that it is generally better for the law to be settled than for it to be right.[123] Championing stability in the law also "reduces incentives for challenging settled precedents, saving parties and courts the expense of endless relitigation."[124] Many believe that prioritizing consistency can strengthen the integrity of the judicial process and the Court's legitimacy.[125]

But the typical justifications for *stare decisis* cannot justify retaining the *Harlow* decision.[126] Instead, several factors help determine when it is appropriate to overrule past precedent: (1) the soundness of the decision's reasoning, (2) its

120. One of the Court's primary concerns in reformulating qualified immunity was preventing overdeterrence. *Harlow*, 457 U.S. at 814. But this concern with deterring individuals from accepting office or deterring officers from acting has nearly eclipsed the concern of the statute's proponents that, without a federal remedy with teeth, it is more difficult to deter state actors from violating constitutional rights.

121. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 362 (2010).

122. Hilton v. S.C. Pub. Rys. Comm'n, 502 U.S. 197, 202 (1991) ("Stare decisis has added force when the legislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a previous decision, for in this instance overruling the decision would dislodge settled rights and expectations or require an extensive legislative response."); *see also* Allied-Signal, Inc. v. Director, 504 U.S. 768, 783 (1992) ("[R]eliance interests are of particular relevance because '[a]dherence to precedent promotes stability, predictability, and respect for judicial authority.").

123. Payne v. Tennessee, 501 U.S. 808, 828 (1991) (Stare decisis is not an inexorable command; rather, it "is a principle of policy and not a mechanical formula of adherence to the latest decision.") (quoting Helvering v. Hallock, 309 U.S. 106 (1940)).

124. Kimble v. Marvel Entertainment, LLC, 576 U.S. 446, 455 (2015).

125. *Payne*, 501 U.S. at 827.

126. In recent years, the Supreme Court has indicated a greater willingness to depart from *stare decisis* and overrule decisions it now considers incorrect. *See, e.g.*, Dobbs v. Jackson Women's Health Organization, 142 S. Ct. 2228 (2022); Ramos v. Louisiana, 140 S. Ct. 1390 (2020); Franchise Tax Bd. of Cal. v. Hyatt, 139 S. Ct. 1485 (2019).

workability, (3) its consistency, and (4) reliance interests the decision implicates.[127] Each of these factors supports returning to the pre-*Harlow* immunity test that considers a state actor's subjective good or bad faith.

A. Quality of Reasoning

First, "[a]n important factor in determining whether a precedent should be overruled is the quality of its reasoning."[128] *Harlow*'s reasoning—as applied to Section 1983 cases—is weak because it is unrelated to the statute's text or history.[129] Instead, the *Harlow* majority relied almost entirely on policy justifications to disrupt an otherwise fairly consistent area of the law.[130] As is evident in *Wilkes* and the cases discussing absolute immunity, any immunity that existed at the common law considered an individual's subjective good faith.[131] The *Harlow* Court's elimination of this subjective element cannot be dismissed as a mere recalibration of the standard.[132] Instead, it "completely reformulated qualified immunity along principles not at all embodied in the common law."[133]

The *Harlow* Court wandered away from its judicial function and toward "the essentially legislative activity" of creating a qualified immunity rule from scratch.[134] In other words, the Court plainly "substitute[d] [its] own policy

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127. Janus v. Am. Fed'n of State, Cty., and Mun. Emps., Council *31*, 138 S. Ct. 2448, 2478–79 (2018). Based on the reasons presented *infra*, the Court should also reexamine *Harlow v. Fitzgerald.*

128. *Janus*, 138 S. Ct. at 2479.

129. David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. PA. L. REV. 23, 49 (1989) ("*Harlow*'s standard was broader than necessary, immunizing actions which an official in some circumstances could reasonably be expected to know violate constitutional rights. By focusing on the applicable legal norms, however, it had the virtue of limiting immunity to situations where officials were most likely acting without specific constitutional guidance.").

130. Keller, *supra* note 15, at 1394 (explaining that the *Harlow* Court abrogated subjective inquiries "precisely because malice is a 'question of fact' for the 'jury' that precluded summary judgment resolution of some cases").

131. *Wilkes v. Dinsman*, 48 U.S. 89, 121 (1849).

