CHALLENGING THE CONSTITUTIONALITY OF QUALIFIED IMMUNITY

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ABSTRACT

Qualified immunity is a frequent target of scholarly criticism. Normative critiques typically argue that qualified immunity is an unjust policy that fails to achieve its purported policy objectives, whereas positive critiques seek to undermine the doctrine’s legal foundations largely by demonstrating that the Supreme Court committed any number of historical and interpretive errors when it created qualified immunity. Typically absent from such critiques, however, is any analysis of whether qualified immunity itself is permissible under the Constitution. This Article seeks to fill that gap and demonstrates that qualified immunity is unconstitutional under both Article III and equal protection principles. Qualified immunity violates Article III by forcing federal courts to choose between forsaking their duty to say what the law is or else issuing advisory opinions in the form of unnecessary constitutional rulings. As for equal protection, qualified immunity affords similarly situated plaintiffs with different substantive rights based only on their respective geographic locations, thereby interfering with the fundamental right of equal access to the courts. Notably, although the Supreme Court read qualified immunity into 42 U.S.C. § 1983, it has never squarely addressed the constitutionality of the doctrine. Thus, unlike other criticisms of qualified immunity, lower courts may permissibly accept the constitutional arguments presented herein and sever qualified immunity from Section 1983.

INTRODUCTION

The doctrine of qualified immunity, under which state actors are civilly liable for violations of only “clearly established” constitutional rights, is a popular target of scholarly criticism. Normative critiques typically focus on qualified immunity’s practical and moral failures, whereas positive critiques seek to undermine the legal justifications for the doctrine. However, little scholarship has addressed the foundational question of whether qualified immunity, in its current form, is permissible under the Constitution. This Article seeks to fill that gap by analyzing qualified immunity under Article III and equal protection principles, ultimately concluding that qualified immunity is unconstitutional on both grounds.

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The implications of qualified immunity’s unconstitutionality are significant. The Supreme Court has never squarely addressed the qualified immunity’s constitutionality. Unlike other scholarly arguments against qualified immunity, lower courts may immediately accept the constitutional arguments presented herein and curb application of qualified immunity. If lower courts reject the doctrine on constitutional grounds, it will effectively end qualified immunity or else prompt a heretofore reluctant Supreme Court to finally address the (un)lawfulness of qualified immunity head on.

Part I of this article provides background information, beginning with a description of the historical development of qualified immunity from common law to the present. Next it summarizes the criticisms that legal scholars and others have directed at qualified immunity, which are intended to undermine the doctrine’s normative and positive foundations.

Part II outlines constitutional objections to qualified immunity, beginning with an argument that qualified immunity violates Article III. One of the primary duties assigned to judges by the Constitution is to say what the law is. But when government defendants are granted qualified immunity on the basis that the claimed right was not clearly established at the time of the violation, the judge need not conclude whether a constitutional violation actually occurred. And if the judge continues to make such a conclusion despite the clearly-established inquiry resolving the claim, the result is an advisory opinion. Therefore, qualified immunity forces judges to choose between fulfilling their duty to say what the law is or else issuing impermissible advisory opinions. In either case, Article III is violated.

Part II next argues that qualified immunity violates equal protection under the Due Process Clause of the Fifth Amendment. Specifically, the current state of the law recognizes a right as being clearly established if it follows from binding Supreme Court or circuit court precedent. But a circuit court’s decisions are binding only in the geographic areas falling under its jurisdiction, so similarly situated plaintiffs are often afforded different clearly established rights based only on their geographic location, despite such plaintiffs all asserting their claims under the same federal statute and the Constitution. This geographic classification thus unconstitutionally interferes with the fundamental right of equal access to the courts for petition and redress. In addition, the geographic classification cannot survive rational basis because the statutory text provides that no such classifications should apply.
Lastly, Part III addresses some practical concerns that would accompany a court holding that qualified immunity is unconstitutional, beginning with a discussion of *stare decisis*. It next elaborates on some factors courts must consider if they were to declare qualified immunity unconstitutional, particularly questions of standing and remedy. Ultimately, the Article concludes that lower courts should rule against qualified immunity’s constitutionality and sever the defense from the relevant statute.

I. QUALIFIED IMMUNITY BACKGROUND

A. History and Development of Qualified Immunity

In America’s infancy, government officials that violated constitutional rights were typically subjected to common-law tort claims rather than claims expressly based on constitutional law. For example, Plaintiff would sue defendant federal officer in trespass; defendant would claim federal empowerment that trumped the state law of trespass under the principles of the supremacy clause; and plaintiff, by way of reply, would play an even higher supremacy clause trump: Any federal empowerment was ultra vires and void because of Fourth Amendment limitations on federal power itself. If, but only if, plaintiff could in fact prove that the Fourth Amendment had been violated, defendant’s shield of federal power would dissolve, and he would stand as a naked tortfeasor.1

Thus, an officer that unlawfully searched a home was technically liable for trespass rather than violation of the Fourth Amendment. In such cases, the fact that government actors may have acted in good faith did not provide them with immunity from liability.2

But the legal landscape shifted dramatically during Reconstruction when Congress passed several laws pursuant to the enforcement powers granted it under the Thirteenth, Fourteenth, and Fifteenth Amendments.3 One such

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2 See Little v. Barreme, 6 U.S. (2 Cranch) 170, 179 (1804) (Marshall, C.J.) (imposing liability on naval captain who unconstitutionally, but “with pure intention” and the president’s authorization, captured a Danish boat); Wise v. Withers, 7 U.S. (3 Cranch) 331, 333, 337 (1806) (Marshall, C.J.) (finding liability where officer entered the plaintiff’s home to collect a fine improperly imposed by a court-martial); Miller v. Horton, 26 N.E. 100, 103 (1891) (Holmes, J.) (imposing liability on government agents who killed plaintiff’s horse on mistaken belief that horse carried a dangerously infectious disease); see also William Baude, *Is Qualified Immunity Unlawful?*, 106 CAL. L. REV. 45, 55–57 (2018).
law was the Civil Rights Act of 1871, section 1 of which provided the following:

[A]ny person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall . . . be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress. 4

In other words, Congress created a private cause of action allowing a plaintiff to sue and obtain damages from state actors for violations of constitutional rights. This cause of action still exists but has been recodified with minor modifications at 42 U.S.C. § 1983.

Thereafter, the Supreme Court had occasion to consider whether a government actor’s “good faith” served as a defense to liability to civil rights claims. In Myers v. Anderson, 5 the Court “reject[ed] an argument that plaintiffs must prove malice to recover” damages against state election officials who enforced a racially discriminatory voting law. 6 Myers therefore extended “the logic of the founding-era cases” by rejecting a good-faith defense to constitutional claims brought under the Act. 7

Beginning in the 1950s, the Court changed course and granted legislators absolute immunity for constitutional violations resulting from legislative acts. 8 The next decade, it granted immunity to a police officer who carried out an unconstitutional arrest based on the officer’s good-faith defense. 9 The trend toward immunity continued in the 1970s when the Court extended qualified executive immunity to state officials, National Guardsmen, and a university president accused of unconstitutional acts that resulted in the deaths of four Kent State University students. 10 The Court later extended good-faith immunity to a state hospital superintendent who held an individual in medical confinement despite the fact that the individual posed no danger to himself or others. 11 Even with these developments, however,

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4 Civil Rights Act of 1871, 42nd Cong. § 1 (1871).
5 238 U.S. 368 (1915).
6 Baxter, 140 S. Ct. at 1863 (Thomas, J., dissenting from denial of certiorari).
7 Baude, supra note 2, at 58.
immunity was available only to government actors who had an actual, subjective good faith belief in the lawfulness of their actions.

That changed in 1982 when the Court revolutionized civil rights law and first articulated the modern doctrine of qualified immunity. In *Harlow v. Fitzgerald*, the plaintiff alleged that the defendants, in their capacities as former aides to President Richard Nixon, unlawfully discharged the plaintiff as part of a conspiracy to violate the plaintiff’s constitutional rights.\(^\text{12}\) The Court vacated the judgment below in favor of the plaintiff, holding that he could succeed on his claims only upon a showing that the defendants’ conduct “violate[d] clearly established statutory or constitutional rights of which a reasonable person would have known.”\(^\text{13}\) Whether that burden has been met depends on “objective” factors “as measured by reference to clearly established law” at the time the alleged constitutional violation occurred.\(^\text{14}\) Justice Brennan, joined by Justices Marshall and Blackmun, concurred in the majority opinion and predicted that the standard articulated therein “would not allow the official who actually knows that he was violating the law to escape liability for his actions, even if he could not ‘reasonably have been expected’ to know what he actually did know.”\(^\text{15}\)

As the doctrine of qualified immunity continued to develop, Justice Brennan’s prediction proved less than prescient. Just three years after *Harlow*, the Court emphasized that the relevant inquiry was not on what an official knew or should have known about the state of constitutional law.\(^\text{16}\) Rather, as the Court explained, *Harlow* “purged [the] qualified immunity doctrine of its subjective components,” and the only relevant inquiry is whether a hypothetical reasonable official could have believed that his or her conduct was constitutional.\(^\text{17}\) “[I]t is therefore irrelevant whether each officer defendant actually believed—or even in some sense knew—that his conduct violated a statutory or constitutional right . . . ”\(^\text{18}\)

Left open in *Harlow*, however, was the question of when exactly a right was considered “clearly established” such that a government actor should be

\(^{12}\) 457 U.S. 800, 802–03 (1982).
\(^{13}\) *Id.* at 818.
\(^{14}\) *Id.*
\(^{15}\) *Id.* at 821 (Brennan, J., concurring) (emphasis in original)
\(^{17}\) *Id.*; see also Anderson v. Creighton, 483 U.S. 635, 641 (1987).
\(^{18}\) Frasier v. Evans, 992 F.3d 1003, 1016 (10th Cir. 2021), *cert. denied* 142 S. Ct. 427 (2021) (applying *Harlow*) (internal quotation marks omitted).
aware of its existence. Subsequent developments have since made clear that judicial decisions are the only valid interpretive source of clearly established law. Moreover, a case is not considered to have clearly established a right for a subsequent Section 1983 action unless the two cases are factually analogous at “a high degree of specificity.” Absent such specificity, according to the Court, the obvious “unlawfulness of the officer’s conduct [would] not follow immediately from the conclusion that the rule was firmly established,” and the officer could not reasonably be expected to apply the established rule to the situation facing him- or herself. That said, the Court has, on rare occasions, departed from the specificity standard when facing particularly egregious and “obvious” constitutional violations.

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19 457 U.S. at 818 n.32 (“[W]e need not to define here the circumstances under which ‘the state of the law’ should be ‘evaluated by reference to the opinions of this Court, of the Court of Appeals, or of the local District Court.’”) (citation omitted).

20 Dist. of Columbia v. Wesby, 138 S. Ct. 577, 589 (2018) (“To be clearly established, a legal principle must have a sufficiently clear foundation in then-existing precedent.”).

