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Abstract

For the first time in its fifty-year history, the future of qualified immunity is in serious doubt. The doctrine may yet survive for many years. But thanks largely to the recent mass movement for racial justice, major reform and abolition are now live possibilities. This development raises a host of questions that have been little explored in the voluminous literature on qualified immunity because its abolition has been so difficult to imagine before now. Perhaps the most pressing is how overworked federal courts will respond to a substantial influx of new cases fueled by qualified immunity's curtailment or demise. Might judicial capacity concerns prompt judges to take countermeasures that discourage constitutional tort suits, effectively reproducing qualified immunity by another name? Can anything be done to prevent this outcome?

This Article takes up these questions, which will remain relevant as long as qualified immunity persists and become urgent if and when the doctrine is seriously reformed or abolished. The first step is to disaggregate the federal judiciary into its component parts. A substantial influx of new constitutional tort litigation poses little threat to the capacity of the Supreme Court because the Justices would not feel compelled to review more than a tiny fraction of these cases. Lower courts, however, must decide every case presented to them and many of them are already staggering under

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overwhelming workloads. Several of the tools available for managing a sudden surge of cases would raise substantial obstacles to the success of constitutional tort plaintiffs, replicating many, if not all, of the effects of qualified immunity. This outcome is not inevitable, however. Avoiding it will be "Round Two" in the battle over qualified immunity. The most powerful weapons in that fight, as in Round One, will be political and social, rather than legal.

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INTRODUCTION

The past decade has been a roller coaster for the doctrine of qualified immunity, which protects government officials against personal liability unless their conduct violates clearly established federal law.[1] Until quite recently, qualified immunity seemed like a fixed star of the Supreme Court's constitutional torts jurisprudence. Not only did the Court's decisions embrace an expansive understanding of the doctrine, one that protected "all but the plainly incompetent or those who knowingly violate the law,"[2] but the Court repeatedly granted certiorari and reversed routine lower court decisions denying qualified immunity.[3] Many of these decisions were unanimous or nearly so. [4] The signal was loud and clear: lower courts should get with the program or face the embarrassment of repeated reversal, with no end in sight. In 2018, one leading scholar of the doctrine warned would-be reformers, "The legal community can continue to argue about qualified immunity at the margins, but should not reasonably expect any

1. *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (establishing the qualified immunity standard).

2. Malley v. Briggs, 475 U.S. 335, 341 (1986).

3. For a summary of the Court's summary reversal practice in qualified immunity cases, see William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 85 (2018); *see also* Lynn Adelman, *The Supreme Court's Quiet Assault on Civil Rights*, DISSENT 1, 4 (2017), https://perma.cc/VFL2-U3SW (PDF) ("Of the nineteen opinions [the Supreme Court] has issued since 2001, in seventeen it found that government officials were entitled to qualified immunity because the plaintiff could not produce a precedent with facts close enough to those in the case at bar.").

4. Aziz Z. Huq, *Judicial Independence and the Rationing of Constitutional Remedies*, 65 DUKE L.J. 1, 48 (2015).

transformation of the doctrine's basic structure over its next fifty years."[5]

Then, came the summer of 2020. Following George Floyd's death under the knee of a Minneapolis police officer, a tidal wave of protests placed qualified immunity reform squarely on the national political agenda—a development that would have been scarcely imaginable in the absence of such popular mobilization.[6] For a brief moment, qualified immunity appeared to be in serious jeopardy in both Congress and the courts. Commentators from across the political spectrum criticized the doctrine's legal foundations and policy consequences.[7] Several Justices joined the chorus, including the Supreme Court's most liberal member and its most conservative.[8] When we wrote the first draft of this Article in August 2020, we described qualified immunity as "on the ropes."

In retrospect, that assessment seems far too optimistic. For opponents of qualified immunity, the heady days of summer 2020 have given way to a far murkier and more daunting landscape. Justice Ruth Bader Ginsburg is dead, and her successor on the Court seems likely to be significantly more sympathetic to qualified immunity.[9] Control of Congress is closely divided, and the Senate filibuster remains a formidable obstacle to legislative reform. Bipartisan

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5. Alan K. Chen, *The Intractability of Qualified Immunity*, 93 NOTRE DAME L. REV. 1937, 1938 (2018) [hereinafter Alan Chen].

6. *See, e.g.*, Debra Cassens Weiss, *Death of George Floyd Brings Debate on Qualified Immunity for Police Misconduct*, A.B.A. J. (June 2, 2020, 11:18 AM), https://perma.cc/YQH6-QVHD; Opinion, *How the Supreme Court Lets Cops Get Away with Murder*, N.Y. TIMES (May 29, 2020), https://perma.cc/V6R9-K538; *see also* Madison Pauly, *Limiting Qualified Immunity for Cops Was a Bipartisan Issue After George Floyd's Death. What Happened?*, MOTHER JONES (May 25, 2021), https://perma.cc/GK62-W5ER.

7. *See, e.g.*, Baude, *supra* note 3, at 85; Adelman, *supra* note 3; Fred O. Smith, Jr., *Formalism, Ferguson, and the Future of Qualified Immunity*, 93 NOTRE DAME L. REV. 2093, 2113 (2016). *See generally* Cassens Weiss, *supra* note 6 (summarizing public debate).

8. *Compare* Baxter v. Bracey, 140 S. Ct. 1862, 1864 (2020) (Thomas, J., dissenting), *with* Kisela v. Hughes, 138 S. Ct. 1148, 1154–55 (2018) (Sotomayor, J., dissenting).

9. *See, e.g.*, Kevin L. Cope & Joshua B. Fischman, *An Empirical Analysis of Judge Amy Coney Barrett's Record on the Seventh Circuit* (Oct. 14, 2020), https://perma.cc/B5TM-NTP7.

negotiations have led nowhere, and popular skepticism of calls to defund or abolish the police have made police reform—including qualified immunity reform—a potent wedge issue.[10] As a result, the short-term prospects for curtailment or abolition of qualified immunity have dimmed considerably.

We have not, however, simply returned to the status quo ante. On both the legislative and the judicial fronts, the path to qualified immunity reform or abolition now appears longer and more tortuous than it did in the summer of 2020. And there is certainly no guarantee of ultimate success. But thanks to the millions of Americans who marched after George Floyd's death, it is still eminently possible to imagine a future in which qualified immunity is seriously reformed or abolished. In fact, the House of Representatives actually passed a bill that would have abolished the doctrine in the spring of 2021.[11] This legislation stalled in the Senate, but it demonstrates a crucially important fact: qualified immunity reform now enjoys strong institutional support from one of the two major political parties. This alone places qualified immunity on thinner ice than it has been at any previous point in its fifty-year history.

The prospect that qualified immunity might be curtailed or abolished raises a host of questions that have been little explored in the voluminous academic literature because, until recently, the doctrine's repeal has been so difficult to imagine.[12] Among these, perhaps the most pressing is how the federal courts will respond to a substantial influx of new cases fueled by qualified immunity's contraction or demise. The Supreme Court has long justified qualified immunity as necessary to protect government officials and federal courts from an onslaught of frivolous litigation.[13] And many academic

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10. *See, e.g.*, Catie Edmondson, *Bipartisan Police Reform Talks Are Officially Dead*, N.Y. TIMES (Sept. 22, 2021), https://perma.cc/VD9Z-4GED; Pauly, *supra* note 6.

11. George Floyd Justice in Policing Act of 2021, 117 H.R. 1280, 117th Cong. § 102.

12. One notable exception is Joanna C. Schwartz, *After Qualified Immunity*, 120 COLUM. L. REV. 309, 310–11 (2020) [hereinafter Schwartz, *After Qualified Immunity*]. Schwartz does not take on the judicial capacity question, however.

13. *See, e.g.*, Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2080 (2011) ("Courts should think carefully before expending scarce judicial resources to resolve difficult and novel questions of constitutional or statutory interpretation that

commentators have noted the ways in which judicial concern about swelling caseloads shapes doctrinal development.[14] One leading scholar has gone so far as to argue that limiting the volume of litigation is an essential explanation for the Supreme Court's steady expansion of qualified immunity.[15] How will the federal courts respond if and when this protection against docket overload is removed? Might they take countermeasures to discourage the filing of constitutional tort suits, effectively reproducing qualified immunity by another name? Can anything be done to prevent this outcome?

This Article takes up these questions, which will remain relevant as long as qualified immunity persists and will become urgent if and when the doctrine is seriously reformed or abolished. The first step toward answering them is to recognize that the federal judiciary, like Congress, is a "they" not an "it."[16] In particular, the capacity constraints operating on the Supreme Court and the lower federal courts are very different.[17] Because the Supreme Court is primarily a court of

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will have no effect on the outcome of the case."); Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) ("Reliance on the objective reasonableness of an official's conduct . . . [should] permit the resolution of many insubstantial claims on summary judgment."); Huq, *supra* note 4, at 55 ("Justices repeatedly emphasize caseload and judicial-economy concerns in regard to habeas, suppression remedies, and constitutional tort.").

14. *See, e.g.*, ANDREW COAN, RATIONING THE CONSTITUTION: HOW JUDICIAL CAPACITY SHAPES SUPREME COURT DECISION-MAKING 19 (2019) ("[I]n certain important constitutional domains, the limits of judicial capacity create strong pressure on the Supreme Court to adopt hard-edged categorical rules, defer to the political process, or both."); Huq, *supra* note 4, at 33 ("Rather, as with the constitutional tort context, a close study of doctrinal development suggests that the Court is the principal architect in this fault rule, and that looming large among its motives is an institutional concern with judicial economy."); Marin K. Levy, *Judging the Flood of Litigation*, 80 U. CHI. L. REV. 1007, 1028 (2013) [hereinafter Levy, *Judging the Flood of Litigation*] ("The justices have considered in some cases whether a particular decision will lead to a flood of new claims into federal court . . . .").

15. *See generally* Huq, *supra* note 4 (collecting evidence for this causal hypothesis).

16. *Cf.* Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239 (1992) (coining this phrase).

17. *See, e.g.*, COAN, *supra* note 14, at 13–18 (describing the capacity constraints on Supreme Court decision-making as a function of its unique norms and position in the judicial hierarchy); Andrew B. Coan, *Judicial*

discretionary jurisdiction, it can withstand a very large increase in the volume of federal filings with little discomfiture, so long as it is willing to deny certiorari in the vast majority of those cases.[18] This does not mean that the Supreme Court's capacity is unlimited.[19] There are many areas where the Court feels compelled to review a large fraction of cases, most notably constitutional domains implicating the validity of federal laws.[20] In these contexts, the Court must be—and is—very careful about inviting a large influx of new cases.[21] But constitutional tort suits do not fall into this category because they are highly fact-bound, and their impact is mostly confined to the interests of the litigants.[22] Eliminating or limiting qualified immunity is therefore very unlikely to strain the capacity of the Supreme Court to any significant extent.[23]

The lower federal courts are a different story. As courts of mandatory jurisdiction, the courts of appeal and district courts have far less flexibility. They must decide every case brought before them, and they feel strong pressure to do so relatively expeditiously.[24] When the volume of litigation increases substantially, the lower federal courts must stretch their

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Capacity and the Substance of Constitutional Law, 122 YALE L.J. 422, 427 (2012) (same).

18. *See* COAN, *supra* note 14, at 22–23 (explaining the wide latitude the Court enjoys in "normal domains," where it feels no pressure to review more than a small fraction of cases); Coan, *supra* note 17, at 428 (noting that the Court could "respond to any increase in demand simply by refusing to hear more cases").

19. *See* Coan, *supra* note 17, at 429 ("[T]he number of cases the Court must decide to eliminate significant disuniformity must not exceed its capacity of one hundred fifty to two hundred full-dress decisions per Term.").

20. COAN, *supra* note 14, at 29; Coan, *supra* note 17, at 428.

21. *See generally* COAN, *supra* note 14 (collecting examples); Coan, *supra* note 17 (same).

22. *See, e.g.*, Baude, *supra* note 3, at 85 ("[M]ost of the Court's qualified immunity decisions are just fact-bound applications of the already-established principle that liability requires clearly established law.").

23. *See* COAN, *supra* note 14, at 21. The Supreme Court does occasionally act to limit the workload of federal courts but only very sporadically. *See* Part II.D *infra*.

24. *See* Coan, *supra* note 17, at 429.

limited resources even thinner.[25] That means something has to give. This has been a particularly acute problem in the federal courts of appeal, whose dockets have vastly expanded in the past several decades.[26] The result is a system of judicial triage, in which the traditional elements of appellate review—oral argument, extensive engagement and deliberation by Article III judges, and a lengthy, written, published opinion with precedential effect—are reserved for a select few cases deemed to be of greatest importance. All other cases are relegated to a second-class status.[27] The federal district courts have not been as well studied as the courts of appeal, but they too possess tools for expeditiously disposing of cases they perceive to be of little value.[28]

If courts respond to the repeal or contraction of qualified immunity by relegating constitutional tort suits to this disfavored category, the practical result may be something very like qualified immunity by another name. Such a response might even put constitutional tort plaintiffs in a worse position overall if their cases are all lumped together in the same low-value category, even those that could have surmounted the hurdle of qualified immunity. As an added complication, judicial triage mostly operates in the shadows away from public scrutiny. This makes it especially difficult to resist, reform, or even observe.[29]

None of this is inevitable. If and when the reform of qualified immunity triggers a flood of new constitutional tort suits taxing the capacity of the lower federal courts, judges and clerks' offices will have a wide array of options for managing the strain. One of those options is to relegate constitutional tort suits to the same second-class status as social security, immigration, and pro se cases. But that is not the only option. Judicial resources could instead be reshuffled, in any number

25. *See id.* (describing how the "judicial commitment to timely and efficient access to the legal system" conflicts with the lower courts' increased caseload).

26. Peter S. Menell & Ryan Vacca, *Revisiting and Confronting the Federal Judiciary Capacity "Crisis": Charting a Path for Federal Judiciary Reform*, 108 CALIF. L. REV. 789, 794 (2020).

27. *See infra* Parts III.B.1–2.

28. *See infra* Part III.B.3.

29. *See infra* Part IV.B.

of ways, to ensure that constitutional tort suits receive judicial attention on par with that accorded complex commercial disputes and other cases perceived as significant by most federal judges. Anytime the lower courts take on a substantial influx of new cases some compromise of judicial standards is likely to be necessary. But constitutional tort suits need not bear the brunt of it. Persuading lower court judges that these suits are worthy of close attention will be the next major challenge facing advocates of governmental accountability after the fall of qualified immunity.[30]

Lawyers have an important role to play in making this case, but that role is a limited one. Because so much of the machinery of judicial triage operates in obscurity, it is mostly immune to lawyerly arguments.[31] Much of the heavy lifting will have to be done by social movements, working to shape the consciousness of federal judges and the presidents who appoint them, along with the public as a whole. If the recent mass protests have demonstrated anything, it is that claims for redress from injustice—particularly injustice at the hands of the police—are not merely a cost of doing business, as the Supreme Court has sometimes intimated.[32] Still less are they a niche or special interest. They are crucial to the legitimacy of the American legal and political systems and, as such, a matter of the greatest national moment.[33] Only when the average federal judge has internalized this proposition are constitutional tort suits likely to receive first-class treatment in the federal court system.[34] Getting to this point will be Round Two of the battle over qualified immunity.