132. Nor can it be adequately justified in response to Monroe v. Pape. In *Monroe*, the Court expanded liability under Section 1983 by holding that "under color of" law included unauthorized as well as authorized actions. 365 U.S. 167, 187 (1961). First, *Monroe* was decided more than twenty years before *Harlow*. Therefore, the *Harlow* Court's expansion of immunity cannot be described as necessary to keep pace with the expansion of liability in *Monroe*. Second, a correct interpretation of the statute in *Monroe* does not demand an incorrect interpretation in *Harlow*. Even if *Monroe* were wrongly decided, a solution to that problem should not come from further distorting Section 1983 in the context of immunity, rather than liability.

133. Anderson v. Creighton, 483 U.S. 635, 645 (1987).

134. *See* Crawford-El v. Britton, 523 U.S. 574, 611–12 (1998) (Scalia, J., dissenting) ("We find ourselves engaged, therefore, in the essentially legislative activity of crafting a sensible scheme of qualified immunities for the statute we have invented—rather than applying the common law embodied in the statute that Congress wrote.").

preferences for the mandates of Congress."[135] Modern qualified immunity conflicts not only with modern principles of statutory interpretation, but also with the text, purpose, and history of the statute it accompanies.[136]

Most justices today flatly reject interpretations that flout text and history. Rooted neither in the text of Section 1983 nor its history,[137] *Harlow*'s qualified immunity is a relic of a time before textualism was the prevailing practice.[138] Commenting on the now dominant approach to interpretation, Justice Kagan famously remarked that "we're all textualists now."[139] Championing policy interests above the text and purpose of a statute is at odds with how most justices, judges, and scholars now agree statutes should be interpreted.[140] Indeed, the *Harlow* decision comes close to the type of "freewheeling policy choice" the Court should not make.[141] As a result, the quality of its reasoning cannot be a reason to keep *Harlow*.

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

136. *Id.* at 1871 ("Because our analysis is no longer grounded in the common-law backdrop against which Congress enacted the 1871 Act, we are no longer engaged in 'interpret[ing] the intent of Congress in enacting' the Act.") (quoting Malley v. Briggs, 475 U.S. 335, 342 (1986)).

137. *Anderson*, 483 U.S. at 645 ("[T]he Court completely reformulated qualified immunity along principles not at all embodied in the common law, replacing the inquiry into subjective malice so frequently required at common law with an objective inquiry into the legal reasonableness of the official action.").

138. *See* Anton Metlistky, *The Roberts Court and the New Textualism*, 38 CARDOZO L. REV. 671, 675 (2016) ("Over the last several decades, the new textualism has asserted itself as the dominant method of statutory interpretation.").

139. Harvard Law School, *The Antonin Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading Of Statutes*, YOUTUBE (Nov. 25, 2015), https://www.youtube.com/watch?v=dpEtszFT0Tg&ab_channel=HarvardLawSchool. This year, however, Kagan criticized conservative members of the Court for being "textualist only when being so suits [them]." *West Virginia v. Environmental Protection Agency*, 142 S. Ct. 2587, 2641 (2022) (Kagan, J., dissenting). Regardless of the merits of Kagan's criticism, the Justices at least purport to be engaging in textualism to justify their statutory interpretations.

140. Wyatt v. Cole, 504 U.S. 158, 171–72 (1992) (Kennedy, J., concurring) ("[W]e may not transform what existed at common law based on our notions of policy or efficiency."); Buckley v. Fitzsimmons, 509 U.S. 259, 268 (1993) ("[W]e do not have a license to establish immunities from § 1983 actions in the interests of what we judge to be sound public policy. Our role is to interpret the intent of Congress in enacting § 1983, not to make a freewheeling policy choice.") (internal quotations and citations omitted).

141. *Malley*, 475 U.S. at 342.

B. Workability

Second, *stare decisis* does not require the Court to adhere to unworkable decisions.[142] Although the *Harlow* Court advanced litigation-related policy rationales to justify its decision, modern qualified immunity is largely unworkable.[143] By requiring an exceedingly similar case to clearly establish the law,[144] qualified immunity has eclipsed the statute Congress enacted.[145]

The Court has continued to heighten the clearly established standard, particularly in the Fourth Amendment context.[146] Although plaintiffs need not present "a case directly on point" for a right to be clearly established, "existing precedent must have placed the statutory or constitutional question beyond debate."[147] General propositions of the law do not suffice.[148] Instead, "the violativenatureof particular conduct[must be]clearlyestablished . . . in light of the specific context of the case, not as a broad general proposition."[149] And the contours of the right must be sufficiently definite that "any reasonable official in the [officer's] shoes would have understood that he was violating it."[150] This emphasis on particularity enables a defendant who violated constitutional rights uniquely—

142. Montejo v. Louisiana, 556 U.S. 778, 792 (2009) ("[T]he fact that a decision has proved 'unworkable' is a traditional ground for overruling it.").