21 Id. at 590 (explaining that the “clearly established standard” requires precedent to “be so well defined that it is clear to a reasonable officer that his conduct was unlawful in the situation he confronted.”) (internal quotation marks omitted).

22 Id. (internal quotation marks omitted).

23 See, e.g., Taylor v. Riojas, 114 S. Ct. 52, 56 (2020) (per curiam) (holding that prison officials were not entitled to qualified immunity for a constitutional violation that occurred when they confined a naked prisoner in a frigid cell covered in feces and raw sewage despite no need or justification for doing so); Hope v. Pelzer, 536 U.S. 730, 741-42 (2002) (declining to require Section 1983 plaintiff to identify materially similar caselaw establishing Eighth Amendment violation where prison guards handcuffed shirtless plaintiff to a hitching post for seven hours in the heat of day, offered drinking water only once or twice, and provided no bathroom breaks). Although the “obvious” constitutional violation exception could conceivably relieve some of the harsh results stemming from qualified immunity, courts often decline to invoke it even when faced with wrongful conduct that would appear patently egregious to the average person. See, e.g., Jessop v. City of Fresno, 918 F.3d 1031, 1033-34 (9th Cir. 2019) (finding no violation of clearly established law where officers stole more than $200,000 in cash and rare coins while exercising a search warrant); Corbitt v. Vickers, 929 F.3d 1304, 1307 (11th Cir. 2019) (finding no violation of clearly established law where police officer shot a ten-year-old child in the leg while attempting to kill a non-threatening dog); Doe v. Woodard, 912 F.3d 1278, 1296 (10th Cir. 2019) (finding no violation of clearly established law where state officers performed a warrantless strip search of a four-year-old girl); Baxter v. Bracey, 751 F. App’x 869, 870 (6th Cir. 2018) (finding no violation of clearly established law where police officer sicced police dog on a suspect who had already surrendered and had his hands raised); Allah v. Milling, 876 F.3d 48, 59-60 (2d Cir. 2017) (finding no violation of clearly established law where prison officials kept a pretrial detainee in solitary confinement for more than a year in retaliation for the detainee asking a question about commissary access). See also generally Alexander J. Lindvall, Qualified Immunity and Obvious Constitutional Violations, 28 GEORGE MASON L. REV. 1047 (2021) (arguing that “courts should more frequently withhold qualified immunity from” government actors who “commit obvious constitutional violations”) (emphasis in original).
In addition, there remains an open question about what precedent can clearly establish rights. The Supreme Court has indicated that a right is clearly established when it is dictated by controlling authority or a robust consensus of cases from persuasive authorities.\textsuperscript{24} Relying on that rule, the federal Courts of Appeal have generally found a right to be clearly established if it is dictated by their own precedent or that of the Supreme Court.\textsuperscript{25} Additionally, in at least the First and Eleventh Circuits, caselaw from the highest court in the relevant state may also be considered in the clearly-established inquiry.\textsuperscript{26} But despite longstanding practice and the fact that

\textsuperscript{24} Wilson v. Layne, 526 U.S. 603, 617 (1999) ("Petitioners have not brought to our attention any cases of controlling authority in their jurisdiction at the time of the incident that clearly established the rule on which they seek to rely, nor have they identified a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful."). Despite the Supreme Court’s approval of analyzing whether a consensus of cases of persuasive authority clearly establishes the right at issue, the Eleventh Circuit has refused to consider cases decided in other circuits. See Amnesty Intern., USA v. Battle, 559 F.3d 1170, 1184 (11th Cir. 2009) ("In this Circuit, only the case law of the Supreme Court, the Eleventh Circuit or the law of the highest court of the state where the events took place . . . can ‘clearly establish’ constitutional rights.") (emphasis added). Most other circuits have set a high bar to demonstrate that a right is clearly established based on cases from sister courts. See, e.g., Irizarry v. Yehia, 38 F.4th 1282, 1296 (10th Cir. 2022) ("[W]e have held that the weight of authority from other circuits may clearly establish the law when at least six other circuits have recognized the right at issue."); Ashford v. Raby, 951 F.3d 798, 804 (6th Cir. 2020) ("[A]s a threshold matter, our sister circuits’ precedents are usually irrelevant to the clearly established inquiry. The only exception is for extraordinary cases where out-of-circuit decisions both point unmistakably to a holding and are so clearly foreshadowed by applicable direct authority as to leave no doubt regarding that holding.") (emphasis in original) (internal quotation omitted); Parker v. Boyer, 93 F.3d 445, 447 (8th Cir. 1996) (holding that two recently decided cases in other circuits were insufficient to clearly establish constitutional right at issue).

\textsuperscript{25} See, e.g., Ashford, 951 F.3d at 604 (looking to Sixth Circuit precedent as a potential source of clearly established rights); Sloley v. VanBramer, 945 F.3d 30, 40–43 (2d Cir. 2019) (looking to Second Circuit precedent as a source of clearly established rights); Cox v. Glanz, 800 F.3d 1231, 1247 (10th Cir. 2015) (holding that a plaintiff can rely on Supreme Court or Tenth Circuit decisions to demonstrate a clearly established right); Lefemine v. Wideman, 672 F.3d 292, 298–99 (4th Cir. 2012) (explaining that case law either from the Supreme Court or the Fourth Circuit can determine if a right is clearly established, "sustained on other grounds by 568 U.S. 1 (2012); Coffin v. Brandau, 642 F.3d 999, 1015 (11th Cir. 2011) ("Our Court looks only to binding precedent—cases from the United States Supreme Court, the Eleventh Circuit, and the highest court of the state under which the claim arose—to determine whether the right in question was clearly established at the time of the violation."); Rivero v. City of San Francisco, 316 F.3d 857, 865 (9th Cir. 2002) (explaining that the relevant inquiry is what the constituted clearly established law in the Ninth Circuit at the time of the alleged rights violation); Starlight Sugar, Inc. v. Soto, 253 F.3d 137, 144 (1st Cir. 2001) ("[W]e have held that a right can be treated as clearly established in this circuit if we have unequivocally identified that right in prior decisions, regardless of Supreme Court silence on the subject or a lack of unanimity among the circuits.").

\textsuperscript{26} See Coffin, 642 F.3d at 1013 ("Our Court looks only to binding precedent—cases from the United States Supreme Court, the Eleventh Circuit, and the highest court of the state under which the
circuit precedent is undoubtedly “controlling” within a given circuit’s own jurisdiction, the Supreme Court has indicated the existence of an open question on “what precedents—other than [its] own—qualify as controlling authority for purposes of qualified immunity.”27 As for now, however, the circuit courts uniformly treat their own precedent as clearly establishing rights within the geographic boundaries of their jurisdiction.

In sum, qualified immunity protects government actors from liability under Section 1983 unless the right at issue was clearly established at the time of the violation.28 Clearly established rights must generally be derived from claim arose—to determine whether the right in question was clearly established at the time of the violation.”; *Starlight Sugar*, 253 F.3d at 143-44 (“When determining whether a constitutional right is clearly established for purposes of qualified immunity, state, as well as federal, decisions can be considered.”). It should also be noted that a right will not be considered clearly established in the First or Seventh Circuits “where there is arguably contrary authority from the highest court of a state within the . . . Circuit,” despite circuit precedent holding that such a right exists. *See Starlight Sugar*, 253 F.3d at 144; *see also* Sutterfield v. City of Milwaukee, 751 F.3d 342, 350 (7th Cir. 2014) (explaining that an officer was entitled to qualified immunity where Seventh Circuit and Wisconsin caselaw conflicted on the breadth of the community-caretaker warrant exception). The Sixth Circuit, on the other hand, has held that “for the purposes of examining a claim of qualified immunity from a § 1983 cause of action—[it] turn[s] only to federal court precedent . . . .” *Wood v. Eubanks*, 25 F.4th 414, 425 (6th Cir. 2022) (holding that clearly established law forbade officer from arresting plaintiff for wearing a “Fuck the Police” shirt even where countervailing state caselaw held that such speech is constitutionally unprotected).

27 Dist. of Columbia v. Wesby, 138 S. Ct. 577, 591 n.8 (2018); *see also* Rivas-Villegas v. Cortesluna, 142 S. Ct. 4, 7 (2021); Kisela v. Hughes, 130 S. Ct. 1148, 1153 (2018); City and County of San Francisco v. Sheehan, 575 U.S. 600, 614 (2015); Carroll v. Carman, 574 U.S. 13, 17 (2014); Reichele v. Howards, 566 U.S. 650, 665–66 (2012); *but see* Camreta v. Greene, 563 U.S. 692, 707–08 (2011) (explaining that a Ninth Circuit decision clearly established the law for officials who engaged in analogous behavior within the Ninth Circuit’s jurisdiction). Despite the Court’s recent implications to the contrary, the Court has, in prior cases, explicitly rejected the notion that “clearly established” inquiry should be limited to an analysis of only Supreme Court precedent. *See United States v. Lanier*, 520 U.S. 259, 268-69 (1997) (explaining that no case “has held that the universe of relevant interpretive decisions is confined to [Supreme Court] opinions” when determining whether a right is clearly established and noting that the Court has previously “referred to a decision of a Court of Appeals in defining the established scope of a constitutional right for purposes of § 241 liability”); *Hope v. Pelzer*, 536 U.S. 730, 739–41 (2002) (applying *Lanier’s* clearly-established reasoning in the § 1983 context).

28 Regarding whether a right was clearly established at the time of the violation, there is likely an indeterminate period of time following a judicial decision clearly establishing a right during which the right will still not be considered clearly established due to the need of state actors to have sufficient time to learn about and digest the recent holding. *See* Lintz v. Skipski, 25 F.3d 304, 306 (6th Cir. 1994) (“State officials must have some time to adjust and learn about judge-made law as it evolves. . . .”); *Robinson v. Bibb*, 840 F.2d 349, 350 (6th Cir. 1988) (holding that “even though a clearly established right existed, it was not unreasonable for him not to know of it four days after it was decided”); *Schlothauer v. Robinson*, 757 F.2d 196, 197–98 (8th Cir. 1985) (finding no violation of clearly established law despite an analogous case within the circuit, decided eleven days before
cases bearing a high level of factual resemblance to the case at issue, and those cases must generally come from either the Supreme Court or a binding circuit court. Unless a Section 1983 plaintiff can clear that high bar, a governmental defendant is immune from liability and the plaintiff cannot obtain damages.