Part I provides a brisk overview of the doctrinal landscape, with particular emphasis on the prospects for repeal or contraction of qualified immunity and the judicial capacity

30. *See infra* Part III.B.

31. *See infra* Part IV.B.

32. *See* Mullenix v. Luna, 577 U.S. 7, 12 (2015) (per curiam) ("Put simply, qualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law.'" (quoting Malley v. Briggs, 475 U.S. 335, 341 (1986))); Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (explaining that qualified immunity's objective reasonableness standard "should avoid excessive disruption of government").

33. *See infra* Part I.C.2.

34. *See infra* Part IV.C.

problem that this threatens to create. Part II begins the work of disaggregating this judicial capacity problem, explaining why reform of qualified immunity would not significantly tax the capacity of the Supreme Court. Part III explains why the lower federal courts are different and surveys the various tools at their disposal for managing a substantial influx of constitutional tort cases. Part IV evaluates the implications of this account for qualified immunity reform and explains the primacy of social movements and political organizing over lawyers in Round Two of this battle.

I. THE LAY OF THE LAND

Qualified immunity has its roots in judicial interpretation of 42 U.S.C. § 1983, which establishes a civil action for damages against "every person" who deprives another person of federal constitutional or statutory rights "under color of" state law.[35] This Part begins by very briefly summarizing these origins. It then turns to the expansion of qualified immunity in recent decades. It concludes by explaining the recent developments that have rendered the seemingly impregnable fortress of qualified immunity vulnerable for the first time in its fifty-year history. That vulnerability no longer appears as acute as it did in the summer of 2020, and it is certainly no guarantee that qualified immunity will ultimately be reformed or abolished. But this makes the present moment, in which qualified immunity reform seems genuinely possible but no longer imminent, an especially apt one for thinking through the judicial capacity challenges that are very likely to plague the federal courts in a post-qualified immunity world.

A. *Origins*

The Supreme Court first held that executive officers were entitled to limited immunity from personal liability for money damages in the 1967 case of *Pierson v. Ray*.[36] In *Pierson*, the petitioners, a group of fifteen Black and white clergymen, entered a segregated bus station in Jackson, Mississippi, while on a "prayer pilgrimage": a journey from New Orleans to

35. 42 U.S.C. § 1983.

36. 386 U.S. 547 (1967); *see id.* at 557.

Detroit to promote racial equality and integration.[37] While they were at the station, the entire party was arrested by a group of Jackson City police officers for violating the local segregation ordinance.[38] The charges were later dropped and the ministers sued the officers under § 1983 as well as the common law of false arrest and imprisonment.[39] The respondents prevailed on both counts, and the Fifth Circuit affirmed.[40]

The Supreme Court held that police officers sued under § 1983 could raise a "defense of good faith and probable cause."[41] The Court described this newly recognized defense as rooted in the common-law defenses that were available to officers under the state common law of false arrest and imprisonment.[42] Although *Pierson* itself was somewhat fuzzy on this point, subsequent decisions make clear that qualified immunity is premised on the common-law defenses that were well-established in 1871, when § 1983 became law, not those available under contemporary law.[43]

Pierson proved to be the first of many shoes to drop. The second was the 1982 case of *Harlow v. Fitzgerald*.[44] *Harlow* arose from the intrigue surrounding the dismissal of Ernest Fitzgerald, an engineer and manager in the Senior Executive Service of the U.S. Air Force.[45] On November 13, 1968, Fitzgerald testified before Congress about billions of dollars in suspicious costs connected with the C5-A military transport plane, which suffered from numerous technical defects.[46] Two months later, he was fired, allegedly in retaliation for his testimony.[47] Fitzgerald then brought suit against White House

37. *Id.* at 548–49, 552.

38. *Id.* at 553.

39. *Id.* at 549–50.

40. *Id.* at 550.

41. *Id.* at 557.

42. *Id.* at 556–57.

43. *See, e.g.*, Buckley v. Fitzsimmons, 509 U.S. 259, 268 (1993) ("Certain immunities were so well established in 1871, when § 1983 was enacted, that 'we presume that Congress would have specifically so provided had it wished to abolish' them." (quoting *Pierson*, 386 U.S. at 554–55)).

44. 457 U.S. 800 (1982).

45. *Id.* at 802; *see* Nixon v. Fitzgerald, 457 U.S. 731, 733–34 (1982).

46. *Nixon*, 457 U.S. at 734.

47. *Id.*

staffers Bryce Harlow and Alexander Butterfield, claiming that they had conspired to effect his wrongful dismissal.[48]

In an opinion written by Justice Lewis Powell, joined by seven other justices, the Supreme Court held that Harlow and Butterfield were entitled to qualified, though not absolute, immunity.[49] This immunity "would be defeated if an official 'knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff].'"[50] The Court further explained that "the objective reasonableness of an official's conduct" should be "measured by reference to *clearly established law*."[51] The italicized phrase would become the linchpin of an ever-expanding doctrine of qualified immunity that one federal judge recently described as "unqualified impunity."[52]

B. *The Modern Era*

The Supreme Court's modern decisions have defined the "clearly established law" necessary to defeat a claim of qualified immunity exceptionally narrowly. In practice, the Court requires that the facts of the prior decision clearly establishing the law be virtually identical to those of the case in which qualified immunity is raised by the defense.[53] To be sure, the Court frequently insists that it "do[es] not require a case directly on point for a right to be clearly established."[54] But it insists far more vehemently that "clearly established law should not be defined at a high level of generality."[55] Indeed, as Joanna Schwartz has observed, "The Court has

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

49. *Id.* at 807–08.

50. *Id.* at 815 (emphasis omitted) (alteration in original) (quoting Wood v. Strickland, 420 U.S. 308, 322 (1975)).

51. *Id.* at 818 (emphasis added).

52. Zadeh v. Robinson, 928 F.3d 457, 479 (5th Cir. 2019) (Willett, J., concurring in part and dissenting in part).

53. *See, e.g.*, Joanna Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1814–15 (2018) [hereinafter Schwartz, *The Case Against Qualified Immunity*]; *Adelman*, *supra* note 3, at 4.

54. White v. Pauly, 137 S. Ct. 548, 551 (2017) (per curiam) (alteration in original) (internal quotation omitted).

55. *Id.* at 552 (internal quotation omitted).

stated—and regularly restated—that government officials violate clearly established law only when 'the contours of a right are sufficiently clear that *every* reasonable official would have understood that what he is doing violates that right.'"[56] Needless to say, this sets an extremely high bar, especially for plaintiffs asserting fact-sensitive claims governed by vague constitutional standards.

To signal that it means business, the Supreme Court has coupled this stringent standard with unusually aggressive and often summary review of lower court decisions denying qualified immunity.[57] This is a significant departure from the Court's general refusal to trouble itself with mere error correction, and the language in many of the summary reversals "reflects apparent frustration that the message the Court has been trying to send has not gotten through."[58] Somewhat surprisingly, this approach has not been limited to the conservative Justices who have been most vocal in their defense of law enforcement prerogatives. Until fairly recently, a majority of the Court's applications of qualified immunity were unanimous.[59] This combination of an exceptionally high standard for overcoming qualified immunity, frequent summary reversal, and frequent unanimity created the impression of an unstoppable doctrinal juggernaut.[60]

Academic reactions to these developments were generally quite critical but also resigned. Many scholars noted the irregularity of the Court's frequent use of summary reversal in

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56. Schwartz, *The Case Against Qualified Immunity*, *supra* note 53, at 1815 (quoting Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011)); *see* Anderson v. Creighton, 483 U.S 635, 640 (1987) (discussing when a right is clearly established).

57. *See, e.g.*, *White*, 137 S. Ct. at 553 (granting certiorari and summarily reversing); Mullenix v. Luna, 577 U.S. 7, 19 (2015) (per curiam) (same); Taylor v. Barkes, 575 U.S. 822, 827 (2015) (per curiam) (same).

58. Richard C. Chen, *Summary Dispositions as Precedent*, 61 WM. & MARY L. REV. 691, 716 (2020) [hereinafter Richard Chen].

59. *See* Huq, *supra* note 4, at 48 ("Today, the majority of applications of qualified immunity elicit not just a majority, but unanimity, from the Court.").

60. *See id.* ("Qualified immunity—notwithstanding its potentially significant normative and distributive effects—is thus beyond debate for the current Court.")

qualified immunity cases.[61] Long-time defenders of qualified immunity argued that the Court's recent decisions "extend[] qualified immunity beyond any defensible rationale."[62] Long-time critics were even harsher.[63] But resistance seemed futile, especially after the appointment of two new conservative Justices in 2017 and 2018.[64] Under the circumstances, few would have strenuously disagreed with Alan Chen's warning that no serious transformation of qualified immunity was likely within the next fifty years.[65] Even fewer would have had the temerity to suggest that "the darkest hour is just before dawn." Yet so, for a moment, it seemed in the summer of 2020. That moment has passed, but not without leaving a lasting impression. Serious qualified immunity reform is now a genuine possibility. It is therefore essential to ask what a

61. *See, e.g.*, Richard Chen, *supra* note 58, at 694 ("[S]ummary reversals have been far more commonly used to reach results the conservative Justices generally support, favoring government officials in qualified immunity cases and the state in federal habeas cases."); Baude, *supra* note 3, at 85 (discussing the use of summary reversal in qualified immunity cases when "the Court also summarily remanded, or 'GVRed,' three other qualified immunity cases for reconsideration in light of the summary reversal, hinting that their analysis was wrong and creating a multiplier effect"); Adelman, *supra* note 3, at 4 ("Ironically, in the one summary reversal that favored a Section 1983 plaintiff, Justices Alito and Scalia objected that the Court was engaging in error-correcting.").

62. John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 VA. L. REV. 207, 256 (2013); *see, e.g.*, Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 NOTRE DAME L. REV. 1853, 1854 (2018) ("[Q]ualified immunity is by no means perfect."); Richard H. Fallon, Jr., *Bidding Farewell to Constitutional Torts*, 107 CALIF. L. REV. 933, 961 (2019) [hereinafter Fallon, *Bidding Farewell*] ("[T]he Court has shown little appreciation of the rule-of-law premises that underlay Founding-era and early nineteenth-century reliance on common law norms and traditional rules of equitable practice to hold officials accountable for constitutional violations.").

63. *See* Schwartz, *The Case Against Qualified Immunity*, *supra* note 53, at 1836 ("Qualified immunity doctrine is historically unmoored, ineffective at achieving its policy ends, and detrimental to the development of constitutional law."); Smith, *supra* note 7, at 2113 ("The problems with the current doctrine are both glaring and growing. And they cannot be unseen.").

64. *Cf.* Schwartz, *The Case Against Qualified Immunity*, *supra* note 53, at 1798 ("In many ways, qualified immunity's shield against government damages liability is stronger than ever."); Baude, *supra* note 3, at 86 ("The Court's enthusiasm for qualified immunity does not seem to be flagging.").

65. *See* Alan Chen, *supra* note 5, at 1938.

world without this doctrine would look like and what challenges such a world might bring.

C. *The Prospects for Abolition, Repeal, or Reform*

The previously unstoppable juggernaut of qualified immunity began to come under increasing fire from all sides in the latter part of the last decade. Led by Sonia Sotomayor, the liberal justices became increasingly critical of qualified immunity during this period.[66] Around the same time, Clarence Thomas announced his willingness to reconsider qualified immunity "in an appropriate case," a move apparently inspired by William Baude's 2018 law review article, *Is Qualified Immunity Unlawful?*[67] Whenever the most liberal and the most conservative Justices on the Court converge, it is worth paying attention. But far more important was the mass popular response to the death of George Floyd. In the fifty-three years since *Pierson v. Ray*, nothing has done more to increase the salience of qualified immunity reform. The initial wave of popular mobilization around this issue has now crested. In its wake, substantial hurdles to reform once again loom large, including fear of crime, opposition by police

66. *See, e.g.*, Mullenix v. Luna, 577 U.S. 7, 26 (2015) (per curiam) (Sotomayor, J., dissenting) ("By sanctioning a 'shoot first, think later' approach to policing, the Court renders the protections of the Fourth Amendment hollow.").

67. *See* Ziglar v. Abbasi, 137 S. Ct. 1843, 1871 (2017) (Thomas, J., concurring) (citing Baude, *supra* note 3). Others have advanced similar arguments for decades. *See, e.g.*, JAMES E. PFANDER, CONSTITUTIONAL TORTS AND THE WAR ON TERROR 11 (1st ed. 2017) ("Throughout the nineteenth century, courts consistently took the position that the task of conferring immunity was a matter for the legislative branch to consider."); Ann Woolhandler, *Patterns of Official Immunity and Accountability*, 37 CASE W. RES. L. REV. 396, 397 (1987) (noting divergence between modern and historical approaches to official immunity); David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1, 2 (1972) (explaining the "contrast between the modern doctrines and earlier American law, and the process of conceptual confusion by which the modern rules have gradually and imperceptibly supplanted the old"). But unsurprisingly, Baude's unimpeachable conservative credentials seem to have won him a more receptive audience. *Cf.* LAWRENCE BAUM & NEAL DEVINS, THE COMPANY THEY KEEP: HOW PARTISAN DIVISIONS CAME TO THE SUPREME COURT 8–14 (2019) (describing the influence of politically like-minded elites on Supreme Court Justices). In this regard, he performed a most valuable service.

unions, political polarization, and the many veto points of the federal legislative process.[68] But a path forward remains visible, thanks in large part to the enduring impact of the popular mobilization of 2020.

1. Counting Noses at the Supreme Court

Qualified immunity is a creature of statutory interpretation, or perhaps the common law.[69] It can therefore be overruled by the Supreme Court or legislatively abolished by Congress. We begin with the Supreme Court because that is historically where all of the action on qualified immunity has been.[70] To some extent, this is an exercise in reading tea leaves because the Court has yet to depart from its hardline approach to qualified immunity in any significant way. But three recent developments merit attention as potential portents of future change. Notably, all three predate the racial justice protests that began in May of 2020.

The first is Justice Thomas's recent expression of "growing concern with [the Court's] qualified immunity jurisprudence."[71] In an argument that cites and closely tracks Baude's article, Thomas's *Ziglar v. Abbasi*[72] concurrence notes that the Civil Rights Act of 1871[73] does not mention qualified immunity or any other defenses.[74] Despite this, he endorses the Court's oft-expressed view that "certain immunities were so well established in 1871 . . . that we presume that Congress would have specifically so provided had it wished to abolish them."[75]

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68. *See, e.g.*, Pauly, *supra* note 6; Edmondson, *supra* note 10.