143. Scott Michelman, *The Branch Best Qualified to Abolish Immunity*, 93 NOTRE DAME L. REV. 1999, 2016 (2018) (arguing qualified immunity is unworkable because "nearly every case requires judges to make a legal determination based on vague and malleable concepts like the 'reasonable officer' and 'fair warning'").

144. District of Columbia v. Westby, 138 S. Ct. 577, 590 (2018) ("[W]e have stressed the need to identify a case where an officer acting under similar circumstances . . . was held to have violated [the law].") (cleaned up).

145. Karen Blum, Erwin Chemerinsky & Martin A. Schwartz, *Qualified Immunity Developments: Not Much Hope Left for Plaintiffs*, 29 TOURO L. REV. 633, 656 (2013) ("Therefore, courts are able to grant qualified immunity and dismiss Section 1983 claims by requiring an exact case on point from a high level court and the recently implemented heightened standard for proving a clearly established law.").

146. *See* Mullenix v. Luna, 577 U.S. 7, 26 (Sotomayor, J., dissenting) ("By sanctioning a "shoot first, think later" approach to policing, the Court renders the protections of the Fourth Amendment hollow.").

147. Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011).

148. Riechle v. Howards, 566 U.S. 658, 665 (2012).

149. *Mullenix*, 577 U.S. at 12 (2015) (quoting *Aschcroft*, 563 U.S. at 741).

150. Plumhoff v. Rickard, 572 U.S. 765, 778–79 (2014).

that is, in a way that hasn't yet been done in a case before the Supreme Court or in their circuit[151]—to escape liability.[152]

Even with these directives in mind, courts still face challenges in determining whether a right is "clearly established."[153] One of these challenges—finding a case on point—is compounded by *Pearson v. Callahan*, which permits courts to first answer whether there is clearly established law before deciding if there has been a constitutional violation.[154] Some argue *Pearson* has led to a stagnation in the development of constitutional law.[155] They note that by resolving cases on the immunity issue, courts leave prospective plaintiffs with little to point to in the way of clearly established law.[156]

It is worth noting that *Pearson* overruled *Saucier v. Katz*[157] just eight years after it was decided.[158] And it did so because it "now [had] a considerable body of new experience to consider regarding the consequences of requiring adherence to this inflexible procedure."[159] In short, the Court thought there was a better way. To be sure, the *Saucier* rule was certainly judge-made and related only to how a judge might walk through a case, so it was afforded less *stare decisis* protection.[160] But

151. Not all courts are willing to accept that circuit precedent can clearly establish a constitutional right to put an officer on notice. For example, in Ramirez v. Escajeda, 44 F.4th 287, 293 (5th Cir. 2022), the court explained that it is an open question whether the cases it publishes can clearly establish a constitutional right. It relied on *Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4, 7, (2021) (per curiam), for this hesitation, as that case "assum[ed]" the proposition that "controlling Circuit precedent clearly establishes law for purposes of § 1983." *See also Crittindon v. LeBlanc*, 37 F.4th 177, 199 n.4 (5th Cir. 2022) (Oldham, J., dissenting) ("The Supreme Court has never said that we can hold . . . officers liable under § 1983 for violating the commands of our precedent (as opposed to theirs).").

152. Madeline Sharp, *The Erosion of Civil Rights Remedies: How* Ashcroft v. al-Kidd *Altered Qualified Immunity*, 10 DEPAUL J. FOR SOC. JUST. 1, 6 (2017) (explaining that the *Hope v. Pelzer* decision—where the Court declined to require a case factually on point—is the anomaly).

153. *See* John C. Williams, *Qualifying Qualified Immunity*, 65 VAND. L. REV. 1295, 1295–99 (2012) (arguing that courts struggle to (1) define how general or specific the right is, (2) identify which sources of law might be capable of clearly establishing a right, and (3) determine whether a right can be clearly established if courts have issued conflicting opinions on it).

154. Pearson v. Callahan, 555 U.S. 223, 227 (2009).

155. Silverstein, *supra* note 22, at 522 (arguing that without reaching the constitutional question, courts create "a cycle where a constitutional violation need not be answered 'because the law is unclear and the law is unclear because the violation continues to go unaddressed.'") (citation omitted).