B. Criticisms of Qualified Immunity

a. Normative Critiques of Qualified Immunity

Popular interest in qualified immunity has risen sharply in the aftermath of several racially-charged incidents of police violence. Naturally, political interest groups have seized on the moment to advance normative critiques of qualified immunity as part of a broader effort to promote criminal justice and law enforcement reforms. Normative critiques may focus on qualified immunity doctrine and the arguments for and against it.

immunity’s policy failures and argue that the it encourages police abuse or erodes community trust in law enforcement.\(^3\) \(^0\) Just as cogent, if not more, are reflections on the doctrine’s moral failures and the injustice of allowing law enforcement officers to commit egregious acts without any civil liability or offering any recourse to victims.\(^3\) \(^1\) Notably, normative critiques have not been limited to the political arena, as both judges and academics have advanced similar critiques in their own writings.\(^3\) \(^2\)

In addition to shedding light on the unjust and immoral outcomes of qualified immunity, Professor Joanna Schwartz has also argued that qualified immunity does little to further the policies that purportedly justify its existence, including (1) shielding officers acting in good faith from financial liability,\(^3\) \(^3\) (2) protecting against overdeterrence in the participation of public

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\(^1\) See, e.g., Jay Schweikert, Qualified Immunity: A Legal, Practical, and Moral Failure, CATO INST. POLY ANALYSIS 901 (2020) (“[I]t is entirely possible… for courts to hold that government agents did violate someone’s rights, but that victim has no legal remedy simply because that precise sort of misconduct had not occurred in past cases.”); 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/29VK-F9W5] (“By doing away with qualified immunity, we can begin to hold officers accountable for their conduct while reimagining their role in our communities.”); see also supra note 23.

\(^2\) See, e.g., Kisela v. Hughes, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) (discussing a “disturbing trend” in the Court’s qualified immunity jurisprudence that “sends an alarming message to law enforcement officers . . . that they can shoot first and think later”); Zadeh v. Robinson, 902 F.3d 457, 479 (5th Cir. 2019) (Willett, J., concurring dubitante) (“To some observers, qualified immunity smacks of unqualified impunity, letting public officials duck consequences for bad behavior—no matter how palpably unreasonable—as long as they were the first to behave badly.”); David G. Maxted, The Qualified Immunity Litigation Machine: Exercising the Anti-Racist Heart of § 1983, Weaponizing Interlocutory Appeal, and the Routine of Police Violence Against Black Lives, 98 DENV. L. REV. 629, 657 (2021) (arguing that when the Supreme Court created qualified immunity, “it made a value judgment that is untrue and immoral, valuing the time and careers of officers more than the lives of those harmed”); Charles R. Wilson, “Location, Location, Location”: Recent Developments in the Qualified Immunity Defense, 57 N.Y.U. ANN. SURV. AM. L. 445, 447 (2000) (“Judges in qualified immunity matters frequently face a series of unappealing moral choices, ranging from subjecting a public servant to personal liability for conduct undertaken in good faith, to eliminating a potential remedy for a plaintiff who has been subjected to embarrassing and degrading conduct.”).

\(^3\) Pierson v. Ray, 386 U.S. 547, 555 (1967) (“A policeman’s lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does.”).
employment or the discharge of public duties, and (3) protecting government officials from the burdens of discovery and trial. According to Professor Schwartz, qualified immunity does little to shield officers from financial liability because Section 1983 defendants “are almost always indemnified and thus rarely pay anything towards settlements and judgments entered against them.” Nor is it likely that qualified immunity meaningfully prevents overdeterrence because available evidence demonstrates “that law enforcement officers infrequently think about the threat of being sued when performing their jobs.” Moreover, studies have shown that high profile, racially-charged shootings play a greater role in inhibiting police department recruiting than does fear of civil liability. Lastly, Professor Schwartz argues that all “available evidence indicates that qualified immunity often is not functioning as assumed, and is not achieving its intended goals” because it only “infrequently protects government officials from burdens associated with discovery and trial in filed cases.”

Accordingly, the normative case against qualified immunity can be summarized as thus: If qualified immunity contributes to negative and unjust outcomes while simultaneously failing to achieve its more laudatory aims, then why should it be allowed to continue?

b. Positive Critiques of Qualified Immunity

One possible retort to normative criticisms of qualified immunity is that such critiques cannot lead to the doctrine’s judicial abolition because qualified immunity is required by positive law. In other words, qualified immunity is not merely a judicial invention but flows from a proper reading

34 Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982) (“These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office.”).
35 Pearson v. Callahan, 555 U.S. 223, 231 (2009) (“[W]e have made clear that the ‘driving force’ behind [the] creation of the qualified immunity doctrine was a desire to ensure that ‘insubstantial claims’ against government officials [will] be resolved prior to discovery.”) (citation omitted).
36 Joanna C. Schwartz, How Qualified Immunity Fails, 127 YALE L.J. 2, 8–9 (2017); see also generally Joanna C. Schwartz, Police Indemnification, 89 N.Y.U. L. REV. 885, 925-26, 939 (2014) (“Officers are always indemnified even if they have been disciplined, terminated, or criminally prosecuted as a result of their conduct.”).
38 Id. at 1813 (“[A] recent survey found that a majority of officers believe recent high profile shootings of Black men—not civil suits or the threat of liability—have made their job harder and discouraged them from stopping and questioning people they consider suspicious.”).
39 Schwartz, How Qualified Immunity Fails, supra note 36, at 76.
of Section 1983 itself. And because the role of judges is to interpret the law without regard to their own policy preferences, the doctrine must persist until Congress amends Section 1983 to eliminate qualified immunity as a defense. However, recent scholarly critiques have chipped away at the positive justifications underlying qualified immunity as well.

As explained by Professor William Baude in his seminal article *Is Qualified Immunity Unlawful?*, the fact that Section 1983’s text does not explicitly provide for a qualified immunity defense does not rule out the possibility that a qualified immunity defense may be “derived from common law” or is otherwise required by Section 1983’s interpretation. Along those lines, the Supreme Court or its justices have put forward three positive legal reasons that liability under Section 1983 is subject to a qualified immunity defense: (1) it “derives from a putative common-law rule that existed when Section 1983 was adopted,” (2) it “is legitimate compensation for a different error the Court supposedly made earlier in construing the scope of Section 1983,” and (3) it “derives from principles of fair notice analogous to the criminal law rule of lenity.” But according to Professor Baude, none of those rationales withstands scrutiny or justifies qualified immunity in its current form.

### i. The Common Law and Derogation Canon

The Supreme Court most commonly justifies qualified immunity via reference to a good-faith defense available to government tortfeasors at common law when the Civil Rights Act of 1871 was enacted. However, as discussed in more detail above, “lawsuits against officials for constitutional violations did not generally permit a good-faith defense during the early years

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40 Barnhart v. Sigmon Coal Co., Inc., 534 U.S. 438, 461–62 (2002) (noting that the Court’s “role is to interpret the language of the statute enacted by Congress” and that “parties should not seek to amend the statute by appeal to the Judicial Branch”).

41 Baude, supra note 2, at 49–51 (“Qualified immunity derives from a putative common-law rule that existed when Section 1983 was adopted.”).

42 *Id.* at 51.

43 *Id.*

44 *Id.* at 52 (“The most widely known theory of qualified immunity draws upon this historical background in a general way arguing that the immunity is a common-law backdrop that could be read into the statute...”; *see also* Pierson v. Ray, 386 U.S. 547, 557 (1967) (“We hold that the defense of good faith and probable cause, which the Court of Appeals found available to the officers in the common-law action for false arrest and imprisonment, is also available to them in the action under § 1983.”).
of the Republic" or immediately following passage of the Act. Therefore, the Court’s common-law justification is ahistorical and fundamentally flawed. Further compounding the Courts historical error is that good faith was not generally treated as a freestanding defense at common law but was used to defeat specific tort claims that required a showing of bad faith as an element of the tort at issue. Although several justices have acknowledged that the Court’s qualified immunity jurisprudence has substantially departed from any conceivable common-law historical basis, the Court has continued to cite the doctrine’s imagined common-law roots.

Moreover, the notion that a purported common law defense should be read into Section 1983 stems from a canon of interpretation known as the “derogation canon,” which provides “that statutes in ‘derogation’ of the common law should be strictly construed” and that any statutory attempt to repeal a common law rule must do so expressly. But the derogation canon is an odd tool for creating qualified immunity because the canon “is most concerned with common-law rights, not defenses.” Moreover, application of the derogation canon in the qualified-immunity context creates tension with the principle that remedial statutes, such as Section 1983, should be broadly

45 Baude, supra note 2, at 55 (“[T]here was no well-established, good-faith defense in suits about constitutional violations when Section 1983 was enacted, nor in Section 1983 suits early after its enactment.”); see also supra notes 1–2 and accompanying text.
46 Baude, supra note 2, at 58–60.
47 Id. at 61 (citing several justices where they described the Court had moved away from the common law inquiry of the qualified immunity doctrine); see also Wyatt v. Cole, 504 U.S. 138, 170 (1992) (Kennedy, J., concurring) (“In the context of qualified immunity for public officials, however, we have diverged to a substantial degree from the historical standards.”); Crawford-El v. Britton, 523 U.S. 574, 611 (1998) (Scalia, J., dissenting) (“[O]ur treatment of qualified immunity under 42 U.S.C. § 1983 has not purported to be faithful to the common-law immunities that existed when § 1983 was enacted, and that the statute presumably intended to subsume.”); Ziglar v. Abbasi, 137 S. Ct. 1843, 1871 (2017) (Thomas, J., concurring in part and concurring in judgment) (“[W]e have completely reformulated qualified immunity along principles not at all embodied in the common law.”); Baxter v. Bracey, 140 S. Ct. 1862, 1864 (2020) (Thomas, J., dissenting from denial of certiorari) (“In several different respects, it appears that our [qualified immunity] analysis is no longer grounded in the common-law backdrop against which Congress enacted the 1871 Act. There likely is no basis for the objective inquiry into clearly established law that our modern cases prescribe.”).
50 Id. at 161. (emphasis added).
and liberally interpreted in accordance with their remedial aims.\textsuperscript{51} Thus, appeals to the common law and the derogation canon provide, at most, shaky support for reading qualified immunity into Section 1983.