69. *See, e.g.*, Wyatt v. Cole, 504 U.S. 158, 170 (1992) (Kennedy, J., concurring) ("Our immunity doctrine is rooted in historical analogy, based on the existence of common-law rules in 1871, rather than in 'freewheeling policy choice[s].'" (alteration in original) (quoting Malley v. Briggs, 475 U.S. 335, 342 (1986))).

70. *See supra* Part I.A–B.

71. Ziglar v. Abbasi, 137 S. Ct. 1843, 1870 (2017) (Thomas, J., concurring).

72. 137 S. Ct. 1843 (2017).

73. Pub. L. No. 44-22, 17 Stat. 13 (1871).

74. *Ziglar*, 137 S. Ct. at 1870 (Thomas, J., concurring) ("Although the [Civil Rights Act of 1871] made no mention of defenses or immunities, 'we have read it in harmony with general principles of tort immunities and defenses rather than in derogation of them.'" (citation omitted)).

75. *Id.* (alteration in original) (internal quotation omitted).

The problem, as Justice Thomas sees it, is that the Court has conducted the proper historically-based common law inquiry only sporadically.[76] In most other cases, he finds the Court's qualified immunity analysis defective.[77] Thomas particularly chastises the Court for its reliance on a "clearly established law" standard that he argues has no foundation in the common law of 1871.[78] For all of these reasons, Thomas suggests that the Court should "shift the focus of [its] inquiry to whether immunity existed at common law."[79] This is obviously not a call for total abolition of qualified immunity, but if Baude's article is any guide, Justice Thomas's approach would substantially narrow the scope of official immunity relative to current doctrine.[80]

The second recent development of note is Justice Sotomayor's series of increasingly impassioned dissents in qualified immunity cases, frequently joined by the late Justice Ruth Bader Ginsburg.[81] Several of these dissents focus on what Sotomayor views as the Court's one-sided approach to selecting qualified immunity cases for review, but she has also been sharply critical of qualified immunity itself.[82] Perhaps the best example is her biting observation in *Kisela v. Hughes*[83] that the

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76. *See id.* at 1871 ("In the decisions following *Pierson*, we have 'completely reformulated qualified immunity along principles not at all embodied in the common law.'" (quoting Anderson v. Creighton, 483 U.S. 635, 645 (1987))).

77. *Id.*

78. *See id.* ("We have not attempted to locate that standard in the common law as it existed in 1871, however, and some evidence supports the conclusion that common-law immunity as it existed in 1871 looked quite different from our current doctrine.").

79. *Id.* at 1872.

80. *See* Baude, *supra* note 3, at 60 ("[E]ven if one were to grant the existence of a good-faith defense and import it to constitutional claims, modern immunity cases have distorted those common-law rules to a troubling degree.").

81. *See, e.g.*, Kisela v. Hughes, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting); Utah v. Strieff, 136 S. Ct. 2056, 2071 (2016) (Sotomayor, J., dissenting).

82. *See, e.g.*, *Kisela*, 138 S. Ct. at 1162 ("Such a one-sided approach to qualified immunity transforms the doctrine into an absolute shield for law enforcement officers, gutting the deterrent effect of the Fourth Amendment.").

83. 138 S. Ct. 1148 (2018).

Court's approach to qualified immunity "sends an alarming signal to law enforcement officers and the public. It tells officers that they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished."[84] While Justice Sotomayor has never expressly called for the abolition of qualified immunity, she closes her *Kisela* dissent by declaring, "[T]here is nothing right or just under the law about this."[85] Passages like this make it fair to surmise that she would at least give abolition of qualified immunity a sympathetic hearing. Her conspicuous attention to questions of racial justice point in the same direction.[86]

The third recent development of note is Justice Neil Gorsuch's "just the text ma'am" approach to statutory interpretation, which was on prominent display in his majority opinion in *Bostock v. Clayton County*.[87] The significance of this development is a bit more speculative. *Bostock*, of course, held that discrimination on the basis of sexual orientation and transgender status are sex discrimination under Title VII.[88] Substantively, this has nothing to do with qualified immunity. But Justice Gorsuch's insistent—almost ostentatious—refusal to look beyond the text, which the dissenters pilloried as ahistorical literalism, is becoming his calling card.[89] On this basis, it is not difficult to imagine him sharing Justice Thomas's reluctance to recognize an expansive, judicially crafted defense that finds no support in the text of § 1983 or the common-law background against which that statute was

84. *Id.* at 1162.

85. *Id.*

86. *See, e.g.*, *Strieff*, 136 S. Ct. at 2071 (Sotomayor, J., dissenting) ("We must not pretend that the countless people who are routinely targeted by police are 'isolated.' They are the canaries in the coal mine whose deaths, civil and literal, warn us that no one can breathe in this atmosphere.").

87. *See* Bostock v. Clayton County, 140 S. Ct. 1731, 1737 (2020) ("When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit.").

88. *Id.* at 1743.

89. *Compare id.* at 1738 ("[O]nly the words on the page constitute the law adopted by Congress and approved by the President."), *with id.* at 1757 (Alito, J., dissenting) ("According to the Court, the text is unambiguous. The arrogance of this argument is breathtaking."), *and id.* at 1825 (Kavanaugh, J., dissenting) ("[C]ourts must follow ordinary meaning, not literal meaning.").

adopted. It is even possible to imagine Gorsuch going further than Thomas and refusing to recognize eighteenth century common-law defenses on the ground that "only the written word is the law."[90] But this may be getting too speculative. Suffice it to say that Gorsuch has a limited track record on the Supreme Court and shares many of the methodological commitments that make Justice Thomas and Professor Baude skeptical of qualified immunity.[91] It is not outlandish to think that Gorsuch might provide an additional vote to reconsider the Court's modern qualified immunity jurisprudence. For those keeping count at home, this makes three potentially persuadable Justices, two short of a majority. Before Justice Ginsburg's death, she would have brought the number to four.

None of the six other sitting Justices has expressed especially serious reservations about qualified immunity. And it would be foolish to make any strong predictions about Justices Thomas, Sotomayor, and Gorsuch based on the slender reeds we have gathered in the foregoing paragraphs. But we have not gathered these reeds for the purpose of making predictions. We have done so to establish a rough picture of the state of play before May of 2020, the death of George Floyd, and all that has come afterward. As of that moment, qualified immunity looked strong, but subversive stirrings were beginning beneath the surface for the first time in many decades. Then, the world exploded.

2. Black Lives Matter

On May 25th, 2020, George Perry Floyd, Jr., a forty-six-year-old Black man, was killed while in police custody in Minneapolis, Minnesota.[92] Derek Chauvin, a white police

90. *Id.* at 1737 (majority opinion).

91. *See* Baude, *supra* note 3, at 88 ("In suggesting that the doctrine of qualified immunity is unlawful . . . I mean . . . that the doctrine lacks legal justification, and the Court's justifications are unpersuasive."); Ziglar v. Abbasi, 137 S. Ct. 1843, 1872 (2017) (Thomas, J., concurring) ("Until we shift the focus of our inquiry to whether immunity existed at common law, we will continue to substitute our own policy preferences for the mandates of Congress.").

92. Richard A. Opel Jr. & Kim Barker, *New Transcripts Detail Last Moments for George Floyd*, N.Y. TIMES (July 8, 2020), https://perma.cc/86LE-SPG6 (last updated Apr. 1, 2021).

officer, knelt on Floyd's neck for almost ten minutes, as Floyd was handcuffed and pinned on the pavement.[93] Floyd repeatedly protested his treatment, telling Chauvin and the three other officers present: "I can't breathe."[94] Video footage of the encounter circulated around the internet and appeared in virtually every national media outlet. The news of Floyd's death sparked international outrage, igniting massive protests against racism and police brutality around the world and a global reckoning with racial injustice.[95]

This mass uprising did not spring from nowhere, of course. For years, community groups and grassroots activists across the United States had been laying the groundwork and building networks in preparation for just such a moment.[96] Social media provided a powerful organizing tool,[97] and the enormous pent-up frustration caused by the COVID-19 pandemic fueled an outpouring of energy and passion that would have been difficult to imagine in more normal times.[98] The pervasive sense of vulnerability created by the pandemic

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93. *Id.*

94. *Id.*

95. *See* Giulia McDonnell Nieto del Rio et al., *A Timeline of What Has Happened in the Year Since George Floyd's Death*, N.Y. TIMES (May 25, 2021), https://perma.cc/5Y7T-9ZTK ("In the hours that followed, the cellphone video showing George Floyd's murder would spread across the globe and incite an uprising for racial justice nearly unparalleled in American history.").

96. *See* Manual Pastor, *Is the Chauvin Conviction Just a Moment, or the Start of Lasting Change?*, PRAC. INSIGHTS COMMENTS. (July 7, 2021), https://perma.cc/9CQG-8M8M ("The widespread reaction to the murder of George Floyd was sparked by the sheer brazenness of Officer Chauvin, egged on by the broken system of policing, but the groundwork for the upswell of protest is due in large part to the tireless work of countless organizers.").

97. *See* Toni Jaramilla, *BLM: Uprisings to Reform*, L.A. LAW., June 2021, at 30, https://perma.cc/4H4P-DCAZ ("Using social media as a powerful tool of activism, BLM has amplified the voices of the oppressed to inspire revolutionary and radical change. The significant movements of our time, #MeToo and #BLM, are a result of social media activism.").

98. *See* Maneesh Arora, *How the Coronavirus Pandemic Helped the Floyd Protests Become the Biggest in U.S. History*, WASH. POST (Aug. 5, 2020, 7:00 AM), https://perma.cc/N655-4AUX ("But for many, particularly those who had never before turned out for a BLM protest, what pushed them into the streets was being hurt by pandemic public health measures.").

may also have shaped the public's remarkably favorable initial response to the protests.[99]

Among many contributing groups, Black Lives Matter (BLM) quickly assumed an especially prominent role, to the point that its name became virtually synonymous with the nationwide movement for racial justice.[100] BLM is a social and political movement that was founded in 2013 by activists Alicia Garza, Patrisse Cullors, and Opal Temeti after the acquittal of Trayvon Martin's killer George Zimmerman.[101] The BLM website describes the movement as "[a]n ideological and political intervention in a world where Black lives are systematically and intentionally targeted for demise. It is an affirmation of Black folks' humanity, our contributions to this society, and our resilience in the face of deadly oppression."[102] By design, the movement is nonhierarchical and decentralized; it consists of dozens of member-led chapters and associated groups around the world.[103]

Few movements in U.S. history, and virtually none in recent memory, have shifted the focus of public attention to racial justice as quickly or starkly as BLM. And activists who identify with BLM have long made ending qualified immunity a goal of the movement.[104] It is easy to see why: the disproportionate impact of police violence and harassment on Black Americans is a matter of extensive record.[105] But

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99. *Cf.* Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 2 (2008) (recognizing human vulnerability "is essential if we are to attain a more equal society than currently exists in the United States").

100. *See, e.g.*, Arora, *supra* note 98 (describing the protests surrounding police violence as "Black Lives Matter or anti-police brutality protests").

101. *Herstory*, BLM, https://perma.cc/RWQ2-CDCS.

102. *Id.*

103. *Id.*

104. *See, e.g.*, *Black Lives Movement*, JUST. FOR ALL, https://perma.cc/3WLL-97SA (advocating for legislative action to end qualified immunity).

105. *See, e.g.*, Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479 (2016) (analyzing the systemic and institutional cause of these disparities); Fagan et al., *Street Stops and Broken Windows Revisited: The Demography and Logic of Proactive Policing in a Safe and Changing City*, *in* RACE, ETHNICITY, AND POLICING: NEW AND ESSENTIAL READINGS 309, 335 (Stephen K. Rice & Michael

qualified immunity serves as both a practical and a symbolic obstacle to legal accountability for these injuries, sending a powerful message about the relative importance of law enforcement and the people, often Black, whose rights they violate.

The George Floyd protests gave this issue far greater salience than it has ever had before, making abolition or significant curtailment of qualified immunity a real possibility for the first time in five decades. The protests have influenced the chances of reform in both the Supreme Court and Congress, though in somewhat different ways and to a more modest extent than initially appeared. We now consider each in turn.

3. Judicial Reform

Supreme Court Justices have life tenure.[106] Unlike presidential or congressional candidates, they do not have to worry about how their position on qualified immunity will affect their fortunes at the polls. But Supreme Court Justices are also human beings enmeshed in social, professional, and political networks. They talk to their friends and clerks and colleagues. They consume the same news media as ordinary citizens, at least those who share their basic ideological orientation.[107] Like other human beings, Supreme Court Justices cannot avoid being influenced by the cultural environment in which they live and work, and that environment has been profoundly shaped by the George Floyd protests, as it has for every American.

These dynamics are the subject of a large literature analyzing the influence of social movements on the

D. White eds., 2010) (finding that Black men aged eighteen to nineteen had roughly an 80 percent chance of being stopped by police in 2006).

106. U.S. CONST. art. III, § 1 ("The Judges, both of the supreme and inferior Courts, shall hold their offices during good Behaviour . . . .").

107. *See* BAUM & DEVINS, *supra* note 67, at 9 ("Supreme Court Justices, as Chief Justice Rehnquist put it, 'go home at night and read the newspapers or watch the evening news on television; they talk to their family and friends about current events.'" (quoting William R. Rehnquist, *Constitutional Law and Public Opinion*, 20 SUFFOLK U. L. REV. 751, 768 (1986))).

development of constitutional law.[108] Jack Balkin and Reva Siegel's summary is both representative and helpful here: "Courts respond to social disruption by social movements rather than initiate it themselves; they reconstitute and reformulate law in the light of political contestation, rationally reconstructing and synthesizing changes in political norms with what has come before."[109] Put differently, successful social movements shift the boundaries of the thinkable, often in profound ways, for Supreme Court Justices as much as anyone else.

Prior to the George Floyd era, it was already possible to identify as many as four Justices (including the late Justice Ginsburg) who were open to rethinking qualified immunity to some extent.[110] The moderate liberal Justices, Elena Kagan and Stephen Breyer, were not among this group.[111] But as a result of the BLM movement, the salience of qualified immunity in their social networks is likely to have increased substantially, as is the negativity with which members of those networks view qualified immunity.[112] In effect, strongly opposing qualified immunity will become—is already in the process of becoming—a defining characteristic of liberals and progressives in good standing.[113] This will create significant social pressure on Justices Kagan and Breyer to rethink their views.[114] The same will go for Justice Breyer's eventual successor, if appointed by a Democratic president.