156. Sam Kamin, *Harmless Error and the Rights/Remedies Split*, 88 VA. L. REV. 1, 49 (2002) ("Furthermore, if the entitlement to qualified immunity were determined before the merits of the underlying case, difficult issues and close cases would almost never be decided on the merits in damages actions . . . This nearly circular analysis could serve to stagnate the substance of constitutional law almost indefinitely.").

157. Saucier v. Katz, 533 U.S. 194 (2001).

158. *Compare Pearson*, 555 U.S. 223 *with Saucier*, 533 U.S. 194.

159. *Pearson*, 555 U.S. at 234.

160. *Id.*at 233–34.

even so, this openness to better ways of evaluating qualified immunity cases shows that it is not an area of the law that is so deeply entrenched it cannot be altered.[161] Indeed, because the court has recently backtracked on the order of operations in qualified immunity cases, *Harlow* should not be immune from reconsideration either.

C. Consistency of the Doctrine

Third, a case's consistency with other related decisions is a relevant consideration in whether to reverse it.[162] Cases applying *Harlow* and its progeny have been less than consistent.[163] Since *Harlow* was decided, the Court has continued to tinker with qualified immunity and has heightened the standard for clearly established law.[164] Although the objective standard was lauded as a simpler approach,[165] applying the ever-narrowing clearly established test has further divided lower courts.[166] Lower courts splinter on exactly what is required for clearly established law.[167] And, at the same time, the Court continues to move the needle on what is required for the law to be clearly established, making the standard almost elusive.[168]

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161. *But see* Dobbs v. Jackson Women's Health Org., 142 U.S. 2228, 2257 (considering and rejecting the argument that abortion rights were "entrenched").

162. *See* Janus v. Am. Fed'n of State, 138 S. Ct. 2448, 2478 (2018).

163. Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1818 (2018) ("[T]he Court perpetuates uncertainty about the contours of the Constitution and sends the message to officers that they may be shielded from damages liability even when they act in bad faith.").

164. *Id.* at 1833.

165. Harlow v. Fitzgerald, 457 U.S. 800, 815–16 (1982).

166. Michael S. Catlett, *Clearly Not Established: Decisional Law and the Qualified Immunity Doctrine*, 47 ARIZ. L. REV. 1031, 1054 (2005) (detailing the splits among the circuits in determining whether law is clearly established).

167. John C. Jeffries, Jr., *What's Wrong with Qualified Immunity?*, 62 FLA. L. REV. 851, 852 (2010) (explaining that "the circuits vary widely in approach"); Michelman *supra* note 143 at 2015–16 ("Courts have had difficulty applying qualified immunity consistently, as figuring out what a reasonable officer "should have known" and at what level of specificity a legal principle has been established can devolve into an almost metaphysical exercise.").

168. *See, e.g.*, District of Columbia v. Wesby, 138 S. Ct. 577, 590 (2018) ("The 'clearly established' standard also requires that the legal principle clearly prohibit the officer's conduct in the particular circumstances before him. The rule's contours must be so well defined that it is 'clear to a reasonable officer that his conduct was unlawful in the situation he confronted.'"); White v. Pauly, 137 S. Ct. 548, 552 (2017) ("The panel majority misunderstood the "clearly established" analysis: It failed to identify a case where an officer acting under similar circumstances.").

Additionally, the circuits differ on what authority can even serve as clearly established law.[169] There is a variety of approaches among the lower courts on what cases actually put an officer on notice.[170] And some courts have not even answered the question, instead noting that the Supreme Court has left it open.[171]

The fractures do not stop there. The courts of appeals are further divided on what to make of the Supreme Court's decision in *Hope v. Pelzer*.[172] There, the plaintiff was an Alabama prisoner who had been twice handcuffed to a hitching post as punishment for disruptive conduct.[173] The Eleventh Circuit found that this violated his Eight Amendment right to be free of cruel and unusual punishment.[174] But because there was no case with "materially similar" facts, it granted defendants qualified immunity.[175] The Supreme Court rejected this "rigid gloss on the qualified immunity standard."[176] It instead explained that "officials can still be on notice that their conduct violates established law even in novel factual circumstances."[177] The combination of related Eleventh Circuit precedent, a DOJ report, and "[t]he obvious cruelty inherent in this practice" was enough to put the defendants on notice that their conduct was unlawful.[178]

The *Hope* Court left open the door for whether "obviousness" is ever enough to clearly establish that conduct violates the Constitution.[179] And the courts of appeals do not answer that question uniformly.[180] Some apply a circuit-created

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169. Michael S. Catlett, *Clearly Not Established: Decisional Law and the Qualified Immunity Doctrine*, 47 ARIZ. L. REV. 1031, 1044–45 n.112 (2005) (explaining that the question whether to look only to Supreme Court precedent or incorporate circuit or district cases divides the circuit courts).