Recent scholarship has revealed still another reason that the derogation canon has no place in Section 1983’s interpretation: When Congress originally passed the Civil Rights Act of 1871, the statute’s text expressly abrogated common law defenses to civil rights claims.\textsuperscript{52} Specifically, the Act imposed liability for rights violations notwithstanding “any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary.”\textsuperscript{53} For unknown reasons, that language was omitted from the recorded statutory text in the first edition of the Revised Statutes of the United States.\textsuperscript{54} The existence of that language, however, directly undermines any claim that Congress intended to incorporate common-law defenses or qualified immunity into Section 1983.\textsuperscript{55}

\textit{ii. A Judicial Remedy for a Prior Judicial Mistake}

Justice Antonin Scalia offered an alternative justification for qualified immunity in a dissenting opinion in \textit{Crawford-El v. Britton}.\textsuperscript{56} In his dissent, Justice Scalia argued that \textit{Monroe v. Pape}\textsuperscript{57} incorrectly held that a government agent acts “under color of” law for Section 1983 purposes even when the agent’s conduct was illegal under state law.\textsuperscript{58} Therefore, although qualified immunity in its modern form bears little resemblance to any common-law defense that existed in 1871, its creation was justified because “[a]pplying normal common-law rules to the statute that \textit{Monroe} created would carry us further and further from what any sane Congress could have enacted.”\textsuperscript{59} “Under this theory of qualified immunity, it does not matter whether the doctrine can be justified on first principles. It is a judicially invented immunity for a judicially ‘invented’ statute.”\textsuperscript{60}

\textsuperscript{51} Id.; see also Piedmont & N. Ry. Co. v. Interstate Com. Comm’n, 286 U.S. 299, 311–12 (1932) (“The Transportation Act was remedial legislation and should therefore be given a liberal interpretation \ldots”.).
\textsuperscript{52} Reinert, \textit{supra} note 49 at 165.
\textsuperscript{53} \textit{Id.} at 113 (internal quotation marks omitted).
\textsuperscript{54} \textit{Id.}
\textsuperscript{55} \textit{Id.}
\textsuperscript{57} 365 U.S. 167 (1961).
\textsuperscript{58} \textit{Crawford-El}, 523 U.S. at 611-12 (Scalia, J., dissenting) (internal quotation marks omitted).
\textsuperscript{59} \textit{Id.} at 611.
\textsuperscript{60} Baude, \textit{supra} note 2, at 63.
But Justice Scalia’s argument stands only if he was right that *Monroe* incorrectly interpreted Section 1983’s “under color of” law provision. Unfortunately for Justice Scalia, available historical evidence indicates “that ‘under color of’ is a longstanding legal term that encompasses false claims of legal authority.”61 For example, early American courts held that the term “under color of law” referred to official action without proper authority.62 It is therefore likely that Justice Scalia’s interpretation of Section 1983’s “under color of” law provision is mistaken rather than *Monroe’s*.63

### iii. The Rule of Lenity

The final positive-law justification the Supreme Court has offered for qualified immunity is derived from the criminal law rule of lenity, which requires courts to resolve ambiguity in criminal laws in favor of defendants.64 In particular, the Court is concerned with lenity as applied in cases dealing

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61 *Id.* at 64.
63 Another conceivable justification for qualified immunity that can be derived from Justice Scalia’s *Crawford*-El dissents is that due to *Monroe’s* interpretation of Section 1983, reading qualified immunity into the statute is necessitated by the absurd results doctrine. The absurd-results doctrine requires courts to avoid statutory interpretations that “would produce an absurd and unjust result which Congress could not have intended.” Clinton v. City of New York, 524 U.S. 417, 429 (1998). But the “Court rarely invokes [the absurd-results doctrine] to override unambiguous legislation,” Barnhart v. Sigmon Coal Co., Inc., 534 U.S. 438, 441 (2002), and “it seems counterintuitive at best to say that Congress could not have intended a regime without qualified immunity, given the historical periods in which we got by without it.” Baude, *supra* note 2, at 78. Application of the absurd-results doctrine in this context seems particularly inappropriate given the many judges, legislators, academics, and political interest groups currently advocating for qualified immunity’s abolition. See *supra* notes 29–39 and accompanying text; see also Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 237 (2012) (“The absurdity must consist of a disposition that no reasonable person could intend.” (emphasis added)). Any serious attempt to argue that absurd-results doctrine justifies the current qualified immunity regime would likely fail, especially considering the heavy presumption that congressional intent is best derived from the plain language of the statute. See Am. Tobacco Co. v. Patterson, 456 U.S. 63, 68 (1982) (explaining that there is an assumption that the legislative intent is expressed by the ordinary meaning of the words used by Congress); Consumer Prod. Safety Comm’n v. GTE Sylvania, 447 U.S. 102, 108 (1980) (“Absence a clearly expressed legislative intention to the contrary, [the language of the statute itself] must ordinarily be regarded as conclusive.”); *see also* Scalia & Garner, *supra*, at 56 (“[T]he purpose [of a statute] must be derived from the text, not from extrinsic sources such as legislative history or an assumption about the legal drafter’s desires.”).
64 *See* United States v. Davis, 139 S. Ct. 2319, 2333 (2019) (describing “the rule of lenity’s teaching that ambiguities about the breadth of a criminal statute should be resolved in the defendant’s favor”).
with a related Reconstruction-era statute, now codified at 18 U.S.C. § 242,\(^65\) providing for criminal prosecution of state actors who violate constitutional rights under color of law.\(^66\) For example, in *United States v. Screws*, the Court reviewed the convictions of Georgia officials prosecuted under Section 242.\(^67\) Reversing the officials’ convictions, a plurality of the Court reasoned that Section 242 might pose constitutional concerns if it permitted convictions on the basis of “a large body of changing and uncertain law.”\(^68\) To avoid such issues, the plurality held convictions under Section 242 could stand only against officials who violate rights previously made “definite by decision or other rule of law.”\(^69\) Accordingly, in this context, lenity required that Section 242 be interpreted so as to allow government defendants “fair warning” of potential criminal violations.\(^70\)

The Court has since analogized qualified immunity to the “fair warning” rule from *Screws*, thereby implying that lenity requires that Section 1983 defendants be entitled to a qualified-immunity defense.\(^71\) As Professor Baude explains, however, there are problems with applying the rule of lenity to Section 1983 given that statute’s lack of criminal application and the textual differences between Sections 1983 and 242.\(^72\) But even if “Section 1983 falls within the domain of lenity and fair notice, there is a less lofty reason that those principles cannot justify qualified immunity doctrine: Qualified immunity doctrine has come to bear little practical resemblance to the rules applicable to criminal defendants.”\(^73\) Therefore, the rule of lenity could “justify [only] a much more modest immunity doctrine than the one we have, one that at most, tracks the modest defenses available to real criminal defendants.”\(^74\)

Whether considered separately or together, the above-described criticisms of qualified immunity, both normative and positive, represent a

\(^{65}\) For simplicity, all discussion of this statute will reference its current citation rather than past codification references.

\(^{66}\) Baude, *supra* note 2, at 69–72.

\(^{67}\) 325 U.S. 91 (1945).

\(^{68}\) Id. at 96.

\(^{69}\) Id. at 103.

\(^{70}\) Id. at 104; Baude, *supra* note 2, at 70–71.


\(^{72}\) Baude, *supra* note 2, at 72–74.

\(^{73}\) Id. at 74.

\(^{74}\) Id. at 77.
powerful theoretical challenge to the doctrine’s validity. But binding Supreme Court precedent squarely forecloses both sets of arguments as a means to practically challenge application of qualified immunity in a given case. And to date, the Supreme Court has declined to hear direct challenges to the doctrine.

II. THE UNCONSTITUTIONALITY OF QUALIFIED IMMUNITY

Recent scholarly critiques of qualified immunity largely fall into two categories: (1) normative critiques based on the doctrine’s policy and moral failures, and (2) positive critiques undermining the positive and legal justifications for the Supreme Court’s qualified immunity jurisprudence. Typically absent from these critiques, however, is any contention that qualified immunity is itself unconstitutional. Although some have attempted to demonstrate how qualified immunity fits within the United States’ constitutional scheme, there is comparatively little scholarship analyzing whether the Constitution forbids (or mandates) the doctrine in its present

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75 Although an in-depth discussion of such is beyond the scope of this article, it is worth noting that qualified immunity also has its defenders in both the judiciary and the academy. See, e.g., Winzer v. Kaufman County, 940 F.3d 900, 900 (5th Cir. 2019) (Smith, J., dissenting from denial of rehearing en banc) ("Abandon hope, all ye who enter Texas, Louisiana, or Mississippi as peace officers with only a few seconds to react to dangerous confrontations with threatening and well-armed potential killers . . . [T]here is little chance that, any time soon, the Fifth Circuit will confer the qualified-immunity protection that heretofore-settled Supreme Court and Fifth Circuit caselaw requires."); Michael L. Wells, Some Objections to Strict Liability for Constitutional Torts, 55 GA. L. REV. 1277 (2021) (describing benefits of qualified immunity); Lawrence: Rosenthal, Defending Qualified Immunity, 72 S.C.L. REV. 547 (2020) (arguing for the lawfulness of, and functional case for, qualified immunity; Hillel Y. Levin & Michael L. Wells, Qualified Immunity and Statutory Interpretation: A Response to William Baude, 9 CAL. L. REV. ONLINE 40 (2018) (arguing against the position that qualified immunity is unlawful because it did not exist as a defense when Congress enacted § 1983); Aaron L. Nielson & Christopher J. Walker, A Qualified Defense of Qualified Immunity, 93 NOTRE DAME L. REV. 1853, 1854 (2018) (offering a defense of qualified immunity and “recommendations on how the Supreme Court should improve the doctrine . . . .”).

76 See Wearry v. Foster, 33 F.4th 260, 273–81 (5th Cir. 2022) (Ho, J., dubitante) (arguing that although qualified immunity and other immunity doctrines are likely “wrong as an original matter,” precedent required dismissal of claims that a detective and prosecutor fabricated evidence that resulted in the plaintiff’s wrongful conviction).

77 See generally Baxter v. Bracy, 140 S. Ct. 1862 (2020) (declining to hear appeal presenting question of whether qualified immunity should be narrowed or abolished).

78 See supra notes 29–74 and accompanying text (discussing normative and positive critiques of qualified immunity).

This section attempts to fill that gap in the literature and argues that qualified immunity is unconstitutional under Article III and on equal-protection grounds. Unlike other arguments against the doctrine, a judicial finding that qualified immunity is unconstitutional is not foreclosed by precedent from the Supreme Court. In fact, the conclusion that qualified immunity is unconstitutional follows directly from Supreme Court caselaw that is still in effect.

Qualified immunity forces judges to violate their responsibilities under Article III of the Constitution. A judge’s duty is first and foremost to say what the law is. However, when dealing with qualified immunity, judges often forsake their duty to say what the law is or determine whether a constitutional violation occurred and instead skip to determining whether the right at issue was clearly established. In the alternative, if a judge does hold that a constitutional violation occurred, that holding is rendered advisory upon a subsequent determination that the right at issue was not clearly established. Because qualified immunity forces judges to choose between shirking their constitutional duties and offering constitutionally prohibited advisory opinions, it follows that qualified immunity violates Article III.

Qualified immunity also denies Section 1983 plaintiffs equal protection under the law. Due to how courts currently determine whether a right is clearly established in a particular case, some plaintiffs are denied the opportunity to recover under Section 1983 even when subjected to an identical wrong for which a different plaintiff in another jurisdiction received damages. But Section 1983, a federal law, applies with equal authority in all United States jurisdictions. That two identically situated plaintiffs are treated differently under the statute based solely on geographic location is a violation of the equal protection requirements found in the Fifth Amendment.