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108. *See, e.g.*, Jack M. Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927, 929 (2006); Jack M. Balkin, *How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure*, 39 SUFFOLK L. REV. 27, 52 (2005).

109. Balkin & Siegel, *supra* note 108, at 947.

110. *See supra* Part I.C.1.

111. *See supra* Part I.C.1.

112. *Cf.* Deja Thomas & Juliana Menasce Horowitz, *Support for Black Lives Matter Has Decreased Since June but Remains Strong Among Black Americans*, PEW RSCH. CTR. (Sept. 16, 2020), https://perma.cc/DSS4-V9J9 ("A majority of U.S. adults (55%) now express at least some support for the [Black Lives Matter] movement . . . .").

113. *See id.* (reporting that 88 percent of Democrats support the Black Lives Matter movement).

114. *See* BAUM & DEVINS, *supra* note 67, at 3–8 (summarizing how polarized social networks of judicial elites influence Supreme Court decision-making).

The conservative Justices will probably experience less pressure on this front because their social networks are likely to have more mixed—and even hostile—views of the BLM movement.[115] Concern about rising crime is also likely to dampen their enthusiasm.[116] But even the social networks of conservative Justices are unlikely to be entirely immune from this influence. Think of Mitt Romney's decision to join a BLM march[117] and former President George W. Bush's public letter supporting racial justice.[118] A shift of just one or two Justices could be sufficient to tip the balance in favor of abolition or, much more likely, limitation, of qualified immunity.

In June of 2020, the Justices declined to take up several cases asking them to reconsider qualified immunity.[119] Many observers interpreted this as an indication that a majority of the Court still favors qualified immunity or at least prefers leaving this matter to Congress.[120] But these are not the only possible explanations. It could also be that neither side was sure it has the votes, so both are biding their time. In any case, the balance could very well shift going forward, as the Justices absorb the lessons of this unique and still unfolding historical moment. The Court's recent per curiam reversals of lower-court decisions granting qualified immunity are one

115. *See* Thomas & Horowitz, *supra* note 112 ("Among Republicans and those who lean to the Republican Party, about two-in-ten (19%) now say they support the movement at least somewhat, down from four-in-ten in June.").

116. *See* Domenico Montanaro, *Rising Violent Crime Is Likely to Present a Political Challenge for Democrats in 2022*, NPR (July 22, 2021, 5:01 AM), https://perma.cc/47ED-8LZQ (explaining that Republicans are using the rise in violent crime in urban areas across the country to criticize Democratic policy).

117. *See* McKay Coppins, *Why Romney Marched*, ATLANTIC (June 8, 2020), https://perma.cc/S8E6-5NRK ("A reporter asks [Mitt Romney] what he's doing there, and the Republican senator from Utah responds: 'We need to stand up and say that black lives matter.'").

118. *Statement by President George W. Bush*, GEORGE W. BUSH PRESIDENTIAL CTR. (June 2, 2020), https://perma.cc/5KR7-WGQN.

119. *See, e.g.*, Baxter v. Bracey, 140 S. Ct. 1862, 1862 (2020).

120. *See, e.g.*, Jennifer Rubin, Opinion, *It's a Big Deal When the Supreme Court Decides Not to Decide*, WASH. POST (June 16, 2020), https://perma.cc/Y9H6-H9BC (characterizing the Supreme Court's decision to deny certiorari to qualified immunity cases as a "punt").

preliminary indication that some such shift is underway.[121] But two other, even more recent per curiam decisions—handed down just as this Article was going to press—point in the opposite direction.[122]

In sum, the influence of social movements is dynamic and changes over time. The heightened consciousness on matters of racial justice in liberal and progressive networks may fade, and conservative backlash to the more far-reaching demands of BLM may intensify, overwhelming the cross-partisan sympathies George Floyd's death provoked in its immediate aftermath. Only time will tell what lessons the Justices absorb from this searing episode.

4. Legislative Reform

A much more straightforward path to repeal or reform of qualified immunity is through legislation. A few years back, this prospect would have been just as implausible as judicial abolition.[123] But unlike Supreme Court Justices, legislators must pay close attention to public opinion and interest-group politics. Most Republican elected officials still strongly oppose qualified immunity reform.[124] But the BLM movement has

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121. *See* Taylor v. Riojas, 141 S. Ct. 52, 53 (2020) (reversing the Fifth Circuit's grant of qualified immunity, despite a lack of similar precedent, because "no reasonable correctional officer could have concluded that it was constitutionally permissible" to house a prisoner in "deplorably unsanitary conditions" for six days); McCoy v. Alamu, 141 S. Ct. 1364, 1364 (2021) ("Judgment vacated, and case remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of *Taylor v. Riojas*.").

122. *See* City of Tahlequah v. Bond, No. 20-1668, 2021 WL 4822664, at *3 (U.S. Oct. 18, 2021) (summarily reversing the lower-court's denial of qualified immunity "did not give fair notice" to the defendant police officer); Rivas-Villegas v. Cortesluna, No. 20-1539, 2021 WL 4822662, at *2 (U.S. Oct. 18, 2021) (same).

123. *Cf.* Huq, *supra* note 4, at 48 ("Qualified immunity—notwithstanding its potentially significant normative and distributive effects—is thus beyond debate for the current Court.").

124. *See, e.g.*, Edmondson, *supra* note 10; Kathryn Watson, *White House Says Reducing Immunity for Police Is a Non-Starter*, CBS NEWS (June 8, 2020, 3:43 PM), https://perma.cc/2PFF-GFNV (explaining that President Trump considers ending qualified immunity a "non-starter").

made qualified immunity abolition a top legislative priority,[125] and Black Americans are a major source of Democratic votes.[126] The same goes for Americans of other races who support BLM.[127] As a result, members of Congress have come forward with a flurry of varying proposals.[128]

The most prominent example to date is the George Floyd Justice in Policing Act.[129] This omnibus police reform act passed the House of Representatives in the spring of 2021 but stalled in the face of Republican opposition in the Senate.[130] It included myriad measures intended to combat police violence and increase police accountability.[131] Most relevant to this Article is a provision that would have eliminated qualified immunity as a defense to civil suits against law enforcement or correctional officers. Section 102 of the bill amends 42 U.S.C. § 1983 to add the following language:

> It shall not be a defense or immunity in any action brought under this section . . . that—(1) the defendant was acting in good faith, or that the defendant believed, reasonably or otherwise, that his or her conduct was lawful at the time when the conduct was committed; or (2) the rights, privileges, or immunities secured by the Constitution and

125. *See Demand Congress End Qualified Immunity*, BLM (July 22, 2021), https://perma.cc/RW96-45JN ("[I]t should be a top priority for Congress and the White House to end qualified immunity—to end the prioritization of protecting white supremacy in policing and start prioritizing the safety of our people.").

126. *See* Michael Andre et al., *National Exit Polls: How Different Groups Voted*, N.Y. TIMES (Nov. 3, 2020), https://perma.cc/ZB3V-C3RJ (showing that Black voters accounted for 13 percent of the total vote and 87 percent of Black voters voted for the Democratic presidential candidate in the 2020 presidential election).

127. *See id.* (showing that 20 percent of voters had a favorable opinion of the Black Lives Matter movement, 78 percent of whom voted for the Democratic presidential candidate in the 2020 presidential election).

128. *See* JOANNA R. LAMPE, CONG. RSCH. SERV., LSB10486, CONGRESS AND POLICE REFORM: CURRENT LAW AND RECENT PROPOSALS 4–8 (2020) (detailing the various legislative proposals for law enforcement reform).

129. George Floyd Justice in Policing Act, H.R. 1280, 117th Cong. (2021).

130. *See* H.R. 1280, 117th Cong., 167 CONG. REC. 40 (2021).

131. *Cf.* LAMPE, *supra* note 128, at 6–7 (detailing the various sections of the Justice in Policing Act of 2020 dedicated to law enforcement reform).

> laws were not clearly established at the time of their deprivation by the defendant.[132]

This language notably mirrors the language used by the Supreme Court in creating and elaborating qualified immunity doctrine.[133] It is clearly designed to abolish the doctrine.

The near-term prospects for passage of the George Floyd Act—or any similar proposal—are grim. Current Democratic majorities are razor-thin in both houses, and the legislative gauntlet any proposal must pass through is forbidding, culminating in the sixty-vote threshold necessary to overcome a Senate filibuster. But the Act's passage in the House demonstrates that police reform, including qualified immunity reform, has become a central priority of the Democratic coalition. This is a clear consequence of the massive popular mobilization of 2020, and it significantly increases the long-term odds of qualified immunity reform or abolition. In the meantime, it is vital to ask what repeal or contraction of qualified immunity will mean for constitutional tort litigation.

D. *Opening the Floodgates*

Scholars and judges disagree about many aspects of this question. Will scrapping qualified immunity deter unlawful government conduct or over-deter lawful and socially beneficial law enforcement activities? Will it have any deterrent effect at all, in a world where virtually all law enforcement officers are indemnified against personal liability? Will courts be less willing to recognize new constitutional rights in a world where government officials are strictly liable for their actions? There is no consensus on any of these matters.[134]

On one point, however, both judges and scholars broadly agree: abolition of qualified immunity is likely to lead to a

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132. H.R. 1280 § 102.

133. *See, e.g.*, Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) ("[G]overnment officials performing discretionary functions generally are shielded for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person should have known.").

134. *Compare* Schwartz, *After Qualified Immunity*, *supra* note 12, at 316–17, 351–52 (predicting no over-deterrence and no narrowing of constitutional protections), *with* Fallon, *Bidding Farewell*, *supra* note 62, at 938, 978 (predicting narrowing and possible over-deterrence).

substantial increase in the volume of constitutional tort suits.[135] Indeed, protecting government officials against an onslaught of frivolous litigation has long been a central and explicit justification for the expansive version of qualified immunity embodied in current judicial doctrine.[136] Many scholars disagree that the suits discouraged by qualified immunity are frivolous, but there is little dispute that the doctrine does, in fact, discourage constitutional tort filings.[137]

This consensus rests on a powerful and intuitive theoretical foundation. As the case law currently stands, qualified immunity is a substantial barrier to recovery for many, if not all, constitutional tort plaintiffs. By many accounts, that barrier is almost insurmountable.[138] If this is true, eliminating or weakening qualified immunity would substantially increase the expected value of bringing a constitutional tort suit. The effect seems likely to be especially significant for fact-sensitive excessive force cases, where courts have been especially exacting in their requirement that plaintiffs point to a factually identical prior decision in order to overcome qualified immunity.[139] If the expected benefits of filing constitutional tort suits increase while costs remain constant, rational plaintiffs and plaintiffs' lawyers will likely file more constitutional tort suits. The bigger the increase in

135. *See, e.g.*, Schwartz, *After Qualified Immunity*, *supra* note 12, at 338 ("Doing away with qualified immunity will likely cause the total number of cases filed to increase . . . .").

136. *See supra* note 13 and accompanying text.

137. *See supra* note 13 and accompanying text.

138. *See, e.g.*, Joanna C. Schwartz, *Qualified Immunity's Selection Effects*, 114 NW. U.L. REV. 1101, 1152 (2020) [hereinafter Schwartz, *Selection Effects*] ("To some lawyers, the challenges associated with qualified immunity appear insurmountable."); Katherine A. Macfarlane, *Predicting* Utah v. Streiff*'s Civil Rights Impact*, 126 YALE L.J. F. 139, 144 (2016) (describing qualified immunity as a "nearly insurmountable obstacle").

139. *See, e.g.*, Karen M. Blum, *Qualified Immunity: Time to Change the Message*, 93 NOTRE DAME L. REV. 1887, 1899 (2018) ("Fourth Amendment excessive force cases are inevitably fact specific. Thus, insisting on precedent with the degree of particularity required by the Supreme Court in recent cases means that many . . . plaintiffs with serious and substantial injuries will be left without redress for actual constitutional violations . . . .").

expected benefit, the more filings should be expected to increase.[140]

History seems to back up this hypothesis. In the aftermath of *Monroe v. Pape*,[141] which expanded the availability of civil rights actions under § 1983, the volume of such cases exploded.[142] The same thing happened to the overall volume of federal filings in the decades following the Warren Court's expansion of individual constitutional rights, particularly rights of criminal defendants, along with the availability of habeas corpus relief for violation of those rights.[143] Of course, many other changes occurred during this period, including substantial population growth,[144] multiplication of statutory causes of action, and expansion of the federal administrative state.[145] But most observers agree that the exponential increase in judicial caseloads was driven in significant part by judicial decisions increasing the expected benefit of litigating

140. *See, e.g.*, STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 390 (2004) ("[S]uit is more likely the lower the cost of the suit, the greater the likelihood of winning at trial, and the greater the plaintiff's award conditional on winning."); RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 97–98 (1996) (discussing the effects of a decrease in the real price of legal services on federal caseloads).

141. 365 U.S. 167 (1961).

142. *See* Merritt E. McAlister, *"Downright Indifference": Examining Unpublished Decisions in the Federal Courts of Appeals*, 118 MICH. L. REV. 533, 544 (2020) ("Especially important was *Monroe v. Pape* . . . . Since that 1961 decision, federal civil rights actions under § 1983 became a major part of the work of the federal courts."); Nielson & Walker, *supra* note 62, at 1870–71 ("Before *Monroe v. Pape*, § 1983 was remarkable for its insignificance. Indeed, one commentator found only 21 suits brought under this provision in the years between 1871 and 1920. After *Monroe*, by contrast, there have been tens of thousands." (internal quotation omitted)).

143. *See, e.g.*, McAlister, *supra* note 142, at 543–44 ("Increased litigiousness, coupled with Warren Court decisions that expanded criminal and civil rights, also affected federal dockets.").

144. *See* David Lam, *How the World Survived the Population Bomb: Lessons From 50 Years of Extraordinary Demographic History*, 48 DEMOGRAPHY 1231, 1237 (2011) ("The 2% growth rates of the 1960s really were a population explosion by historical standards, almost surely never seen before and never to be seen again.").

145. *See* McAlister, *supra* note 142, at 543–44 (explaining that, during the Warren Court, Congress expanded federal jurisdiction over criminal and civil matters, and the Court's decisions "expanded criminal and civil rights").

constitutional claims.[146] Abolishing or seriously curtailing qualified immunity would represent far and away the most significant pro-plaintiff change in the availability of relief under § 1983 since *Monroe*.[147] It would be quite surprising if this change did not lead to a substantial increase in constitutional tort filings.

This straightforward story comes with important caveats. Qualified immunity is only one barrier among many that reduce the expected benefits of bringing constitutional tort suits. Hostile judges and juries, government-friendly substantive law, lack of experienced counsel, lack of access to essential evidence, and many other factors also come into play.[148] The abolition or limitation of qualified immunity would do nothing to address these barriers to redress for constitutional tort plaintiffs, which vary from one jurisdiction to another and interact in complex ways.[149] In some cases, and perhaps many, this might be enough to tip the cost-benefit balance against filing suit even in the absence of qualified immunity. It is therefore difficult to estimate with confidence how much abolition of the doctrine would increase the volume of constitutional tort litigation.