170. Amelia A. Friedman, *Qualified Immunity in the Fifth Circuit: Identifying the "Obvious" Hole in Clearly Established Law*, 90 TEX. L. REV. 1283, 1289–90 (2012). Friedman details the split among the circuits over what law can clearly establish a right: "The Second and Eleventh Circuits limit the analysis to case law from within each circuit. The Eighth and Ninth Circuits are willing to consider all available decisional law. The Fourth and Sixth Circuits only look to extra-circuit case law in limited circumstances and as such are practically as restrictive as the Eleventh Circuit. The Fifth Circuit nominally recognizes that courts may treat case law from other circuits as a source of clearly established law . . . ." *Id.* (citations omitted).

171. *See* Ramirez v. Escajeda, 44 F.4th 287, 293 (2022).

172. Hope v. Pelzer, 536 U.S. 730 (2002).

173. *Id.* at 733.

174. *Id.* at 738.

175. *Id.*

176. *Id.* at 739.

177. *Id.* at 741.

178. *Id.* at 745–46.

179. *See id.* at 741 ("Arguably, the violation was so obvious that our own Eighth Amendment cases gave the respondents fair warning that their conduct violated the Constitution.").

180. Friedman, *supra* note 171, at 1298–90 (explaining that the circuits have interpreted the *Hope* decision differently).

framework to the question, others openly allow an "obvious" case, some circuits suggest that an obvious case *might* clearly establish the law, and some have not yet embraced the concept at all.[181] These examples illustrate the inconsistencies inherent in the qualified immunity doctrine. A reexamination of *Harlow* might pave the way for a uniform resolution of some of these questions. Therefore, any consistency cannot not support upholding *Harlow*.

D. Reliance on the Decision

Upholding reliance interests is another reason courts may choose to stick to a past decision.[182] "Traditional reliance interests arise 'where advance planning of great precision is most obviously a necessity.'"[183] But section 1983 suits often arise from split-second encounters and accidents, rather than plans, so those traditional reliance interests are not immediately implicated.

Reliance interests arise, of course, for the courts applying *Harlow* and its progeny and the state actors who have been trained under these cases.[184] But "reliance interests can be overcome by the countervailing benefits of interpreting the law correctly."[185] And because courts now need not reach the constitutional question in a Section 1983 case, reliance interests are weaker than they could be, as constitutional law is slower to develop, and fewer rights are clearly established.[186]

And at least for some, managing an immunity that considers a state actor's good faith will not be totally new. Some states have clung to the two-part subjective and objective inquiry for the immunity in their state-law causes of action against officers, showing that litigants and courts are well-equipped to consider a defendant's subjective intent.[187] Though not corresponding to a federal cause of action, the existence of these subjective inquiries in state agent immunity might

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181. *See id.* (detailing the approaches among the circuits and finding a lack of consistency and uniformity).

182. *See* Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2484 (2018).

183. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2276 (2022) (quoting Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 856 (1992)).

184. *See* Randy J. Kozel, *Precedent and Reliance*, 62 EMORY L. J. 1459, 1480–81 (2013) ("Even if the legal system's architects—including its judges—disclaim any fidelity to the past, ceaseless and pervasive overhaul of the legal order cannot be squared with the stable core that the rule of law requires.") (citing *Casey*, 505 U.S. at 866).

185. *Id.* at 1479 ("There is thus no inalienable right to rely on precedent. To the contrary, the protection of reliance is contingent; it can always be subordinated to other values.").

186. *See* Schwartz, *supra* note 158, at 1819–20 ("But when the Supreme Court . . . repeatedly grants qualified immunity without ruling on the underlying constitutional questions, law enforcement agencies have little in the way of guidance about how to craft their policies.").

187. *See, e.g.*, Ex parte Cranman, 792 So. 2d 392, 405–06 (Ala. 2010); Yanero v. Davis, 65 S.W.3d 510, 522 (Ky. 2001).

curb some of the concerns that colored the *Harlow* majority's analysis.[188] If states and their courts can consider a state actor's subjective intent without being completely overrun, then federal courts might also be able to as well.

It is true that *Harlow* has been the law for forty years. But again, this length of time alone is insufficient to uphold it.[189] The length of time a case has been the law does not alone determine its staying power.