A. Article III and Qualified Immunity

a. Judicial Power and Duties

Article III of the United States Constitution outlines generally the powers and duties of the judicial branch, specifically providing that “[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.”[^80] As used in Article III and in

[^80]: U.S. CONST. art. III, § 2.
conjunction with the Supremacy Clause, the judicial power “means the Article III judge’s authority and obligation, in all matters over which jurisdiction is conferred, independently, finally, and effectually to decide the whole case and nothing but the case on the basis, and so as to maintain the supremacy, of the whole federal law.”\(^81\) In other words, “[i]t is emphatically the province and duty of the judicial department to say what the law is.”\(^82\) And in matters that the federal courts have jurisdiction over, Congress may not “prescribe rules of decision” prohibiting a court from giving “effect to evidence which, in its own judgment, such evidence should have”\(^83\) or otherwise leave “the court no adjudicatory function to perform.”\(^84\) Any congressional act that did so would “pass[] the limit which separates the legislative from the judicial power.”\(^85\)

As applied to qualified immunity, a court’s duty to say what the law is arises under the first prong of the analysis: determining whether a constitutional violation occurred.\(^86\) In fact, in what is often deemed the “\textit{Saucier} approach,” the Supreme Court once required courts to conduct that threshold analysis before determining whether the right was clearly established.\(^87\) However, the Court has since abandoned that requirement.\(^88\) Federal courts may instead skip to the question of whether the right was clearly established, the second part of the qualified immunity analysis, and

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\(^85\) Klein, 80 U.S. at 147.

\(^86\) See Frasier v. Evans, 992 F.3d 1003, 1018–19 (10th Cir. 2021), cert. denied, 142 S. Ct. 427 (2021) (rejecting argument that officer’s knowledge of what law required was relevant to qualified immunity analysis because only a court can “say what the law is” as it applies to whether particular conduct violates the constitution); see also Citizens in Charge, Inc. v. Husted, 810 F.3d 457, 440 (6th Cir. 2016) (noting that the first prong of the qualified-immunity analysis “turn[s] on what the law is . . . .”).

\(^87\) Saucier v. Katz, 533 U.S. 194, 201 (2001) (“A court required to rule upon the qualified immunity issue must consider, then, this threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer’s conduct violated a constitutional right? This must be the initial inquiry.”); see also Conn v. Gabbert, 526 U.S. 286, 290 (1999) (“[A] court must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all, and if so, proceed to determine whether that right was clearly established at the time of the alleged violation.”).

\(^88\) Pearson v. Callahan, 555 U.S. 223, 242 (2009) (“Because the two-step \textit{Saucier} procedure is often, but not always, advantageous, the judges of the district courts and the courts of appeals are in the best position to determine the order of decisionmaking that will best facilitate the fair and efficient disposition of each case.”).
resolve a Section 1983 on that basis alone.\textsuperscript{89} Thus, courts may now, with the
Supreme Court’s blessing, effectively dodge their duty to say what the law is
when determining whether a claim is barred by qualified immunity.

In response to this argument, some may object that qualified immunity
does not differ from any other affirmative defense requiring dismissal of a
claim before reaching the merits, but there is a vital distinction between the
two. Like qualified immunity, an affirmative defense may preclude liability
even assuming the truth of all facts alleged in a complaint. But unlike an
affirmative defense, qualified immunity’s “clearly established” requirement
strikes at the heart of the judicial reasoning process. Under qualified
immunity, judges are not permitted to look to ordinary sources of law.\textsuperscript{90} In
addition, qualified immunity directs judges to ignore developments in both
Supreme Court and circuit precedent, even where the operative
constitutional clause or statute were in effect at the time of the alleged rights
violation.\textsuperscript{91} Qualified immunity thus differs from other affirmative defenses
because it represents an especially egregious intrusion and attempt to control
the means that courts exercise their Article III powers. The federal judiciary
must be permitted to review and apply the “whole federal law.”\textsuperscript{92}

In considering other possible objections to this Article III argument, it is
worth discussing the Antiterrorism and Effective Death Penalty Act
(“AEDPA”), which in relevant part precludes habeas relief for state prisoners

\textsuperscript{89} Id.
\textsuperscript{90} For example, only judicial precedent is sufficient to clearly establish rights for purposes of qualified
immunity. See District of Columbia v. Wesby, 138 S. Ct. 577, 589 (2018) (“To be clearly established,
a legal principle must have a sufficiently clear foundation in then-existing precedent. The rule must
be settled law, which means it is dictated by controlling authority or a robust consensus of cases of
persuasive authority.”). That means that judges are effectively prevented from looking to a federal
statute as a source of clearly established law even when handling claims based on statutory rights.
See Key v. Grayson, 179 F.3d 996, 1002 (6th Cir. 1999) (holding that law was not clearly established
where “the language of the ADA and the Rehabilitation Act indicates the statutes’ applicability to
prisons” but there was “no published court decision so holding from the Supreme Court, this court
or a court within this circuit” that had held as much). Likewise, courts may not find clearly
established law in the text of the Constitution itself. See Ashcroft v. al-Kidd, 563 U.S. 731, 742
(2011) (“[T]hat an unreasonable search or seizure violations the Fourth Amendment is of little help
in determining whether the violative nature of particular conduct is clearly established.”). This
is despite the fact that the duty to interpret federal law is “[a]t the core” of Article III’s delegation of
power. See Williams v. Taylor, 529 U.S. 362, 378–79 (2000); see also Marbury v.
Madison, 5 U.S. (1 Cranch) 137, 179 (1803) (“The judicial power of the United States is extended
to all cases arising under the constitution. Could it be the intention of those who have this power,
to say that, in using it, the constitution should not be looked into? That a case arising under the
constitution should be decided without examining the instrument under which it arises?”).

\textsuperscript{92} See Liebman & Ryan, supra note 81, at 771.
unless state court proceedings “resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. . . .”93 In other words, AEDPA is even more exacting than qualified immunity because only Supreme Court opinions are relevant to the “clearly established” inquiry.94 Further, “only the holdings, as opposed to the dicta,” from Supreme Court opinions may be considered for purposes of AEDPA.95

When challenging their state-law convictions, some prisoners have argued that AEDPA violates Article III because it prevents federal courts from fulfilling their duty to say what the law is or otherwise interferes with the judiciary’s independence.96 Addressing one such challenge in Crater v. Galaza, the Ninth Circuit rejected the argument that AEDPA violates Article III by preventing federal courts “from giving [their] independent judgment on the legal effect of the evidence before [them]” and leaving the courts “no adjudicatory function to perform.”97 According to the Ninth Circuit, AEDPA “simply sets additional standards” for granting habeas relief but “does not instruct courts to discern or to deny a constitutional violation.”98

However, as will be explained in further detail below, the Ninth Circuit’s analysis fails to account for the combined effect of the clearly-established inquiry alongside the constitutional prohibition of advisory opinions.99 Those two factors, working in tandem, severely impair a court’s ability to

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95 Id. (internal quotation marks omitted).
96 See, e.g., Crater v. Galaza, 491 F.3d 1119, 1127 (9th Cir. 2007) (holding that AEDPA limitation of federal habeas relief for state court-convicted prisoners does not violate any separation of powers).
97 Id. at 1127 (quoting Davis v. Straub, 430 F.3d 281, 297 (6th Cir. 2005) (Merritt, J., dissenting).
98 Id.
99 It is worth noting that although no circuit court has yet held AEDPA unconstitutional based on the specific Article III argument rejected in Crater and described in this section, a fair number of jurists have indicated that they would accept those same arguments. See, e.g., Davis, 430 F.3d at 197 (Merrit, J., dissenting) (arguing that the prevailing interpretation of AEDPA is unconstitutional under Article III); see also Davis v. Straub, 445 F.3d 908, 908-09 (6th Cir. 2006) (Martin, J., dissenting from denial of rehearing en banc) (indicating the agreement of five Sixth Circuit judges with Judge Merritt’s dissent from the original panel opinion arguing that AEDPA violates Article III); see also Lindh v. Murphy, 96 F.3d 856, 885–90 (7th Cir. 1996) (en banc) (Ripple, J., dissenting) (indicating that two Seventh Circuit judges believe AEDPA violates Article III); see also Brief for Marvin E. Frankel et al. as Amici Curiae Supporting Petitioner, Williams v. Taylor, 529 U.S. 362 (2000) (No. 98-8384) (brief of five former federal judges arguing that AEDPA violates Article III). In fact, a majority of one Ninth Circuit panel would have held AEDPA unconstitutional under Article III but could not due to binding circuit precedent to the contrary. Irons v. Carey, 505 F.3d 846, 854–59 (9th Cir. 2007) (Noonan, J., concurring); id. at 859 (Reinhardt, J., concurring specially).
fulfill its Article III duties and render full compliance with Article III a practical impossibility.

b. 

Advisory Opinions and the Case-in-Controversy Requirement

Federal courts have no power under Article III “to render advisory opinions nor to decide questions that cannot affect the rights of litigants in the case before them.” Rather, a court’s “judgments must resolve a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.” “The rule in federal cases is that an actual controversy must be extant at all stages of review . . . .”

Although the Court no longer requires adherence to the Saucier approach, current precedent still allows courts to opine on the constitutional merits of a claim before moving to the clearly-established inquiry. However, individual jurists and federal courts have voiced concern about how the Court’s “precedents permit or invite courts to rule on the merits of a constitutional claim even when qualified immunity disposes of the matter . . . .” Such concerns are well-founded. A decision holding that a government agent violated a plaintiff’s “constitutional right[s] is immaterial if the court finds that the right was not clearly established at the time of the events giving rise to the lawsuit.” The Court itself has recognized that the primary purpose of following the Saucier approach is that it “promotes the development of constitutional precedent” and explained that it “is especially valuable with respect to questions that do not frequently arise in cases in which a qualified immunity defense is unavailable.”

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100 Preiser v. Newkirk, 422 U.S. 395, 401 (1975) (internal quotation marks and citation omitted).
101 Id. (internal quotation marks and citation omitted).
102 Id. (internal quotation marks and citation omitted).
103 See Pearson v. Callahan, 555 U.S. 223, 236 (2009) (“[W]e now hold that . . . (the procedure in Saucier] should no longer be regarded as mandatory.”); “[B]ased . . . should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the [particular] circumstances. . . .”).
104 Camreta v. Greene, 563 U.S. 692, 716 (2011) (Kennedy, J., dissenting); see also T.S. v. Doe, 742 F.3d 632, 637 (6th Cir. 2014) (“In the interest of avoiding an advisory constitutional ruling, we should first look to whether the rule that the plaintiffs advocate here was clearly established at the time, so as to trigger liability for any potential constitutional violation.”); see also Horne v. Coughlin, 191 F.3d 244, 248–49 (2d Cir. 1999) (declining to view the Saucier approach as “requiring federal courts to express advisory constitutional opinions in every case governed by qualified immunity”).
106 Callahan, 555 U.S. at 224.
provides helpful precedent to guide parties in future cases despite not impacting the case at issue. The Saucier approach thus “violate[s] the ban on advisory opinions because a decision on the constitutional issue has no effect on the outcome of the dispute.”\(^\text{107}\) Rather, it is explicitly intended to advise the future conduct of government actors.