Still, there is a strong theoretical and historical basis for predicting that the effect on constitutional tort filings would be

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146. *See id.* at 544 (explaining that "civil liability . . . for constitutional violations by state actors" led to a dramatic growth in federal case filings and appeals); POSNER, *supra* note 140, at 98 ("More important than any single statute, however, has been the expansion of constitutional rights and remedies.").

147. *Cf.* Schwartz, *After Qualified Immunity*, *supra* note 12, at 360–61 ("[E]liminating qualified immunity will . . . clarify the law, reduce the cost and complexity of civil rights litigation, increase the number of attorneys willing to consider taking civil rights cases, and put an end to decisions protecting officers who have clearly exceeded their constitutional authority.").

148. *See* Joanna C. Schwartz, *Civil Rights Ecosystems*, 118 MICH. L. REV. 1539, 1543–44 (2020) [hereinafter Schwartz, *Civil Rights Ecosystems*] ("[W]hether a civil rights lawsuit is filed and successful also depends on myriad people, rules, and practices far beyond the purview of federal judges . . . .").

149. *See id.* at 1544–45 ("[S]ome civil rights ecosystems are friendlier to civil rights suits than others. . . . As a result, a lawsuit concerning a constitutional violation that would result in a substantial plaintiff's victory in one ecosystem might never be filed in another.").

positive and substantial. The limited available empirical evidence specific to qualified immunity supports this prediction. In two small, qualitative studies, a substantial fraction of civil rights lawyers reported that qualified immunity influenced their case-selection decisions, causing them to turn down cases they would otherwise have taken.[150] As Joanna Schwartz explains, this number is likely to understate qualified immunity's impact on constitutional tort filings because it does not account for those lawyers whom qualified immunity has completely driven out of the constitutional tort business, a group she believes to be quite large.[151] This reinforces the theoretical and historical basis for predicting that abolition of qualified immunity would significantly increase the volume of constitutional tort litigation.

This prediction has independent significance, whether or not the anticipated flood of constitutional tort suits actually materializes. If federal judges are persuaded that the abolition of qualified immunity will have this result, as many of them seem to be, there is a good chance they will act preemptively to discourage the filing of new constitutional tort suits.[152] Indeed, if such preemptive action follows immediately in the wake of qualified immunity's abolition, we may never know how much abolition would have increased the volume of litigation in a world where all else was held constant.

The upshot is that judicial or legislative abolition of qualified immunity is just the beginning. If advocates of governmental accountability are to achieve their goals, they

150. *See id.* at 1155, 1169–78 tbl.7 (recounting that 11 out of 35 respondents reported that qualified immunity substantially influenced their case-selection decisions, including one who quit civil rights practice altogether in response to qualified immunity); Alexander Reinert, *Does Qualified Immunity Matter?*, 8 U. ST. THOMAS L.J. 477, 494 (2011) ("[M]ost attorneys seem to select cases to avoid any possible qualified immunity issues arising in the litigation.").

151. *See id.* at 1148 ("I found a great deal of evidence to suggest that the challenges of civil rights litigation—including qualified immunity—may have caused lawyers to decrease the number of civil rights cases they take or stop taking these cases at all.").

152. *See* Margaret H. Lemos, *Special Incentives to Sue*, 95 MINN. L. REV. 782, 826 (2011) ("[E]ven if litigation incentives do not in fact increase the number of claims filed, judges may believe that they do.").

must look ahead to the actual and perceived judicial capacity problems that abolition is likely to create. Otherwise, the triumph of formally abolishing qualified immunity may well prove short-lived. The stakes are extremely high.

This is not merely a matter of judicial preference for greater leisure or prioritizing administrative economy over substantive justice. Like any other institution, the federal judiciary has limited capacity. As Marin Levy has aptly put it, judicial attention is a "scarce resource."[153] There are only so many federal judges and law clerks and so many hours in a day. Even at the present volume of litigation, it is impossible for the federal courts to accord every case on their dockets the oral argument, extensive consideration by Article III judges, and published precedential opinions that American judicial norms have historically promised.[154] Some form of triage or rationing of scarce judicial resources is unavoidable.[155]

With each new increase in the volume of federal litigation, the need for such measures becomes more acute. As judges look to manage the strain, the influx of new cases that is forcing their hand constitutes a highly salient and ready-at-hand target for second-class treatment, especially when judges are predisposed to be skeptical of the cases in question. If this is how federal courts respond to a new wave of constitutional tort filings, virtually every potential benefit of abolishing qualified immunity will be in jeopardy. In particular, constitutional tort suits will be far less likely to deter unlawful government conduct or to make the victims of such conduct whole if federal courts treat them as a threat to

153. Marin K. Levy, *Judicial Attention as a Scarce Resource: A Preliminary Defense of How Judges Allocate Time Across Cases in the Federal Courts of Appeals*, 81 GEO. WASH. L. REV. 401, 407 (2013) [hereinafter Levy, *Judicial Attention as a Scarce Resource*].

154. *See id.* at 414–15 (explaining that judges have increased the use of unpublished opinions, decreased the availability of oral argument, and increasingly leaned on staff attorney offices to deal with rising caseloads).

155. *See id.* at 414 ("Because judges cannot formally alter the relevant court constraints, they have found ways to work within them. Specifically, judges have created several practices for deciding cases more quickly—practices that come at the expense of the traditional model of appellate decisionmaking."); *see generally* WILLIAM L. REYNOLDS & WILLIAM M. RICHMAN, INJUSTICE ON APPEAL: THE UNITED STATES COURTS OF APPEALS IN CRISIS (2013); POSNER, *supra* note 140.

their dockets, rather than a core element of their judicial responsibility. This makes it essential to understand the nature and limits of federal-court capacity, the tools available to courts for managing increasing demands on that capacity, and the mechanisms for influencing these capacity-management decisions. To that task, we now turn.

II. QUALIFIED IMMUNITY AND SUPREME COURT CAPACITY

How will the federal judiciary cope with a substantial influx of new constitutional tort suits unleashed by the abolition of qualified immunity? The answer to this question begins with recognizing that the federal judiciary, like Congress, is a "they," not an "it."[156] Historically, most discussion of qualified immunity has focused on the Supreme Court. It is the Supreme Court that read qualified immunity into § 1983.[157] It is the Supreme Court that extended qualified immunity even to government officers acting in bad faith.[158] It is the Supreme Court that defined "clearly established law" to require plaintiffs to identify judicial decisions involving nearly identical facts in order to overcome qualified immunity.[159] And it is the Supreme Court that has recently ratcheted up review of apparently routine lower-court decisions denying qualified immunity, often reversing such decisions unanimously.[160] One leading academic commentator has gone so far as to argue that

156. *See* Shepsle, *supra* note 16, at 254 (coining this phrase).

157. *See* 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.").

158. *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) ("We therefore hold that government officials performing discretionary functions generally are shielded for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person should have known.").

159. *See* White v. Pauly, 137 S. Ct. 548, 551 (2017) ("While this Court's case law do[es] not require a case directly on point for a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate. In other words, immunity protects all but the plainly incompetent or those who knowingly violate the law." (alteration in original) (internal quotation omitted)).

160. *See, e.g.*, Pearson v. Callahan, 555 U.S. 223, 245 (2009); Plumhoff v. Rickard, 572 U.S. 765, 768 (2014).

this pattern of decisions is best explained by judicial capacity concerns.[161]

Yet, as this Part explains, eliminating qualified immunity poses no meaningful threat to the Supreme Court's limited capacity. The real judicial capacity threat is to the lower courts, who lack the Supreme Court's discretionary control over their dockets and will therefore be compelled to respond to any substantial increase in the volume of constitutional tort litigation with some form of triage or rationing. The Supreme Court might or might not step in to help the lower courts manage their judicial capacity problems, but it is those problems, and not any strain on the Supreme Court itself, that will dominate Round Two of the battle over qualified immunity. This Part explains why.

A. *The Standard Account*

Most explanatory accounts of qualified immunity center on judicial ideology.[162] This is a familiar story. Over the past fifty years, the Supreme Court has become steadily more conservative and steadily more hostile to the kinds of rights most commonly asserted in constitutional tort litigation and the predominantly poor, marginalized claimants most likely bring such suits. From state sovereign immunity,[163] to habeas corpus,[164] to the Fourth Amendment,[165] to pleading

161. *See* Huq, *supra* note 4, at 25 ("[W]hereas the overdeterrence-related justification for qualified immunity rests on elusive, and perhaps false, empirical supposition, the judicial-economy justification for qualified immunity is both immediately clear and obviously true.").

162. *See, e.g.*, *id.* at 49 (noting and rejecting this commonplace view).

163. *See, e.g.*, Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 75 (1996) ("Here . . . we have found that Congress does not have authority under the Constitution to make the State suable in federal court . . . ."); Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 374 (2001) ("[T]o authorize private individuals to recover money damages against the States, there must be a pattern of discrimination by the States which violates the Fourteenth Amendment . . . .).

164. *See, e.g.*, Davis v. Ayala, 576 U.S. 257, 267 (2015) (finding that a prisoner is only entitled to denying habeas corpus relief because error was harmless); White v. Woodall, 572 U.S. 415, 427 (2014) (denying habeas corpus relief because the state supreme court's holding was not "objectively unreasonable").

165. *See, e.g.*, Herring v. United States, 555 U.S. 135, 147 (2009) (holding that police "negligence . . . [unlike] systemic error or reckless disregard of

standards,[166] to justiciability,[167] the Court has made it more difficult for plaintiffs to get in the courthouse door and more difficult for them to prevail when they do.[168] The expansion of qualified immunity is of a piece with this broader trend. It is also of a piece with the Court's increasing solicitude for the interest of law enforcement at the expense of individual liberty and equality claims, particularly by members of marginalized groups.[169] In many of these areas, the Court's decisions consistently break down along conventional ideological lines, with conservative Justices voting in favor of the government and liberal Justices voting in favor of the individuals asserting constitutional liberty and equality claims.[170]

Many of the arguments advanced by the Justices and their academic defenders are consistent with this conventional wisdom. Perhaps the main concern evinced by the Court's qualified immunity decisions is that strict liability for constitutional torts would over-deter socially beneficial law enforcement activity.[171] The idea is that government officials in general and law enforcement officers in particular do not

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constitutional requirements" does not automatically require suppression of evidence); Whren v. United States, 517 U.S. 806, 813 (1996) (holding that pretextual searches do not violate the Fourth Amendment).

166. *See, e.g.*, Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556 (2007) (replacing notice pleading with "plausibility" requirement); Ashcroft v. Iqbal, 556 U.S. 662, 666 (2009) (reaffirming this shift).

167. *See, e.g.*, Clapper v. Amnesty Int'l USA, 568 U.S. 398, 414 (2013) (requiring plaintiffs to demonstrate an actual or "certainly impending" injury to establish Article III standing); Summers v. Earth Island Inst., 555 U.S. 488, 496 (2009) (plaintiffs have Article III standing to challenge only those applications of a law or regulation that directly affect them).

168. *See generally* ERWIN CHEMERINSKY, CLOSING THE COURTHOUSE DOOR: HOW YOUR CONSTITUTIONAL RIGHTS BECAME UNENFORCEABLE (2017) (recounting this trend).

169. *See* Bertrall L. Ross II, *Democracy and Renewed Distrust: Equal Protection and the Evolving Judicial Conception of Politics*, 101 CALIF. L. REV. 1565, 1569–70 (2013) (discussing the Rehnquist and Roberts Courts' treatment of "discrete and insular minorities" who received heightened protection by the Warren and Burger Courts).

170. *See, e.g.*, *Iqbal*, 556 U.S. at 665 (breaking down along ideological lines); *Clapper*, 568 U.S. at 400 (same); *Herring*, 555 U.S. at 136 (same).

171. *See* Fallon, *Bidding Farewell*, *supra* note 62, at 989 ("In *Harlow* and ever since, the Court's shaping of immunity standards has relied on the assumption that fear of personal liability would have undesirable chilling effects on officials threatened with suit.").

internalize—that is, personally benefit from—the social gains they generate by doing their jobs zealously.[172] If these officials were held personally liable for the costs of doing their jobs zealously, they would be likely to err on the side of caution, to the detriment of society as a whole.[173]

The Court's qualified immunity decisions show far less solicitude for the individuals deprived of their constitutional rights by over-zealous law enforcement or the injustice of requiring these individuals to bear the entire cost of unlawful government conduct that supposedly benefits everyone.[174] The notion that these losses should simply lie where they fall is consistent with a conservative worldview that valorizes law enforcement and has little sympathy for the poor and marginalized groups that most often find themselves caught up in its gears. Many observers, inside and outside the academy, have taken qualified immunity to be the straightforward embodiment of just such a view.[175]

B. *Huq's Judicial Capacity Thesis*

In an important recent article, Aziz Huq challenges this conventional wisdom with an alternative theory of qualified

172. *See* Jeffries, *supra* note 62, at 244 ("The argument [for qualified immunity] is essentially . . . that the prospect of civil liability will induce timidity and caution in the exercise of government powers that generally operate to the public good.").

173. *See, e.g.*, *id.*; Schwartz, *The Case Against Qualified Immunity*, *supra* note 53, at 1806 ("In its most recent decisions, the Court focuses primarily on qualified immunity's presumed ability to shield government officials from burdens associated with discovery and trial.").

174. *See* Utah v. Strieff, 136 S. Ct. 2056, 2069–72 (2016) (Sotomayor, J., dissenting) (condemning the majority's dismissal of the real-world impact of unlawful police conduct).