Together, these factors suggest that *stare decisis* cannot protect *Harlow v. Fitzgerald.* That's because, as a refresher, the Court does not mechanically apply *stare decisis* to protect its wrongly decided and unworkable decisions.[190] Instead, as some of this Court's justices have pointed out, many of the Court's "most notable and consequential decisions have entailed overruling precedent."[191] Last term in *Dobbs*, the Supreme Court relied on three important decisions where it had overruled prior precedent to help justify overturning *Roe v. Wade.*[192]

To be sure, *Dobbs* interpreted the Constitution directly, and *stare decisis* is at its weakest when doing so.[193] *Harlow* and the cases applying it are not constitutional decisions.[194] But Section 1983 covers constitutional torts, and today's immunity is largely a judicial creation, meaning that even though *stare decisis* may not be its weakest when reexamining *Harlow*, neither is it impenetrable.[195] Therefore, this Court should seriously consider reexamining *Harlow v. Fitzgerald*, as its own *stare decisis* factors counsel overturning that decision.

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188. *See, e.g.*, Grider v. City of Auburn, 618 F.3d 1240, 1254–55 (11th Cir. 2010) (considering both § 1983 qualified immunity and Alabama state-agent immunity, which considers whether the defendant harbored bad faith).

189. *See, e.g., id.* at 1268.

190. *See* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 695 (1978).

191. Ramos v. Louisiana, 140 S. Ct. 1390, 1411 (2020) (Kavanaugh, J., concurring); *see also* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2262 (2022) ("Some of our most important constitutional decisions have overruled prior precedents.").

192. *Dobbs*, 142 S. Ct. at 2262–63. The Court cited Brown v. Board of Educ., 347 U.S. 482 (1954), West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937), and West Virginia Bd. of Educ. V. Barnette, 319 U.S. 624 (1943), as important constitutional decisions that overruled prior precedent. *Id.* To be sure, *Harlow* is not a constitutional decision. But the Court's openness to overturning prior precedent that was "egregiously wrong" should also leave open the door to overturn *Harlow*. *See id.*

193. Agostini v. Felton, 521 U.S. 203, 235 (1997) (explaining that *stare decisis* is at its weakest when the Court interprets the Constitution because its "interpretation can be altered only by constitutional amendment or [by] overruling prior decisions").

194. *See* Harlow, 457 U.S. 800 (1982).

195. *See* Mullenix v. Luna, 577 U.S. 7, 26 (2015) (Sotomayor, J., dissenting) (arguing that the current application of qualified immunity renders some constitutional protections "hollow").

III. PROCEDURAL DEVELOPMENTS THAT ASSUAGE THE *HARLOW* COURT'S CONCERNS

If it overturned *Harlow*, the Supreme Court should return to the standard that considered an individual's subjective intent and whether his actions were objectively unreasonable.[196] Under this standard, an official acting in bad faith could not escape liability simply because there is not a case where the facts are directly on point.[197] To be clear: under this standard, a case clearly establishing the law would also independently defeat the qualified immunity defense.[198] But in the absence of such a case, a plaintiff could still proceed past the early stages of litigation if she adequately alleged the defendant acted in bad faith.[199]

The *Harlow* Court's concerns about needless litigation were well-founded, even if not a reason to depart from the common law immunity.[200] The Court was chiefly concerned that insubstantial cases would proceed to trial on the back of blanket allegations of "malice."[201] Some justices worried this would burden the courts with an unmanageable number of cases.[202] And state actors might be pulled from their responsibilities to defend a litany of cases in court.[203] But since *Harlow* was decided in 1982 there have been significant developments in civil procedure that help prevent meritless suits proceeding past the earliest stages of trial.[204]

First, the pleading standards have evolved significantly since *Harlow* was decided. Both *Bell Atlantic Corp. v. Twombly*[205] and *Ashcroft v. Iqbal*[206] were decided after *Harlow*, and this pair of cases heightens the pleading requirements for

196. *See* Denson, *supra* note 109, at 766 ("Clearly, relying on objective legal reasonableness to determine whether officials are entitled to qualified immunity has come at a sacrifice to the effectiveness of § 1983 as a remedy for violations of constitutional rights.").

197. Watson, *supra* note 34, at 250 (explaining that under this approach "[q]ualified immunity would then only be available when both of the following are true: (1) the official had no knowledge or reason to know his action would deprive a person of rights and (2) the official had no intent to deprive a person of rights.").

198. *See id.*

199. *See id.*

200. *See id.* (explaining that these concerns were valid).