That said, the Supreme Court has pushed back somewhat against the conclusion that constitutional rulings violate Article III when the matter may be properly disposed of on clearly-established grounds. In \textit{Camreta v. Greene}, the Court reviewed the Ninth Circuit’s holding that government defendants violated the plaintiff’s rights \textit{even though} the appellate court also concluded that the defendants were immune under the clearly-established prong.\(^\text{108}\) Although a prevailing party typically lacks standing to appeal,\(^\text{109}\) the \textit{Camreta} court explained that a prevailing party may still appeal if “the litigant retains the necessary personal stake in the appeal” and that “[t]his Article III standard often will be met when immunized officials seek to challenge a ruling that their conduct violated the Constitution.”\(^\text{110}\) The Court held Article III’s case-in-controversy requirements were met because the Ninth Circuit’s constitutional holding clearly established the law in that circuit and therefore “may have prospective effect on the parties” by forcing the defendant to “either change the way he performs his duties or risk a meritorious damages action.”\(^\text{111}\)

However, the procedural standing of \textit{Camreta} and the nature of the Court’s review demonstrates that it did not resolve the question of whether unnecessary constitutional rulings in qualified immunity cases raise Article III concerns. The Court held that it had jurisdiction to hear the appeal because of the possible prospective effect of the Ninth Circuit’s holding on the parties. In other words, the Court had jurisdiction only because it had a lower court’s constitutional holding to review. Such a ruling is always absent in the case of a district court issuing an unnecessary constitutional ruling and is often absent for the Courts of Appeal and the Supreme Court as well. Whichever court is the first to opine on the constitutional merits when

\(^{107}\) Healy, \textit{infra} note 105, at 920.

\(^{108}\) \textit{Camreta}, 563 U.S. at 692 (“The court . . . chose[] to rule on the merits of the constitutional claim so that officials would be on notice that they could not dispense with traditional Fourth Amendment protections in this context.”).


\(^{110}\) \textit{Camreta}, 563 U.S. at 702.

\(^{111}\) \textit{Id.} at 702–03.
immunity applies under the clearly-established prong is guilty of issuing an advisory opinion.\textsuperscript{112}

In sum, there is little doubt that addressing the first prong of the qualified immunity analysis when immunity is afforded under the second prong violates Article III’s prohibition on advisory opinions. The constitutional holdings in such cases cannot be considered “mere dicta” because they “establish[] controlling law and prevent[] invocations of immunity in later cases.”\textsuperscript{113} And yet, their issuance is entirely unnecessary to address the merits of the controversies at hand and serve only advisory purposes.

c. The Incompatibility of Article III and Qualified Immunity

As explained, qualified immunity presents two Article III problems: (1) it permits judges to shirk their duty to say what the law is, and (2) it allows judges to issue impermissible advisory opinions.\textsuperscript{114} It is plausible that qualified immunity could survive an Article III challenge if only one of those problems applied. For example, if a judge was concerned about fulfilling her Article III duty to say what the law is, no problem—she could follow the Saucier approach and conduct the necessary constitutional analysis to determine whether a constitutional violation took place. The problem is that doing so requires the judge to issue an advisory opinion in violation of Article III. On the flipside, if a judge was concerned about issuing an advisory opinion and therefore declined to follow the Saucier approach, then that judge forsook her Article III duty to say what the law is and give that judgment legal effect.

Considering these two Article III principles together, the Ninth Circuit’s error in dismissing an Article III challenge to AEDPA’s clearly-established rule is apparent.\textsuperscript{115} It is not sufficient to assert that a judge may offer her “independent judgment on the legal effect of the evidence.”\textsuperscript{116} Rather,

\textsuperscript{112} Apart from its unique procedural posture, relying on Camreta for the proposition that unnecessary constitutional holdings in qualified immunity cases do not violate Article III may ultimately prove problematic. The Court has since hinted that a foundational assumption of Camreta—that circuit court precedent clearly establishes constitutional rights within that circuit—may not be correct. See supra note 27 and accompanying text. If circuit court precedent cannot clearly establish that certain conduct violates the constitution, then Camreta’s conclusion that a lower court’s constitutional holding will govern the future conduct of the parties is significantly less convincing.


\textsuperscript{114} See supra notes 80–110 and accompanying text.

\textsuperscript{115} See supra notes 90–96 and accompanying text.

\textsuperscript{116} See Crater v. Galaza, 491 F.3d 1119, 1127 (9th Cir. 2007).
judges must be permitted to “give . . . effect” to that judgment and may not be “directed to give it an effect precisely contrary.” But if a federal judge determines that a constitutional violation occurred in an AEDPA or Section 1983 case, she is prevented from giving effect to that judgment if the violative conduct was not contrary to clearly established law. Therefore, the judge’s opinion on the constitutional merits is demoted to purely advisory status, which violates Article III.

In sum, it is impossible for federal courts to fully live up to Article III’s requirements under the current qualified immunity regime. Whenever a court grants qualified immunity on clearly-established grounds without addressing the constitutional merits, that court has abandoned its Article III duty to say what the law and to give effect to that judgment. And if a court determines that a constitutional violation occurred but continues to grant qualified immunity on clearly-established grounds, then that court has violated Article III’s prohibition on rendering advisory opinions. Thus, because qualified immunity is fundamentally incompatible with the powers, duties, and limitations Article III places on federal courts, it follows that qualified immunity is itself unconstitutional.

B. Equal Protection and Qualified Immunity

a. Disparate Treatment Based on Geography

Because qualified immunity derives from Section 1983, a federal statute, the Fifth Amendment’s Due Process Clause requires that the doctrine comply with equal protection requirements. Indeed, any federal law

118 See Irons v. Carey, 505 F.3d 846, 859 (9th Cir. 2007) (Reinhardt, J., concurring) (“Nor is authorizing jurists to determine that a citizen's detention is unlawful, but that he must remain incarcerated because a magistrate's error is understandable, consistent with our duty as jurists to enforce the laws and protect the rights of our citizens against arbitrary state action.”).
119 See Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 217–18 (1995) (holding unconstitutional congressional act that “require[d] the federal courts to exercise the judicial Power of the United States . . . in a manner repugnant to the text, structure, and traditions of Article III” because it violated the fundamental principle that it is “the province and duty” of the courts “to say what the law is”) (internal quotation marks and citations omitted)).
120 See generally Bolling v. Sharpe, 347 U.S. 497 (1954) (holding that the Due Process Clause of the Fifth Amendment requires that federal laws comport with the requirements of equal protection). Of note, some scholars have contended that the holding in Bolling is incompatible with an originalist reading of the Fifth Amendment. See Ryan C. Williams, Originalism and the Other Desegregation Decision, 99 Va. L. Rev. 493, 496–97 (2013) (describing originalist critiques of Bolling). However, others have argued
“which in terms gave to one individual certain rights, and denied to another similarly situated the same rights, might be challenged on the ground of unjust discrimination and a denial of equal protection of the laws.\[^{121}\] But that is precisely what qualified immunity does.

Qualified immunity violates equal protection because it arbitrarily discriminates against certain plaintiffs based solely on their geographic location.\[^{122}\] That is, what rights are “clearly established” for a particular plaintiff depends on where the plaintiff was located at the time of the alleged constitutional violation—a right may be recognized in some circuits but not in others.\[^{123}\] Although that may be typical where different jurisdictions are subject to different statutory laws,\[^{124}\] a Section 1983 action is based on a federal statute and the rights asserted therein arise under the Federal

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\[^{121}\] See Backus v. Fort St. Union Depot Co., 169 U.S. 557, 571 (1898) (explaining how it is unjust to give to one party individual rights that are denied to another).

\[^{122}\] In another context, the Supreme Court has recognized that arbitrary geographic restrictions violate the Equal Protection Clause. See, e.g., Gray v. Sanders, 372 U.S. 368, 379–80 (1963) (holding that the Equal Protection Clause requires all persons within a geographical unit to have an equal vote for a representative for that unit, regardless of where “their home may be in that geographical unit”); see also Woodall v. Petition, 465 F.2d 49, 52 (4th Cir. 1972) (“[T]his court thought that laws which absolutely foreclosed to certain persons the advantages of being treated as juveniles solely on the basis of the geographical location of the acts alleged created an unreasonable and irrational classification and were therefore unconstitutional.”).

\[^{123}\] Because each circuit currently looks to its own precedent to determine what rights are clearly established and the Supreme Court has not yet held otherwise, it is assumed for purposes of this discussion that a circuit court’s precedent can clearly establish law within its own geographic jurisdiction. See supra notes 24–27 and accompanying text.

\[^{124}\] See United States v. Pritchard, 317 F. App’x 543 (7th Cir. 2009) (rejecting as frivolous an equal protection complaint that underlying felonious conduct “might well have constituted a misdemeanor in some other, hypothetical state”).
Constitution, and federal laws apply universally across the United States.\(^{125}\) In addition, qualified immunity’s geographic classification differs from an ordinary circuit split because disparate treatment under the same laws is mandated rather than arising from the judiciary’s good faith attempts to interpret the law.

Whether qualified immunity could withstand an equal protection challenge may depend on what level of scrutiny applies. An “equal protection analysis requires strict scrutiny of a legislative classification only when the classification impermissibly interferes with the exercise of a fundamental right . . . or operates to the peculiar disadvantage of a suspect class.”\(^{126}\) Here, the geographic classification imposed by qualified immunity does not involve a suspect class.\(^{127}\) Therefore, strict scrutiny would apply to an equal protection challenge aimed at qualified immunity only if the geographic classification burdens a fundamental right. Otherwise, the geographic classification need only survive rational basis review.\(^{128}\)

\(b\). The Geographic Classification Under Strict Scrutiny

Because qualified immunity affords different litigants with different substantive rights for legal redress, it can be viewed as interfering with the right of access to the courts—which right has long been viewed as fundamental.\(^{129}\) The right of access to the courts must be dispensed in a

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manner consistent with equal protection, which requires courts to afford all similarly situated persons with equal rights for redress of wrongs. Because the Supreme Court has recognized that the fundamental right of access to the courts encompasses the ability to vindicate “basic constitutional rights” through Section 1983 actions, it follows that Section 1983 must likewise provide similarly situated persons with equal rights to vindicate constitutional rights and obtain redress for constitutional injuries. But as explained above, qualified immunity draws a geographic classification that often affords similarly situated persons with different litigation rights under Section 1983, thereby burdening the ability of citizens in the wrong location to exercise the right of access to the courts to seek and obtain redress for constitutional harms. Therefore, courts should subject qualified immunity’s geographic classification to strict scrutiny because it substantially burdens the fundamental right of access to the courts.