175. *See, e.g.*, CHEMERINSKY, *supra* note 168, at 5 ("[Q]ualified immunity . . . . mean[s] that people whose rights have been violated and who have suffered great injuries, including even fatal ones, are left without recourse."); Smith, *supra* note 63, at 2103 (noting "scant attention paid to whether a victim of unconstitutional conduct will see any kind of remedy"); David H. Gans, *The Fourteenth Amendment Was Meant to Be a Protection Against State Violence*, ATLANTIC (July 19, 2020), https://perma.cc/Y99L-VTBM ("The Supreme Court has betrayed the promise of equal citizenship by allowing police to arrest and kill Americans at will.").

immunity focused on judicial capacity.[176] While not denying the role of ideology in judicial decision-making, Huq argues that judicial independence also frees the Supreme Court to pursue non-ideological institutional interests.[177] In particular, he suggests insulation from political accountability gives the Court space to discourage cases that would significantly add to its workload.[178] He thinks that this institutional concern is the best explanation for the Court's qualified immunity decisions and its broader embrace of fault standards across Fourth Amendment suppression proceedings and habeas corpus review of state criminal convictions.[179]

Building on familiar rational-actor models of litigation, Huq posits that qualified immunity should significantly reduce the volume of constitutional tort litigation by reducing the expected value of bringing a constitutional tort suit.[180] If most potential constitutional tort claims will be dismissed on grounds of qualified immunity, plaintiffs and their attorneys have far less incentive to file them in the first place. Qualified immunity is obviously not the only tool courts might use to achieve this end, but Huq notes that it is a familiar one in the common-law tradition.[181] And many alternative tools would likely have been unattractive to the Justices for ideological reasons.[182]

This may be enough to make judicial capacity a possible explanation for the expansion and present contours of qualified immunity doctrine, but Huq recognizes that more is necessary to render it plausible, much less probable. To that end, he points to two principal types of evidence. The first is the absence of sharp ideological division in most of the Supreme

176. *See* Huq, *supra* note 4, at 25 ("[W]hereas the overdeterrence-related justification for qualified immunity rests on elusive, and perhaps false, empirical supposition, the judicial-economy justification for qualified immunity is both immediately clear and obviously true.").

177. *See id.* at 40 (arguing that the Court's judicial capacity concerns about qualified immunity find "at least some causal foundation in the institutional independence of the federal judiciary").

178. *Id.* at 56.

179. *Id.* at 33.

180. *Id.* at 49.

181. *Id.* at 61.

182. *Id.* at 62.

Court's qualified immunity decisions, at least until recently: "Today, the majority of applications of qualified immunity elicit not just a majority, but unanimity, from the Court."[183] Second, he points to many express statements by Justices across the political spectrum linking qualified immunity to a concern with caseload management, which he contends should be taken as genuine.[184] Summing up, Huq concludes: Supreme Court Justices "have since the 1950s repeatedly articulated their resistance to constitutional remediation in terms of the judiciary's institutional interest in caseload management."[185]

Huq's account is eminently plausible and a useful corrective to one-dimensional attitudinalist accounts of Supreme Court decision-making. But we believe it requires two friendly amendments. First, prioritizing caseload management over the constitutional rights of § 1983 plaintiffs and deterrence of unlawful government conduct is itself an ideological decision, as well as an institutional one. This is not to dispute the inevitability of judicial rationing in a world of scarce resources. But the Supreme Court has many levers at its disposal for conserving those resources. Its decision to discourage the filing of constitutional tort suits through an expansive qualified immunity doctrine suggests that it sees these suits as less worthy of judicial attention than others.

That is an ideological judgment, even if it commands assent from some or all of the liberal justices. A differently composed Supreme Court—or a Court awakened to greater consciousness of systemic inequality—might choose to allocate judicial resources quite differently. This recognition becomes crucial when we think about how the federal courts will manage the strain on their limited capacity that is likely to follow abolition of qualified immunity. The question is not whether courts make resource-conscious decisions. It is what priorities those decisions reflect.

That brings us to our second friendly amendment: The capacity of the federal judiciary is not an undifferentiated

183. *Id.* at 48.

184. *See id.* at 52 ("Although ideology has certainly been salient, it does not capture the whole story: Justices repeatedly emphasize caseload and judicial-economy concerns in regard to habeas, suppression remedies, and constitutional tort.").

185. *Id.* at 60.

whole. In particular, it is crucially important to distinguish between the capacity of the lower federal courts and the capacity of the Supreme Court. For understandable reasons, Huq gives the great bulk of his attention to the latter.[186] But the judicial capacity crunch likely to follow abolition of qualified immunity will occur predominantly, if not exclusively, in the lower courts. To think clearly about how courts might respond and what strategies outside actors might employ to influence that response, it is necessary to understand why lower-court—but not Supreme Court—capacity is the central issue. The next sub-Part explains.

C. *Normal vs. Capacity-Constrained Domains*

In the most obvious sense, the capacity of the U.S. Supreme Court is far smaller than the capacity of the lower federal courts. The lower courts decide several hundred thousand cases a year.[187] The Supreme Court currently decides fewer than seventy-five.[188] It could certainly decide more than that, but most scholars doubt it could decide more than 150 or at most 200 cases per year without seriously sacrificing professional standards.[189] For this reason, the Supreme Court is frequently described as a bottleneck atop the pyramid-shaped judicial hierarchy, limiting the capacity of the federal judiciary as a whole.[190]

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186. *See generally* Huq, *supra* note 4.

187. *See Federal Caseload Statistics 2020*, ADMIN. OFF. OF THE U.S. CTS., https://perma.cc/B28N-57T2 (reporting that U.S. District Courts received 425,945 filings and U.S. Courts of Appeals received 50,258 filings).

188. *See, e.g.*, Menell & Vacca, *supra* note 26, at 865.

189. *See, e.g.*, Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1100 (1987) ("[T]he Justices have only 150 full opportunities yearly to carry out their function. No one suggests this number could be increased very much."); ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 268 (2006) ("The Court's peak capacity runs to about 200 cases per year . . . .").

190. *See* COAN, *supra* note 14, at 13 ("The theory is that having just one court at the apex of the system, just one court that possesses authority to make nationally binding decisions of federal law, creates a kind of bottleneck."); NEIL K. KOMESAR, LAW'S LIMITS: THE RULE OF LAW AND THE

This description captures something important, but it also overlooks a crucial distinction between the Supreme Court and lower courts that cuts decidedly the opposite way. Because the Supreme Court's jurisdiction is almost wholly discretionary, the Court is free to hear as many or as few cases as the Justices choose.[191] This is absolutely essential to understanding the Court's capacity. A couple of silly examples help to illustrate the point:

First, if the Justices were so inclined, they could simply grant the first fifty petitions for certiorari they receive each year and deny all the rest. For a variety of reasons, it is inconceivable that the Court would ever adopt this policy. But if it did, the Justices' workload would be entirely independent of the overall volume of federal litigation. That volume could double or triple without taxing the Supreme Court's capacity in the slightest.[192] This is not so different from the real world where there is no strong or obvious relation between the volume of federal litigation and the size of the Supreme Court's docket.[193] The Justices decide significantly fewer cases today than they did in the early 1960s when the total volume of federal litigation was dramatically lower.[194]

Second, if the Justices were willing to decide cases by coin flip or random computer algorithm, they could grant every petition they received—including the wave of new petitions that this policy would trigger—without breaking a sweat. More

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SUPPLY AND DEMAND OF RIGHTS 40–41 (2001) (describing how the appellate hierarchy limits capacity).

191. *About the Supreme Court*, ADMIN. OFF. OF THE U.S. CTS., https://perma.cc/5M9F-CXA3 ("The Certiorari Act of 1925 gives the Court the discretion to decide whether or not to [hear a case].").

192. *Cf.* COAN, *supra* note 14, at 13–14 ("If the justices were so inclined, they could decide cases by coin flip instead of by briefing and oral argument").

193. *See* Menell & Vacca, *supra* note 26, at 865 (charting the falling Supreme Court caseload during period of rising lower court caseloads).

194. *See id.*; REYNOLDS & RICHMAN, *supra* note 155, at 6 ("[I]n 1960, there were 57 filings per judgeship, and today there are 327 filings per judgeship; in the intervening fifty years, judicial workload has increased by nearly 600 percent!"); Levy, *Judicial Attention as a Scarce Resource*, *supra* note 153, at 407 ("In 1950, the average annual filings per active judge was only seventy-three cases, which mean that courts could hold oral argument, consider the merits of each case in chambers, and publish full-length opinions in every matter.").

plausibly, the Court could achieve nearly the same result by substantially expanding its staff and delegating much greater authority to low-level bureaucrats.[195] Again, it is virtually inconceivable that the Justices would ever adopt these policies, but there is nothing inherent in the structure of the Supreme Court or the federal judiciary that would prevent it from doing so.[196]

The upshot is not that the Supreme Court's capacity is unlimited. It is that the limits of that capacity come mostly from the norms governing the Court's certiorari and case handling practices rather than institutional structure, resources, or the Justices' limited time.[197] Specifically, the number of cases the Court is capable of hearing per term is limited by the Justices' commitment to certain minimum professional standards in case handling, including oral argument, extensive written briefing, extensive written opinions, and extensive direct involvement by the Justices themselves.[198] This commitment is so long-standing and widely shared as to be almost invisible.[199] It is also extremely unlikely to change any time soon.[200] For these reasons, it is fair to say that the Court is capable of hearing no more than 150 or at most 200 hundred cases per term. This number is substantially more than the Court's current norm, but quite small relative to the total volume of federal litigation.[201]

Even so, if the Court felt free to deny certiorari indiscriminately, this upper limit on the Court's capacity would leave the Justices effectively immune against increases in the volume of federal litigation. But of course, the Court does not feel free in this regard. In most areas, it is happy to allow lower courts to have the final word in the vast majority of cases, reviewing at most a tiny fraction of their decisions to

195. COAN, *supra* note 14, at 14.

196. *See id.* ("[T]he hierarchical structure of the judicial system . . . alone cannot explain the limited capacity of the judiciary.").

197. *See id.* at 14–18 (describing how the Court's norms influence—and limit—its capacity).

198. *Id*. at 14.

199. *See id*. at 17 (explaining that it would be "unthinkable that any Justice today" would significantly depart from these norms).

200. *Id.*

201. *Id.* at 16.

ensure national uniformity and compliance with Supreme Court precedent.[202] But in many of the most important areas of constitutional law, especially those implicating the validity of many federal statutes, the Court feels compelled to review a much higher fraction of lower court decisions. In particular, it feels compelled to review virtually every lower court decision invalidating a federal statute.[203] This constraint starkly limits the volume of federal litigation the Justices can invite in these domains without overwhelming their limited capacity.[204] Examples include the commerce power, the spending power, the nondelegation doctrine, presidential administration, equal protection, and regulatory takings.[205]

Each of these "capacity-constrained" domains has the potential to affect the validity of hundreds or thousands of federal statutes with tens or hundreds of thousands of individual provisions.[206] Each of these domains also affects the interests of well-organized and well-financed groups with both the incentive and the resources to mount sophisticated legal challenges to federal legislation.[207] And if the Supreme Court interpreted the relevant constitutional provisions to invite such challenges, the Justices themselves would feel compelled to review a large fraction of the resulting litigation. The potential volume of litigation in even one of these domains would be enough to overwhelm the Court's capacity of 150 to 200 cases per year. To avoid this result, the Justices have consistently employed a combination of broad deference to the political process and hard-edged categorical rules.[208] The former reduces the expected benefits of bringing suit and the

202. *Id.* at 22–23; *see also* Coan, *supra* note 17, at 428 n.15 ("[T]he Court is much more willing to tolerate disuniformity in lower court invalidations of state and local laws, the interpretation (as opposed to invalidation) of federal statutes, the exclusion of unconstitutionally obtained evidence, etc.").

203. COAN, *supra* note 14, at 29 n.14 (collecting sources).

204. *Id.* at 29.

205. *See generally id.* (canvassing each of these domains to illustrate how judicial capacity shapes Supreme Court decision-making).

206. *See generally id. See also* Coan, *supra* note 17, at 436–37 ("A robust reading of either the Equal Protection Clause or the Takings Clause, articulated in the form of a vague standard, would imperil half the U.S. Code.").

207. *See generally* COAN, *supra* note 14.

208. *See generally id.*

latter reduces the risk of disuniformity in the lower courts and increases the chances of settlement.[209]

As we mentioned above, most domains are not capacity-constrained in this sense. In these "normal domains," the Supreme Court feels compelled to grant review in only a tiny fraction of cases, if that.[210] For this reason, the volume of federal litigation in these domains has no meaningful impact on the Court's workload. As a result, concerns for its own limited capacity impose virtually no constraint on the Court's ability or willingness to invite an increased volume of litigation by increasing the expected benefits of filing suit.[211] A good recent example is the series of recent Supreme Court decisions holding federal sentencing laws unconstitutionally vague.[212] Because these decisions apply retroactively to final convictions, they have produced tens of thousands of additional filings in the lower courts.[213] But the Supreme Court has decided only a small handful of these cases over the course of five years, barely a blip on its radar screen.

Other normal domains include federal habeas corpus relief for state prisoners, the Fourth Amendment right against unreasonable searches and seizures, the Fifth Amendment right against compelled self-incrimination, and the Sixth Amendment's jury-trial and confrontation clauses. In all of

209. *Id.* at 23–24; *see* KOMESAR, *supra* note 190, at 160 ("These simple rules reduce uncertainty about adjudicative outcomes, facilitate settlements, and allow courts to allocate decision making elsewhere, thereby sharing responsibility with other institutions."); POSNER, *supra* note 140, at 369 ("Because a rule is more definite, its adoption will increase legal certainty and so reduce the amount of litigation, and will also make each lawsuit simpler and shorter . . . .").

210. *See supra* note 18.

211. *Id.*

212. *See, e.g.*, Johnson v. United States, 576 U.S. 591, 606 (2015) (concluding that 18 U.S.C. § 924(e)(2)(B) is unconstitutionally vague); Welch v. United States, 136 S. Ct. 1257, 1268 (2016) (holding that *Johnson* applies retroactively); Sessions v. Dimaya, 138 S. Ct. 1204, 1223 (2018) (concluding that 18 U.S.C. § 16(b) is unconstitutionally vague); United States v. Davis, 139 S. Ct. 2319, 2336 (2019) (concluding that 18 U.S.C. § 924(c)(3)(B) is unconstitutionally vague").

213. *U.S. District Courts—Judicial Business 2016*, ADMIN. OFF. OF THE U.S. CTS., https://perma.cc/NDQ2-PESJ (noting a 350 percent rise in motions to vacate sentences following the Court's decisions in *Welch* and *Johnson*); *U.S. Courts of Appeals—Judicial Business 2016*, ADMIN. OFF. OF THE U.S. CTS., https://perma.cc/MHG4-7EQH (same).

these domains, the Court has, at some point in the past seven decades, expanded constitutional protections or access to a federal judicial remedy in ways that substantially increased the expected benefits of filing suit.[214] In each case, a substantial volume of new litigation has ensued.[215] But as with the Court's recent criminal sentencing decisions, the Justices themselves have never felt obliged to review more than a handful of the resulting cases per term.[216]

Notwithstanding the Court's recent practice of aggressively reviewing and reversing routine lower-court decisions, qualified immunity falls into the same category. No increase in the volume of constitutional tort cases that it currently discourages would impose even a trivial strain on the Supreme Court's limited capacity. As in other normal domains, the Court is and always has been quite content to allow lower courts to have the final word in the vast majority of these cases.[217] The main reason for this is that constitutional tort suits nearly always involve the actions of individual executive officials, rather than the constitutional validity of federal laws.[218] Actions brought under § 1983, which constitute the great bulk of suits in which qualified immunity arises, never

214. *See generally* Fay v. Noia, 372 U.S. 391 (1963) (dramatically expanding the availability of federal habeas corpus review of state criminal convictions); Miranda v. Arizona, 384 U.S. 436 (1966) (establishing a new right to a detailed verbal warning of the Fifth Amendment right to remain silent and Sixth Amendment right to counsel before custodial police interrogations). *See also* COAN, *supra* note 14, at 158 (noting that the Court is content to leave the "vast majority" of lower court decisions in habeas corpus reviews, Fourth Amendment cases, and Title VII cases unreviewed); BRIAN R. MEANS, POSTCONVICTION REMEDIES § 4:6 (2021) (summarizing the historical expansion of constitutional protections under the Fourth, Fifth, and Sixth Amendments).