201. Harlow v. Fitzgerald, 457 U.S. 800, 817 (1982).

202. *Id.*at 817-18.

203. *See* Keller, *supra* note 15, at 43 ("[T]he Court discarded the common law's 'subjective good faith' standard for qualified immunity precisely because malice is a 'question of fact' for the 'jury' that precluded summary judgment resolution of some cases.") (quoting *Harlow*, 457 U.S. at 815–16).

204. *See, e.g.*, Ashcroft v. Iqbal, 556 U.S. 662 (2009); Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007); Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

205. *Twombly*, 550 U.S. at 544.

206. *Iqbal*, 555 U.S. at 1030.

plaintiffs to survive motions to dismiss.[207] In *Twombly*, the Court held that though "heightened fact pleading of specifics" was not required to state a claim for relief, a plaintiff must show "a claim to relief that is plausible on its face" to survive a 12(b)(6) motion to dismiss.[208] Two terms later in *Iqbal*, the Court considered a *Bivens* challenge to the FBI's detaining some Muslim Americans following the September 11, 2001 attacks.[209] There, the Court clarified that a claim to relief is plausible when it contains "factual content [that] allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.[210] "[M]ore than a sheer possibility that a defendant has acted unlawfully" is required.[211]

Taken together, these cases require more for plaintiffs to survive a 12(b)(6) motion to dismiss than when *Harlow* was decided.[212] On a practical level, this means judges must locate any "conclusory" allegations that are "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements," and determine if, without these statements, there are enough facts remaining that a cause of action is plausible.[213] Though both cases purport not to have created a heightened pleading standard, the standards for what a plaintiff must now allege are undoubtedly more stringent than before.[214]

Before *Twombly*, plaintiffs operated under a liberal notice pleading standard.[215] Then, a plaintiff needed to show only that it was possible facts not yet in the complaint could be discovered to support the legal allegation.[216] In turn, a complaint would be dismissed only if it "appear[ed] beyond doubt that the plaintiff [could]

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207. *See id.*

208. *Twombly*, 550 U.S. at 570.

209. *Iqbal*, 556 U.S. at 667.

210. *Id.* at 678.

211. *Id.*

212. *See* Brian Soucek & Remington B. Lamons, *Heightened Pleading Standards for Defendants: A Case Study in Court-Counting Precedent*, 70 ALA. L. REV. 875, 879 (2019) (explaining that the pair of cases imposed a heightened pleading standard on plaintiffs).

213. *Id.* at 880 n.22.

214. Rakesh N. Kilaru, *The New Rule 12(B)(6): Twombly, Iqbal, and the Paradox of Pleading*, 62 STAN. L. REV. 905, 918 (2010) ("While neither case raises the pleading requirement for one group of cases relative to others, both raise the pleading requirement across the board, at least relative to the Conley standard.").

215. Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on* Ashcroft v. Iqbal, 85 NOTRE DAME L. REV. 849, 853 (2010).

216. Soucek & Lamons, *supra* note 213, at 879 (stating that under the *Conley* standard, plaintiffs would surpass the motion to dismiss stage "unless it appeared beyond doubt that the plaintiff can prove *no set of facts* in support of his claim which would entitled him to relief.") (quoting *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957)) (emphasis added).

prove no set of facts in support of his claim [that] would entitle him to relief."[217] The "sole function" of a complaint pre-Twombly was to give the defendant fair notice of the suit against him.[218] It is thus more difficult today for a plaintiff in any case—and especially cases involving subjective intent—to survive this early stage of litigation.[219]

Not only have the requirements been ratcheted up to survive the motion-to-dismiss stage but they also have for summary judgment.[220] Most notably, the Court's decision in *Celotex Corp. v. Catrett*[221] made summary judgment a higher hurdle for plaintiffs to jump.[222] When *Harlow* was decided defendants bore the burden of producing evidence to foreclose the possibility that any of the plaintiff's factual allegations were true.[223] The difficulty this burden presented for defendants colored the *Harlow* Court's reasoning.[224] But *Celotex* lowered the burden for defendants.[225] Now a defendant needs to point only to the inadequacy of the plaintiff's evidence to secure summary judgment, instead of offering their own affirmative evidence.[226]

The impact of the *Celotex* decision alone, according to Justice Kennedy, "alleviated [the] problem" expressed in *Harlow*.[227] Justice Kennedy explained that "*Harlow* was decided at a time when the standards applicable to summary judgment

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217. *Conley*, 355 U.S. at 45–46.