To survive strict scrutiny, qualified immunity’s geographic classification must be “narrowly tailored” to achieve a “compelling government

130 Mayer v. City of Chicago, 404 U.S. 189, 193 (1971) (”[I]t is now fundamental that, once established[,] avenues of appellate review must be kept free of unreasoned distinctions that can only impede open and equal access to the courts.” (cleaned up) (internal quotation marks and citations omitted)); Smith v. Bennett, 365 U.S. 708 (1961) (”[T]o interpose any financial consideration between an indigent prisoner of the State and his exercise of a state right to sue for his liberty is to deny that prisoner the equal protection of the laws.”); Burns v. State of Ohio, 360 U.S. 252, 258 (1959) (”The imposition by the State of financial barriers restricting the availability of appellate review for indigent criminal defendants has no place in our heritage of Equal Justice Under Law.”).

131 See Barbier v. Connolly, 113 U.S. 27, 30 (1884) (explaining that equal protection requires that all “should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts” and that “no greater burdens should be laid upon one than are laid upon others in the same calling and condition”).

132 Wolff v. McDonnell, 418 U.S. 539, 579 (1974) (“The right of access to the courts . . . is founded in the Due Process Clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights.”).

133 See supra notes 118–21 and accompanying text.

134 See Tennessee v. Lane, 541 U.S. 509, 529 (2004) (”[E]nforcement of a variety of basic rights, including the right of access to the courts . . . call[s] for a standard of judicial review at least as searching, and in some cases more searching, than the standard that applies to sex-based classifications.”); Boddie v. Connecticut, 401 U.S. 371, 381 (1971) (applying heightened scrutiny to law burdening right of access to the courts by requiring fees to initiate divorce proceedings without respect to indigency); Woodford v. Ngo, 548 U.S. 81, 122–23 (2006) (Stevens, J., dissenting) (asserting that because access to the courts is a fundamental right, government classifications that substantially burden that right require “searching judicial examination under the Equal Protection Clause”); Guttman v. Khaba, 669 F.3d 1101, 1121–22 (10th Cir. 2012) (explain that “the right of access to the courts” is “a fundamental right that may not be encroached upon unless the infringing provision survives strict scrutiny”).
When performing a strict scrutiny analysis, courts may not simply accept the government’s contention that a classification is narrowly tailored or its interests compelling but must instead “test the government’s assertions.” As will be demonstrated, qualified immunity and its geographic classification cannot survive strict scrutiny.

As articulated by the Supreme Court, the governmental interests in qualified immunity are (1) shielding officers acting in good faith from financial liability, (2) protecting against overdeterrence in the participation of public employment or the discharge of public duties, and (3) protecting government officials from the burdens of discovery and trial. None of those interests are sufficiently compelling to survive strict scrutiny.

As to the first and third interests, the Court recently held that a city’s interest in protecting itself from potential liability did not qualify as a compelling government interest that could justify a suspect classification, which would indicate that shielding officers from liability and the litigation process are not compelling interests for purposes of strict scrutiny. As to the second interest, it could be argued that governments have a compelling interest in ensuring that its officers are not so paralyzed by fear of litigation that they are inhibited from carrying out their duties. Although one could counter that the government’s interest in encouraging constitutional policing and protecting the rights of citizens is at least equally as compelling.

But the most compelling evidence that none of the foregoing interests are truly compelling is that the geographic classification fails to offer sufficient protection for those interests. The geographic restriction affords differing levels of protection to officers based upon their geographic location. Accordingly, officers engaged in identical conduct but in different geographic locations will incur differing levels of liability, face different incentives in carrying out their duties, and experience different burdens in litigation. If

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136 See South Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716, 718 (2021) (Gorsuch, J., statement) (explaining that “[t]he whole point of strict scrutiny is to test the government’s assertions . . . .”)

137 Supra notes 33–39 and accompanying text.


139 See Tennessee v. Garner, 471 U.S. 1, 27 (1985) (O’Connor, J., dissenting) (noting that “the public interest in the prevention and detection of . . . crime is of compelling importance” while arguing against liability of defendant officer for shooting fleeing suspect).

140 Cf. Lefkowitz v. Cunningham, 431 U.S. 801, 808 (1977) (explaining that “Government has compelling interests in maintaining an honest police force and civil service . . . .”).
protecting officers and government officials from such evils were truly compelling interests, then officers would be afforded at least equal amounts of protection regardless of their location. The failure of qualified immunity and the geographic restriction to protect against some harms while leaving virtually identical harms unaddressed in other jurisdictions compels the conclusion that the purported government interests are not compelling for purposes of strict scrutiny.

Even assuming the aforementioned interests are compelling, however, qualified immunity can survive strict scrutiny only if its geographic classification is narrowly tailored to serve those interests. For purposes of strict scrutiny, a classification “is narrowly tailored if it targets and eliminates no more than the exact source of the ‘evil’ it seeks to remedy.” Moreover, to satisfy the narrowly tailored requirement, the government must produce “a strong basis in evidence” that the challenged classification is necessary to further the compelling interest at issue. This is a heavy burden, and qualified immunity’s geographic classification cannot possibly carry it.

The geographic limitation is not narrowly tailored on its face. The first two governmental interests (protecting against officer liability and overdeterrence in carrying out official duties, respectively) could be accomplished by a policy providing for indemnification of officers. In the alternative, Congress could require government agencies or officials to carry insurance that will compensate victims of any unconstitutional acts while protecting officers from bearing the full brunt of liability. But the geographic classification goes further than necessary by requiring victims of constitutional torts to bear the full weight of their injuries without redress.

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141 Although a full examination of such is beyond the scope of this Article, it is worth noting the possibility that Section 1983 defendants might also have equal protection objections to qualified immunity insofar as they are liable under the law of one circuit but would be immune under the law of another.

142 See Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 546 (1993) (noting that “[i]t is established in our strict scrutiny jurisprudence that a law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprotected.”) (internal quotation marks and citations omitted).


145 Supra note 36 and accompanying text.

146 See Michael D. White et al., How Can We Achieve Accountability in Policing? The (Not-So-Secret) Ingredients to Effective Police Reform, 25 LEWIS & CLARK L. REV. 405, 445–46 (2021) (outlining a list of proposed legal reforms to effect positive change in policing, including proposed requirement that officers carry liability insurance).
And the third governmental interest (protecting officers and officials from the burdens of litigation), could be furthered by either by amending the Rules of Civil Procedure to provide for less burdensome discovery based on the amount of damages alleged,\textsuperscript{147} or by requiring litigants to seek administrative relief or go through alternative dispute resolution before seeking relief with the courts.

Apart from its facial inadequacies, qualified immunity also fails the narrowly tailored test because it cannot be shown that Congress had a “strong basis in evidence” or “good reasons” to believe that the geographic classification was necessary to further the aforementioned interests.\textsuperscript{148} This is true for at least two reasons. First, qualified immunity is a judge-made doctrine, and the available historical evidence indicates that it was not intended to include qualified immunity as a defense at all, let alone include the geographic classification as a part of that defense.\textsuperscript{149} Second, as demonstrated by Professor Schwartz, there is virtually no evidence that qualified immunity or the geographic classification are necessary to further the claimed interests or that they are effective in doing so.\textsuperscript{150} Thus, the geographic classification is not narrowly tailored and cannot survive strict scrutiny.

c. The Geographic Classification Under Rational Basis Review

If a court declined to subject qualified immunity’s geographic classification to strict scrutiny, then rational basis review would apply instead. For a classification drawn by Congress to survive rational basis review, neither Congress nor the government needs to “actually articulate at any time the purpose or rationale supporting its classification.”\textsuperscript{151} Rather, the classification will be upheld if a court can imagine any hypothetical purpose that “may reasonably have been the purpose and policy” of Congress in drawing the classification.\textsuperscript{152}

\textsuperscript{147} See, e.g., Utah R. Civ. P. 26(c)(5) (outlining four tiers of discovery that apply based on the amount of damages claimed or the type of case).

\textsuperscript{148} See Alabama Legislative Black Caucus v. Alabama, 575 U.S. 254, 278 (2015) (cleaned up) (explaining that for a law to satisfy strict scrutiny’s narrowly tailored requirement, the legislature must have a “strong basis in evidence” and “good reasons” to believe that such a classification is necessary).

\textsuperscript{149} Supra notes 1–7, 40–74, and accompanying text.

\textsuperscript{150} Supra notes 33–39 and accompanying text.

\textsuperscript{151} Nordlinger v. Hahn, 505 U.S. 1, 15 (1992).

\textsuperscript{152} Id. (citing Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 528–529 (1959)).
If Congress had created qualified immunity, it is plausible that the geographic classification could survive rational basis review. The Court has held that “[a] claim of arbitrariness cannot rest solely on a statute’s lack of uniform geographic impact.” And a rational basis for the classification could be supplied by the policy reasons outlined by the Supreme Court or perhaps if Congress believed that it would be unfair to subject officers to liability without fair notice. If this were the case, it could be argued that the “rational-basis standard . . . [would] not allow [a court] to substitute [its] personal notions of good public policy for those of Congress” by doing away with the geographic classification.

But the wrinkle for qualified immunity is that the geographic classification was not enacted by Congress but was instead created by the Supreme Court. It can therefore be argued that the Supreme Court should not give its own policy preferences the benefit of rational basis review insofar as creating policy is not the Court’s role under the separation of powers. But insofar as the Court seems to believe that qualified immunity is positively required by Section 1983, those policy preferences could hypothetically serve as the rational basis underlying the geographic restriction.

Or at least that would be the case if Congress had not indicated that it did not wish to impose any classifications and instead allow for full equality under Section 1983 and its related provisions:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Where Congress legislated that all persons in the country have the “same right . . . to sue” and enjoy “the full and equal benefit of all laws . . . as is

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154 Supra notes 33–39 and accompanying text.
157 Supra notes 1–27, 40–74, and accompanying text.
158 See Bd. of Trs. v. Garrett, 531 U.S. 356, 383 (2001) (Breyer, J., dissenting) (explaining that rational basis review of statutes for equal protection violations is rooted in “judicial deference and respect for Congress”).
159 Supra notes 8–18, 40–43 and accompanying text.
enjoyed by white citizens,” it strains credulity to claim that Congress also intended that the white citizenry, and everyone else by extension, actually enjoy different rights based on their location.161 “All persons within the jurisdiction of the United States” cannot have rights equal to “white citizens” unless both groups are treated as collective wholes.162 Non-white persons cannot enjoy equal rights with “white citizens” generally if white people living in the Ninth and Fifth Circuits enjoy different substantive rights under Section 1983.

Based on the intention of Congress regarding classifications under Section 1983 and related provisions, qualified immunity’s geographic classification must fail rational basis review. Rational basis review is rooted in “judicial deference and respect for Congress” and the fact that the Constitution “empowers Congress to enforce the equal protection mandate,” not the courts.163 Therefore, although a court may typically imagine lawful rationale that will enable a classification to survive rational basis review,164 the fundamental policy behind rational basis review requires that neither the classification nor any imagined rationales contradict the will of Congress as manifested in the statutory text. And here, where the statute makes clear that Congress did not intend to impose a geographic classification onto Section 1983, it would flagrantly violate the separation of powers for a court to impose such a classification based on imagined justifications. Thus, the geographic classification and qualified immunity, at least in its current form, cannot survive rational basis review.