215. *See, e.g.*, Coan, *supra* note 17, at 438 ("[T]he constitutional rights revolution of the 1950s and 1960s . . . generated an enormous volume of new litigation.").

216. *Id.*

217. *Compare Federal Caseload Statistics 2020*, *supra* note 187 (stating that the federal judiciary's caseload numbers in the hundreds of thousands), *with* Menell & Vacca, *supra* note 26, at 865 (stating that the Supreme Court heard fewer than seventy-five cases in its last term).

218. *See* Coan, *supra* note 17, at 436 (noting that the Supreme Court is generally "toleran[t] of disuniformity" involving "challenges to executive action, rather than legislation, and especially to executive action at the state and local levels").

involve the constitutional validity of federal laws because they can only be brought against persons acting "under color of" state law.[219] Thus, even if the abolition or limitation of qualified immunity triggers a flood of new litigation, the Supreme Court will feel nothing like the pressure it feels in capacity-constrained domains to safeguard its own limited capacity.

D. *Rescuing the Lower Courts*

This is not to suggest that the Supreme Court will necessarily be unmoved by the prospect of a major increase in constitutional tort filings. The Court might be troubled by this prospect, and take steps to counteract it, for ideological reasons. The Court might also worry about the impact of a new influx of cases on already overburdened lower courts. As Marin Levy and Aziz Huq have documented, Supreme Court opinions frequently express judicial capacity concerns, sometimes opportunistically but often with apparent sincerity.[220] A generalized concern with reasonably timely and efficient access to the court system is one of the deeply rooted professional norms widely embraced by American judges.[221]

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219. 42 U.S.C. § 1983.

220. *See* Huq, *supra* note 4, at 28 ("This is . . . one of the rare instances in which one need not guess at the Court's attention to its own institutional concerns. They are explicit on the surface of its opinions."); Levy, *Judging the Flood of Litigation*, *supra* note 14, at 1012

> [T]he justices occasionally suggest or even hold that a new cause of action must go unrecognized, or a case unreviewed, because to do otherwise would invite too many new filings into the federal courts. More frequently, the majority asserts that its holding is sound because it will not lead to an increase in claims, or the dissent accuses the majority of being improperly motivated by a desire to avoid such an increase.

221. *See* Coan, *supra* note 17, at 429 (describing the "widely shared judicial commitment to timely and efficient access to the legal system"); POSNER, *supra* note 140, at 128

> [T]he people who control the federal court system . . . have acted consistently as if they had an unshakable commitment to accommodating any increase in the demand for federal judicial services without raising the price of those services, directly (as by filing fees) or indirectly (as by imposing delay), in the short run or the long run . . . .

Yet in each of the normal domains discussed above, the Supreme Court has been perfectly willing to reshape legal doctrine in ways that triggered a large volume of new litigation in the lower courts.[222] In some of these examples, the Court has subsequently retrenched in ways that reduced the expected value of filing suit, perhaps partially out of concern for lower-court workloads.[223] But often, this has taken decades, and it has by no means been the Court's universal practice. If lower-court workloads struck anything like the same chord with the Justices as their own capacity limits, the Court's response to the caseload crisis of the 1970s and 1980s, which has never truly abated, would have been far more robust than it was.[224]

For all of these reasons, it is no sure thing that the Supreme Court will respond at all to a substantial increase in new constitutional tort suits triggered by the abolition or limitation of qualified immunity. At least in part, this will likely depend on whether the fate of qualified immunity is decided by the Court itself or legislated by Congress. If the latter, a majority of Justices may be more prone to see the resulting strain on lower-court dockets as an outside imposition to be resisted.[225] If the former, a majority of Justices may have come around to a more favorable view of constitutional tort suits, at least partly in response to recent events and the cultural changes they have unleashed.[226] Either way, if the Court chooses to limit the volume of constitutional litigation, it has a wide variety of tools at its disposal.

These tools can be roughly broken down into two categories: substantive and procedural. By making substantive law less friendly to constitutional tort plaintiffs, in general or

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222. *See supra* notes 212–216 and accompanying text.

223. *See, e.g.*, Coan, *supra* note 17, at 439 n.47 ("[T]he Court's retreat from many of these rights in subsequent decades should probably not be understood as compelled by the limits of judicial capacity. Capacity may have been one factor, but it was hardly the only one, as evidenced by the willingness of most liberal justices to stay the course.").

224. *See id*.

225. *Cf.* McNollgast, *Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law*, 68 S. CAL. L. REV. 1631, 1647–48 (1995) (describing the ways in which the legislative branch can influence the Court's judicial capacity budget).

226. *See supra* Part I.C.3.

in particular domains, the Supreme Court could reduce the expected value of bringing constitutional tort suits, neutralizing the effect of qualified immunity's abolition on plaintiffs' incentive to litigate.[227] Even if no Justice consciously sets out to achieve this goal, a general sense that plaintiffs are winning too many suits of this type in the lower courts could predispose some or all of the conservative Justices to pare back substantive constitutional rights as a compensatory adjustment.[228]

The same goes for procedural tools, which encompass pleading standards, discovery rules, summary judgment standards, justiciability doctrine, and the like.[229] These are somewhat cruder instruments because they apply trans-substantively to all civil litigation and not just to constitutional tort suits, though courts frequently appear to manipulate them according to their views of the merits.[230] In any case, these procedural tools work by the same essential mechanism as narrowing of substantive constitutional rights. They reduce the expected value of filing constitutional tort suits.[231]

Taken far enough, either or both of these tools could effectively recreate qualified immunity by another name. To be more precise, they could place constitutional tort plaintiffs as a

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227. *See, e.g.*, NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 147 (1997) ("[T]he courts can reduce the number of requests that they review governmental activity by setting out standards that increase the deference given to the reviewed entity.").

228. *See, e.g.*, Lemos, *supra* note 152, at 836 ("[I]t should come as no surprise if the judges who are unsympathetic to the substantive rights that Congress has sought to promote through litigation incentives, and who are therefore likely to resent an increase in the number of claims filed, largely fall right of center.").

229. COAN, *supra* note 14, at 21–22.

230. *See* Fallon, *Bidding Farewell*, *supra* note 62, at 958 (arguing that *Iqbal* was "not . . . distinctively applicable to constitutional tort actions," but it was "clearly crafted . . . with *Bivens* and § 1983 suits in mind"); *see also* Lemos, *supra* note 152, at 830 ("As *Iqbal* makes clear, *Twombly*'s new rule applies to all categories of federal civil litigation, making it more difficult for plaintiffs to get through the courthouse door.").

231. *See, e.g.*, Lemos, *supra* note 152, at 828–30 (detailing the Court's procedural methods of "reduc[ing] the value, and hence the likely effect, of litigation incentives").

class in roughly the same position they occupied under qualified immunity, which is to say, the position they occupy now. *Roughly* and *as a class* are important qualifiers. No package of compensating substantive and procedural adjustments is likely to disadvantage precisely the same plaintiffs in precisely the same ways as qualified immunity. The burden will fall more heavily on some classes of constitutional claims than others and may also discriminate in more subtle ways. For instance, the importance of precisely analogous prior precedent may diminish, while proof of subjective bad faith or access to documentary evidence increases.[232]

It is even possible that a package of compensating adjustments could make constitutional tort plaintiffs worse off overall. The civil litigation system is not a marvel of modern engineering, manufactured to exacting tolerances and capable of infinitely precise calibration. It is an enormously messy and complex concatenation of dynamic forces, interacting in manifold ways—an ecosystem, to return to Joanna Schwartz's helpful metaphor.[233] Even if a majority of Justices consciously set out to perfectly offset the impact of qualified immunity's abolition, the tools at their disposal are far too crude to achieve this objective except by dumb luck. If the Court is instead reacting instinctively out of a gut sense that too many constitutional tort suits are straining lower court dockets, it is even more likely to over-shoot its mark.

This worst-case scenario is possible but highly speculative, as is the prospect of the Supreme Court making compensating adjustments of any kind to offset an influx of new constitutional tort cases. For two decades, scholarly defenders of qualified immunity have been warning that the doctrine is but one component of a delicate equilibrium.[234] Without it,

232. *See generally* Schwartz, *Selection Effects*, *supra* note 138 (explaining the many ways that qualified immunity influences which cases are brought).

233. *See* Schwartz, *Civil Rights Ecosystems*, *supra* note 148, at 1547–48 ("Instead of the animals, plants, and abiotic elements that populate natural ecosystems, litigation ecosystems are made up of interconnected and interacting causes of action, substantive and procedural rules, attorneys, judges, and juries.").

234. *See, e.g.*, Richard H. Fallon, Jr., *Asking the Right Questions About Officer Immunity*, 80 FORDHAM L. REV. 479, 480 (2011) [hereinafter Fallon, *Asking the Right Questions*] ("[S]ubstantive rights, causes of action to enforce

courts might be more reluctant to recognize new constitutional rights or more likely to restrict justiciability or pleading standards to the detriment of constitutional tort plaintiffs.[235] Instead, as Leah Litman has pointed out, all of these doctrines have grown more stringent—that is, friendlier to defendants and more hostile to plaintiffs—at the same time.[236]

This is not to discount the equilibration thesis entirely. It is empirically plausible that various procedural and remedial doctrines work in tandem to determine the social impact of constitutional litigation and that judges are at least dimly aware of this fact.[237] It is also normatively plausible that judges should consider the interplay between these doctrines when calibrating each of them to optimize the overall impact of their decisions.[238] But this empirical claim is nothing like an

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rights, rules of pleading and proof, and immunity doctrines all are flexible and potentially adjustable components of a package of rights and enforcement mechanisms that should be viewed, and assessed for desirability, as a whole.").

235. *See, e.g.*, *id.*; Fallon, *Bidding Farewell*, *supra* note 62, at 968 (noting that *Brown v. Board of Education*, 347 U.S. 483 (1954), and *Miranda v. Arizona*, 384 U.S. 436 (1966), might have been decided differently if they included damages claims); Jeffries, *supra* note 62, at 247 ("Limitations on money damages facilitate constitutional evolution and growth by reducing the cost of innovation."); Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 889–90 (1999) [hereinafter Levinson, *Rights Essentialism and Remedial Equilibration*] (similar).

236. *See* Leah Litman, *Remedial Convergence and Collapse*, 106 CALIF. L. REV. 1477, 1483 (2018) (describing the "demanding," "stringent," and "narrow" standards for plaintiffs established by the Supreme Court); *see also* Schwartz, *The Case Against Qualified Immunity*, *supra* note 53, at 1815 ("[T]he Court's qualified immunity decisions have nevertheless made it increasingly difficult for plaintiffs to show that defendants have violated clearly established law, and increasingly easy for courts to avoid defining the contours of constitutional rights."); Nancy Leong, *The* Saucier *Qualified Immunity Experiment: An Empirical Analysis*, 36 PEPP. L. REV. 667, 705 (2009) (finding that qualified immunity did not encourage judges to recognize new constitutional rights in cases where courts decided the merits before deciding qualified immunity).

237. *See* Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—And Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 684–85 (2006) [hereinafter Fallon, *The Linkage Between Justiciability and Remedies*] (detailing the empirical evidence behind the equilibration thesis).

238. *See* Fallon, *Asking the Right Questions*, *supra* note 234, at 485 ("[A]s the Supreme Court's historical pattern of doctrinal adjustment helps to establish, role-based obligations by no means eliminate the Justices' capacity and indeed their obligation to exercise reasoned judgment in pursuit of a

ironclad law. As the examples above illustrate, the Supreme Court quite frequently changes constitutional doctrine to increase the expected benefits of filing suit without making compensating adjustments. And normatively, it will often be the case that current equilibrium is suboptimal and that adjusting a single one of its doctrinal elements—like qualified immunity—will change it for the better.

For all of these reasons, advocates of governmental accountability should pay close attention to the Supreme Court's response to the influx of constitutional litigation triggered by qualified immunity's demise. The Court sometimes acts to protect the lower courts against perceived docket pressures in ways that could have a profoundly negative impact on constitutional tort plaintiffs. But very often, the Justices are inattentive, if not deliberately indifferent, to the capacity problems of lower courts. It is therefore quite likely that those courts will be left to manage the aftermath of qualified immunity on their own. The next Part explores how they might do so and how their options differ from the Supreme Court's.

III. QUALIFIED IMMUNITY AND LOWER-COURT CAPACITY

For the lower courts, unlike the Supreme Court, inattention and indifference are not an option. When cases arrive on their dockets, they must dispose of them. And unlike the Supreme Court, which is operating well below its maximum capacity, the lower federal courts have been laboring under a "crisis of volume" for decades.[239] That crisis has shown some signs of plateauing in recent years, but plateauing is not the same as abating. With some variation across circuits and districts, the caseload of the lower courts remains astronomically high.[240] To manage their overcrowded dockets,

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well-designed overall alignment of rights, justiciability doctrines, causes of action, and immunity doctrines.").

239. *See* Menell & Vacca, *supra* note 26, at 813, 843 (describing the consensus that lower courts have been "in or near" a caseload crisis for the past half century); *see generally* Levy, *Judicial Attention as a Scarce Resource*, *supra* note 153 (same); REYNOLDS & RICHMAN, *supra* note 155 (same).

240. *See generally* Menell & Vacca, *supra* note 26 (canvassing the data); Levy, *Judicial Attention as a Scarce Resource*, *supra* note 153 (same).

these courts have had no choice but to ration the administration of justice in various significant ways. These include limiting the use of oral argument and published opinions, greater reliance on staff attorneys, declining reversal rates, and much more.[241] This Part explains why the judicial capacity constraints on lower courts are so different from those operating on the Supreme Court. It then canvasses the varied tools those courts have used to manage their overcrowded dockets and the two-track system of justice that this has produced. The next Part explains the implications for constitutional litigation after qualified immunity and what might be done to address them.

A. *Judicial Capacity and Judicial Hierarchy*

There are two major differences between the lower courts and the Supreme Court with regard to judicial capacity. The first is that the lower courts are courts of mandatory, rather than discretionary, jurisdiction.[242] The second is that the lower courts must work within the bounds of Supreme Court precedent, while the Justices are free to reverse or revise their own prior decisions.[243] Together, these differences make the judicial capacity challenges facing lower courts far more complicated than those facing the Supreme Court.