218. Bone, *supra* note 216, at 853.

219. *See id.*at 853, 873.

220. *Celotex* is part of a "trilogy" of summary judgment-related cases the Supreme Court decided in 1986. *See* Adam N. Steinman, *The Irrepressible Myth of Celotex: Reconsidering Summary Judgment Burdens Twenty Years After the Trilogy*, 63 WASH. & LEE L. REV. 81, 82 (2006). A full analysis of this trilogy is beyond the scope of this Article.

221. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

222. Craig M. Reiser, *The Unconstitutional Application of Summary Judgment in Factually Intensive Inquiries*, 13 U. PA. J. CONST. L. 195, 200 (2009). Resier explains that following *Celotex*, a defendant can obtain summary judgment by pointing to the plaintiff's "lack of material facts," without having to put forth his own affirmative facts to negate the plaintiff's account. *Id.*

223. Adickes v. S.H. Kress & Co., 398 U.S. 144, 158–59 (1970).

224. Wyatt *v. Cole*, 504 U.S. 158, 171 (1992) (Kennedy, J., concurring) ("Harlow was decided at a time when the standards applicable to summary judgment made it difficult for a defendant to secure summary judgment regarding a factual question such as subjective intent, even when the plaintiff bore the burden of proof on the question; and in *Harlow* we relied on that fact in adopting an objective standard for qualified immunity . . . . [But] [u]nder the principles set forth in *Celotex* and related cases, the strength of factual allegations such as subjective bad faith can be tested at the summary-judgment stage.").

225. In doing so, the Court "intended to encourage the use of summary judgment in appropriate cases." Melissa L. Nelken, *One Step Forward, Two Steps Back: Summary Judgment After Celotex*, 40 HASTINGS L. J. 53, 54 (1988).

226. Reiser, *supra* note 223, at 200.

227. *Wyatt*, 504 U.S. at 171 (Kennedy, J., concurring).

made it difficult for a defendant to secure summary judgment regarding a factual question."[228] But "[u]nder the principles set forth in *Celotex* and related cases, the strength of factual allegations such as subjective bad faith can be tested at the summary-judgment stage."[229] As a result, *Celotex* alone directly responds to many of the policy concerns justifying *Harlow*'s break from the common law.

If, however, a plaintiff were to survive both the motion-to-dismiss and summary judgment stages, immunity decisions are now immediately appealable, creating another protection from trial for defendants.[230] Unlike most decisions at the trial level, if a defendant state actor is denied qualified immunity, he can file an interlocutory appeal to have that denial reviewed by an appellate court.[231] The risk that a defendant will be subject to the burdens of trial after an incorrect decision on the question of immunity is lower than before.[232] Like the fortified standards for pleading and summary judgment, the availability of interlocutory appeals for qualified immunity determinations did not exist when *Harlow* was decided.[233] On their own, each of these developments had a sizeable impact on the early stages of litigation. Taken together, they provide defendant officials with a strong protection against the social costs that accompany insubstantial claims proceeding to trial.

Indeed, when these procedural developments are paired with the current qualified immunity test, the balance sought by the *Harlow* Court is skewed.[234] The Court strengthened qualified immunity when it was easier for plaintiffs to fly past motions to dismiss and motions for summary judgment. So to reach an equilibrium, and adhere to recognized principles of interpretation, the Court should reevaluate the immunity set forth in *Harlow* and the cases that followed, allowing courts to consider a defendant state actor's subjective good or bad faith.

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228. *Id.*

229. *Id.*

230. Mitchell v. Forsyth, 472 U.S. 511, 530 (1985).

231. *Id.* at 547 (Brennan, J., concurring).

232. *See* Michael E. Solimine, *Are Interlocutory Qualified Immunity Appeals Unlawful?*, 94 NOTRE DAME L. REV. 169, 173 (2019) (explaining that the *Mitchell* Court believed the interlocutory appeal necessary for state actors to avoid both the burdens of trial and pretrial discovery).

233. *See id.*

234. *See* Keller, *supra* note 15, at 42 ("Given how stringent the test is, commentators have suggested that *Harlow* transformed nominally 'qualified' immunity into something closer to an absolute immunity."); *see also* Imbler v. Pachtman, 424 U.S. 409, 419 n.13 (1979) ("The procedural difference between the absolute and qualified immunities is important. An absolute immunity defeats a suit at the outset, so long as the official's actions were within the scope of the immunity. The fate of an official with qualified immunity depends upon the circumstances and motivations of his actions, as established by the evidence at trial.").