III. HOLDING THAT QUALIFIED IMMUNITY IS UNCONSTITUTIONAL

A. Stare Decisis Considerations

Were a lower court to accept the argument that qualified immunity is unconstitutional, it must be certain to craft its ruling so as not to flaunt governing caselaw. Certain avenues to judicial abolition of qualified immunity are effectively foreclosed by Supreme Court precedent, such as direct challenges to the positive law bases underlying the doctrine. Unless

161 Id.
162 Id.
163 Garrett, 531 U.S. at 383 (citing City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439 (1985)).
and until the Supreme Court reverses or modifies its qualified immunity jurisprudence, lower courts are bound by vertical *stare decisis* to apply qualified immunity regardless of any misgivings they may have with the doctrine.\(^{165}\)

Nor could a court dodge the substantive constitutional issues via the canon of constitutional avoidance. That canon “is an interpretive tool, counseling that ambiguous statutory language be construed to avoid serious constitutional doubts.”\(^{166}\) As applied to Section 1983, a court would weigh an interpretation that includes qualified immunity as a defense against one that does not. Given the serious constitutional concerns with qualified immunity,\(^{167}\) a court considering the issue as a matter of first impression could have relied on that canon to interpret Section 1983 as not providing for qualified immunity. However, lower courts have no basis for employing a canon of interpretation when the relevant statute has already been interpreted by a higher court. Because the Supreme Court has already interpreted Section 1983 as providing for qualified immunity, a lower court cannot base its ruling against qualified immunity on the canon of constitutional avoidance.

That said, *stare decisis* does not bind future courts unless the precedent “squarely addressed the issue” at hand.\(^{168}\) Because the Supreme Court has not squarely addressed whether the doctrine of qualified immunity violates Article III or the Fifth Amendment’s equal protection requirements, lower courts are free to hear, consider, and sustain challenges to qualified immunity on those grounds. They simply must do so while respecting the governing interpretation of Section 1983.

### B. Ruling Against Qualified Immunity

Of course, there are multiple factors that courts must consider were it to find that qualified immunity violates the Constitution. First, courts must address the threshold issue of standing.\(^{169}\) Not every Section 1983 plaintiff

\(^{165}\) See Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989) (“If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.”).


\(^{167}\) See supra notes 78–158 and accompanying text.


\(^{169}\) See Food Mktg. Inst. v. Argus Leader Media, 139 S. Ct. 2356, 2362 (2019) (providing that the question of standing is a “threshold challenge” to a court’s jurisdiction).
will have standing to raise both Article III and equal protection objections. Standing for Article III objections will exist whenever a defendant invokes qualified immunity for lack of a clearly established right or when a court grants immunity on that same basis. Standing for equal protection objections, however, can exist only where plaintiffs base their claims on rights that are, at least arguably, clearly established in other circuits but not the circuit where the litigation is taking place. Absent some disparity between the caselaw of the governing circuit and a sister circuit, plaintiffs could not argue that they are being deprived of equal protection of the law.\footnote{See United States v. Hays, 515 U.S. 737, 743–44 (1995) ("[E]ven if a governmental actor is discriminating on the basis of race, the resulting injury accrues a basis for standing only to those persons who are personally denied equal treatment by the challenged discriminatory conduct") (internal quotation marks and citations omitted).}

Directly related to the issue of standing is that of remedy—whether and how a court could ameliorate the constitutional harms caused by qualified immunity.\footnote{See Steel Co. v. Citizens for a Better Envt’t, 523 U.S. 83, 107 (1998) (holding that the redressability requirement for Article III standing requires that the requested remedy redress the injury complained of).} The most straightforward remedy to curing such harms would be to hold that Section 1983’s provision of qualified immunity renders the statute unconstitutional and then conduct a severability analysis to determine Section 1983 “remains fully operative without” qualified immunity.\footnote{See Murphy v. Nat. Collegiate Athletic Ass’n, 138 S. Ct. 1461, 1482 (2018) (providing that when federal provisions in an Act are found unconstitutional, the severability analysis requires a court to “ask whether the law remains ‘fully operative’ without the invalid provisions” (citation omitted)).} In such a case, the severability inquiry would be simplified by the fact that Section 1983 does not, in fact, contain a qualified immunity provision.\footnote{42 U.S.C. § 1983.} Therefore, there is little concern that, by severing qualified immunity, a court would “rewrite [Section 1983] and give it an effect altogether different from that sought by the measure viewed as whole.”\footnote{Murphy v. Nat. Collegiate Athletic Ass’n, 138 S. Ct. at 1482 (citation omitted).} In fact, by adhering strictly to the text, severance would likely bring Section 1983 into greater harmony with congressional intent and its original meaning.\footnote{See Scalia & Garner, supra note 63, at 56 ([T]he purpose [of a statute] must be derived from the text, not from extrinsic sources such as legislative history or an assumption about the legal drafter’s desires.).} And where Section 1983 or its historical analogues were not interpreted to allow for a good-faith defense or other forms of immunity from 1871 until the 1950s,\footnote{Supra notes 1–18 and accompanying text.} it seems

\[\text{SOURCE}\]
apparent that the law could remain “fully operative” even if qualified immunity were severed therefrom.

However, were a court to find qualified immunity unconstitutional only on equal protection grounds, there may be an alternative remedy available. Rather than severing qualified immunity from Section 1983 in its entirety, a court could elect to sever only the geographic restriction, thereby affording all Section 1983 litigants the same access to clearly established rights regardless of their location. But were a court to embark on such a path, there are at least two possible directions it could take in deciding how to sever the geographic classification.

In the first, a Section 1983 plaintiff would still need to prove the violation of a clearly established right but would be permitted to rely on precedent from all federal appellate courts in meeting that burden. Although that would result in a much weaker form of immunity than is currently required, it would not render qualified immunity worthless as a defense to liability because the plaintiff must still demonstrate that at least one federal appellate court had clearly established the right at issue. In the second, the court would require the plaintiff to prove that the right was clearly established via reference only to Supreme Court caselaw, as such cases apply uniformly across the country. Absent a change to qualified immunity’s factual particularity requirements, this would result in a significantly strengthened form of qualified immunity because it would vastly shrink the body of law that could be used to demonstrate the existence of a clearly established right.

In any event, none of the above-described severance approaches are foreclosed by Supreme Court precedent. If a court decided to sever qualified immunity from Section 1983 due to its acceptance of normative criticisms against the doctrine, that court would be viewed as imposing its policy

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177 See supra notes 19–23 and accompanying text.

178 For example, in the habeas context courts consider only Supreme Court decisions when deciding whether a petitioner’s conviction resulted from a violation of clearly established law. Woods v. Donald, 575 U.S. 312, 316 (2015); accord 28 U.S.C. § 2254(d)(1). And the success rate of habeas petitioners has been shown to be as low as one percent. John H. Blume, AEDPA: The “Hype” and the “Bite,” 91 CORNELL L. REV. 259, 284 (2006); see also Justin F. Marceau, Challenging the Habeas Process Rather Than the Result, 69 WASH. & LEE L. REV. 85, 101 (2012) (documenting the decreasing success rate of habeas petitioners at the Supreme Court since AEDPA’s enactment). In comparison, a study of five federal districts showed that plaintiffs successfully overcame assertions of qualified immunity in 31.6% of cases at the trial court level. Schwartz, How Qualified Immunity Fails, supra note 36, at 36–37.

179 See supra notes 29–39 and accompanying text.
preferences over the enacted will of Congress (insofar as the Supreme Court has interpreted Section 1983 as providing for qualified immunity).\textsuperscript{180} Likewise, acceptance of other positive arguments against qualified immunity\textsuperscript{181} would require lower courts to interpret Section 1983 in a way that flatly contradicts binding precedent.\textsuperscript{182}

In contrast, although the Court has read qualified immunity into Section 1983, it has not squarely addressed whether the statute’s provision of qualified immunity is in line with constitutional requirements of Article III or equal protection. Thus, courts may readily accept constitutional arguments against qualified immunity without doing violence to the separation of powers or jurisprudential norms. Then, once a court has found against the constitutionality of qualified immunity, severing the defense from Section 1983 represents the best available path to give effect to the court’s judgment.

**CONCLUSION**

The doctrine of qualified immunity is unconstitutional under current governing law, violating both Article III and the equal protection principles enshrined in the Fifth Amendment. As such, Section 1983 plaintiffs would do well to employ the constitutional arguments against qualified immunity described herein at every opportunity. Critically, unlike other scholarly critiques of qualified immunity, these constitutional objections can have an immediate impact on civil rights litigation. Current precedent does not preclude courts from sustaining such objections, and they are entirely consistent the current state of constitutional law. Challenging the constitutionality of qualified immunity therefore represents the most viable (non-legislative) path toward abolishing or reforming the current qualified-immunity regime.

Acceptance of Article III or equal protection arguments against qualified immunity and the resultant weakening or abolition of that doctrine would

\textsuperscript{180} See *Malley v. Briggs*, 475 U.S. 335, 342 (1986) (explaining that qualified immunity, rather than absolute immunity, applied to the conduct at issue and emphasizing that the Court’s “role is to interpret the intent of Congress in enacting § 1983, not to make a freewheeling policy choice . . .”)

\textsuperscript{181} See *supra* notes 40–77 and accompanying text.

\textsuperscript{182} See *supra* notes 12–28 and accompanying text.
have an immediate impact on American civil rights litigation.\(^{183}\) The judiciary would be restored to its proper constitutional function of declaring the law and facilitating the equal administration of justice. The law of constitutional torts would be injected with a measure of fairness and equality that is currently absent. Insofar as a right without a remedy is no right at all,\(^{184}\) the American people could rest secure in the knowledge that they have real, substantive rights under the Constitution. And lastly, as a practical matter, lower courts holding that qualified immunity is unconstitutional could compel a heretofore reluctant\(^{185}\) Supreme Court to finally address the (un)lawfulness of the qualified immunity head on.

\(^{183}\) See generally Joanna C. Schwartz, After Qualified Immunity, 120 COLUM. L. REV. 309 (2020) (predicting that eliminating qualified immunity would have a limited but not insignificant effect on civil rights litigation and constitutional law).

\(^{184}\) See Von Hoffman v. City of Quincy, 71 U.S. 535, 554 (1866) (“A right without a remedy is as if it were not. For every beneficial purpose it may be said not to exist.”); Hawkins v. Barney’s Lessee, 30 U.S. 457, 463 (1831) (“There can be no right without a remedy. . . .”).

\(^{185}\) See supra note 77 and accompanying text.