The crux of the problem is simple. Both the federal district courts and the federal courts of appeal are obligated to decide every case presented to them that falls within their jurisdiction.[244] Yet there are only so many judges, each of whom employs only a small handful of clerks. And each judge at both the district and appellate court levels is responsible for

241. *See infra* Part III.B.1.

242. *E.g.*, 28 U.S.C. § 1291; 28 U.S.C. § 1331; 28 U.S.C. § 1332.

243. *See, e.g.*, Hutto v. Davis, 454 U.S. 370, 375 (1982) ("[U]nless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be.").

244. *See, e.g.*, Chris Guthrie & Tracey E. George, *The Futility of Appeal: Disciplinary Insights into the "Affirmance Effect" on the United States Courts of Appeals*, 32 FLA. ST. U. L. REV. 357, 367 (2005) ("In the federal system, the courts of appeals have mandatory jurisdiction over appeals from district courts; thus, they must decide all cases properly brought to them.").

hundreds of cases per year.[245] Not all cases are created equal, of course, and many are settled by the parties with limited judicial involvement.[246] Still, the workload per judge is massive. Any substantial increase in the volume of federal litigation forces lower courts to spread their limited resources even thinner.

If mandatory jurisdiction denies lower court judges the option of simply ignoring the new cases, the hierarchical system of stare decisis limits their flexibility to recalibrate substantive law.[247] The lower courts are bound by Supreme Court decisions determining the generosity of constitutional protections and the level of deference to other institutional actors, the principal determinants of the expected benefits of bringing a federal lawsuit.[248] They are also bound by Supreme Court decisions casting constitutional doctrine in the form of vague standards, which reduces the likelihood of settlement and thus increases the workload of federal judges.[249] Supreme Court precedent is not a steel vise. Lower court judges do have some room to maneuver, which the evidence suggests they sometimes employ to manage their workloads.[250] But their ability to do so is far more constrained than that of the Supreme Court.

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245. *See* Menell & Vacca, *supra* note 26, at 843–63 (describing judicial resources and caseloads for courts of appeal and district courts); Marin K. Levy, *The Mechanics of Federal Appeals: Uniformity and Case Management in the Circuit Courts*, 61 DUKE L.J. 315, 325–65 (2011) [hereinafter Levy, *The Mechanics of Federal Appeals*] (same for courts of appeal); REYNOLDS & RICHMAN, *supra* note 155, at 8 tbl.1 (same).

246. *See* Guthrie & George, *supra* note 244, at 363 ("Most cases will settle (even on appeal) because litigants can generally save money by doing so.")

247. *See, e.g.*, Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 818 (1994) ("[L]ongstanding doctrine dictates that a court is *always* bound to follow a precedent established by a court 'superior' to it."); Sanford Levinson, *On Positivism and Potted Plants: "Inferior" Judges and the Task of Constitutional Interpretation*, 25 CONN. L. REV. 843, 845 (1993) (describing the Supreme Court's perception of lower federal courts as "the simple . . . enforcer[s] of the Supreme Court's dictates, however wise or unwise they may appear to the hapless judge[s] below.").

248. *See supra* note 247.

249. *See* Coan, *supra* note 17, at 433 (describing different approaches the Supreme Court uses to budget judicial capacity).

250. *See infra* Part III.B.

This leaves the lower courts with two unattractive options—queuing and rationing. If federal judges continue to allocate the same amount of time to each case in the face of an increased volume of litigation, new cases will spend more time languishing on federal dockets.[251] This, in turn, may reduce the attractiveness of filing suit in the first place. Such backlogs are not unheard of, and there is substantial variation in the speed with which judges, districts, and circuits clear cases.[252] But queuing is not the main method by which the lower courts have allocated their limited capacity, probably because clearance rates are published and monitored, and most judges do not wish to be shamed before their colleagues.[253]

Instead, lower courts have mostly managed their greatly increased workload by parceling out judicial attention and resources ever more sparingly.[254] Just how—and how self-consciously—they do this remains somewhat opaque. The courts of appeal have been better studied in this regard than federal district courts.[255] But this much is clear: at present workloads, the lower courts have little choice but to ration

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251. *See* Coan, *supra* note 17, at 429 ("As the volume of litigation increases, the ability of the lower courts to process cases in a timely and efficient fashion, while maintaining a commitment to minimum professional standards, diminishes.").

252. *See* Patricia W. Hatamyar Moore, *The Civil Caseload of the Federal District Courts*, 2015 U. ILL. L. REV. 1177, 1202 (2015) (noting that "there are numerous district courts laboring under a higher disposition time" and "numerous courts with a shorter disposition time" than the national median).

253. *See* POSNER, *supra* note 140, at 222 ("Although financial incentives to working hard [on disposing of cases] are not a factor in the federal judiciary, the normally weaker incentive (in modern Western culture) of avoiding being shamed operates on most judges."); *see also* Hatamyar Moore, *supra* note 252, at 1235 ("[T]he median disposition time for civil cases has not dramatically spiked since 1986: it has hovered right around eight months for the past twenty-seven years."); REYNOLDS & RICHMAN, *supra* note 155, at 5 (noting that median time between submission and disposition remains under a year and has grown only modestly since 1980).

254. *See* Levy, *Judicial Attention as a Scarce Resource*, *supra* note 153, at 403–04 ("Although specific practices vary considerably from circuit to circuit, their animating rationale is the same: to keep the courts running, some sets of cases must receive considerably less judicial attention than others.").

255. *See, e.g.*, REYNOLDS & RICHMAN, *supra* note 155 (focusing on federal courts of appeal); Levy, *Judicial Attention as a Scarce Resource*, *supra* note 153 (same). *But see* Hatamyar Moore, *supra* note 252, at 1205–07 (focusing on federal district courts).

their attention. When they do so, they do not treat all cases or litigants equally. Rather, they employ a system of judicial triage, devoting more time and resources to those cases they perceive to be worthiest of their time.[256] The greater the volume of litigation, the thinner judicial resources must be stretched.

B. *Rationing Justice*

This is perfectly reasonable, even inevitable, in the abstract. Judicial time and resources are genuinely scarce, and it is generally not in the power of judges to expand them. Further, not all cases are equally difficult to resolve. It would make little sense to allocate precisely equal resources to every case. Uncomfortable as it makes most judges, rationing should not be a dirty word. Nor should triage. But judgments about the importance of cases and their worthiness of judicial attention do not merely turn on neutrally defined questions of legal difficulty, complexity, or novelty. They also reflect the values, sympathies, and background of those making the decisions. As William Reynolds and William Richman have exhaustively documented, the result is a two-track system in which the cases judges deem most significant—those involving high-powered lawyers, complex commercial transactions, and the interests of government agencies or officials—receive far fuller appellate consideration than cases that do not meet these criteria.[257] Similar differences seem likely to exist at the district court level, though the literature on this is considerably less developed.[258]

In the remainder of this sub-Part, we describe the two-track system of judicial triage adopted by the courts of appeal for managing a caseload that would otherwise be overwhelming. We then canvass a variety of other tools available to the courts of appeal and federal district courts for

256. *See infra* Part III.B.1.

257. *See* REYNOLDS & RICHMAN, *supra* note 155, at 116 ("Track Two cases disproportionately involve the claims of the disfavored in our country—prisoners, the poor, immigrants. Circuit judges apparently prefer to deal with other, more 'important' matters.").

258. *But see generally* Paulluvi Bahl, Case-Management Practices in the District of Arizona (2019) (unpublished student note), https://perma.cc/E994-Y7Y4 (PDF).

managing their overcrowded dockets. If the abolition or limitation of qualified immunity triggers a substantial increase in the volume of constitutional litigation, there is a significant risk that the lower courts will deploy some combination of these tools to manage the new strain on judicial resources. Indeed, it is highly possible that lower courts will act preemptively to ward off the threat of such an increase before it actually materializes. The result would be the recreation of something very like qualified immunity by another name.

1. Judicial Triage

Between 1945 and 1990, the caseloads of the courts of appeal grew by fifteen-fold, far faster than the number of judges serving on these courts.[259] Raw case numbers are a crude measure for many reasons, but more sophisticated measures confirm the startling trend and its continuation up to the present day, though the rate of growth has slowed in recent years.[260] The causes of this caseload crisis are complex and multifold, but most accounts agree that the expansion of constitutional rights and habeas corpus relief by the Warren Court, as well as that Court's decision in *Monroe v. Pape*, were major factors.[261] The dramatic growth of the federal administrative state also played a role.[262]

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259. McAlister, *supra* note 142, at 543.

260. *See, e.g.*, Menell & Vacca, *supra* note 26, at 794 ("The data on caseloads and capacity constraints suggest . . . [that] district and appellate court caseloads per judge have continued to mount and the number of certiorari petitions has more than doubled.").

261. *See* McAlister, *supra* note 142, at 543–44

> Since the 1960s, Congress has continuously expanded federal criminal and civil jurisdiction. Increased litigiousness, coupled with Warren Court decisions that expanded criminal and civil rights, also affected federal dockets. Especially important was *Monroe v. Pape*, which opened the door to civil liability under 42 U.S.C. § 1983 for constitutional violations by state actors who abuse their office. Since that 1961 decision, federal civil rights actions under § 1983 "bec[a]me a major part of the work of the federal courts."

REYNOLDS & RICHMAN, *supra* note 155, at 4 ("The Warren Court's revolutions in constitutional law in the 1950s and 1960s play a large role [in the increase in federal court filings]."); POSNER, *supra* note 140, at 327–28 ("[T]he activist edifice erected by Chief Justice Warren and his colleagues . . . remains

To cope with the vastly increased workload, federal judges gradually evolved a system of judicial triage that consigned an ever-growing number of cases to a second-tier system of review bearing little resemblance to the model taught in most law schools.[263] The contrast to what Reynolds and Richman have dubbed the "Learned Hand model"[264] is stark. Under that traditional approach, every appellate litigant was entitled to have her case decided by lengthy published opinion after oral argument and extensive deliberation by a panel of well-prepared Article III judges.[265] Cases relegated to "Track Two," on the other hand, are accorded none of these perquisites.[266] They are decided without oral argument through unpublished opinions, which are often short, opaque, and generally of startlingly low quality.[267] Former Judge Alex Kozinski, a strong supporter of such opinions, famously described them as "not safe for human consumption."[268]

Perhaps most important, Track Two cases are, for all intents and purposes, decided by anonymous staff law clerks, with little meaningful supervision by Article III judges, under circumstances strongly encouraging uncritical affirmance of

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largely intact . . . . The edifice is responsible in part for the heavy caseload of the federal courts today.").

262. *See* Menell & Vacca, *supra* note 26, at 809–10 (detailing the "new challenges for the federal judiciary" resulting from the rise of the administrative state during the first half of the twentieth century).

263. *See* McAlister, *supra* note 142, at 544 (describing the development of "an 'Appellate Triage model,' by which the federal courts embraced procedural and administrative reforms to institute a two-track or two-tier system of appellate justice").

264. REYNOLDS & RICHMAN, *supra* note 155, at 116.

265. *Id.*

266. *Id.*

267. *See, e.g.*, *id.* at 121 ("[T]he poor quality of so many unpublished opinions provides stark evidence that there has been a systemic breakdown in the work product of the circuit courts."); McAlister, *supra* note 142, at 535 ("These [unpublished] decisions are not precedential and make no law; they are often short, perfunctory, unsigned opinions drafted for the benefit of the parties, not the public."). *But see* Levy, *Judicial Attention as a Scarce Resource*, *supra* note 153, at 446 (defending this approach as a reasonable response to severe resource constraints).

268. Tony Mauro, *Difference of Opinion: To Publish or Not*, LEGALTIMES (Apr. 12, 2004), https://perma.cc/66K6-P89E (PDF) (quoting Letter from Alex Kozinski, Judge, United States Court of Appeals for the Ninth Circuit, to the Advisory Committee on Appellate Rules).

district court decisions.[269] Over the past sixty years, Track Two has gone from the exception to the rule. Marin Levy describes it as the "backbone of federal appellate docket management."[270] Today, barely twenty percent of cases terminated on the merits received oral argument.[271] Less than ten percent of cases are decided through published and signed opinions.[272]

The screening process employed to select cases for oral argument and opinions for publication is opaque and varies from circuit to circuit.[273] But it is principally conducted by administrative staff, and the small fraction of cases chosen for Learned Hand treatment generally involve sophisticated counsel, large organizations, or government interests.[274] Social security, immigration, veterans' benefits appeals, prisoner civil-rights claims, pro se actions, and suits brought by poor and middle-class litigants with less sophisticated counsel are much more likely to be relegated to Track Two.[275] As Merritt McAlister pithily sums it up, "Traditional appellate process—including oral argument and judicial scrutiny—continues for the system's haves. But for its have-nots, the promise of an appeal as of right has become little more than a rubber stamp: 'You lose.'"[276]

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269. *See* McAlister, *supra* note 142, at 567 ("Second-tier process . . . involves no oral argument and little judicial oversight, as staff attorneys do the heavy lifting."); Guthrie & George, *supra* note 244, at 363–85 (detailing possible reasons for the high affirmance rate among the courts of appeal).

270. Levy, *Judicial Attention as a Scarce Resource*, *supra* note 153, at 415.

271. *Judicial Business 2019 Tables*, ADMIN. OFF. OF THE U.S. CTS., tbl.B-10, https://perma.cc/UK9Z-2EZH (PDF).

272. Menell & Vacca, *supra* note 26, at 858.

273. *See* REYNOLDS & RICHMAN, *supra* note 155, at 107 (detailing the differing criteria the circuits use in screening cases for oral argument).

274. *See id.* at 192 ("Wealthy, powerful, institutional, and government litigants get far more of the judges' time and attention than do other litigants.").

275. *See id.* at 119 ("[C]ases involving prisoner rights, social security, criminal convictions, and the like were disproportionately subject to second-class treatment.").

276. McAlister, *supra* note 142, at 536; *see also* Guthrie & George, *supra* note 244, at 362 (noting that the affirmance rate in unpublished opinions is "much higher" than in published opinions).

The reported data is insufficiently granular to determine how often constitutional tort appeals receive this treatment.[277] But the typical lawyers and litigants in such cases have more in common with those commonly relegated to Track Two than with those who consistently receive the full Learned Hand treatment.[278] It also seems likely that government appeals of adverse district court decisions have a better chance of avoiding Track Two than those brought by constitutional tort plaintiffs.[279]

Whether or not this is true, an actual or feared avalanche of such cases following the demise of qualified immunity would create a serious problem for courts of appeal already working beyond capacity. Relegating such appeals to Track Two, where staff law clerks have strong incentives to recommend affirmance rather than reversal, will be a tempting solution. This result would not only deny constitutional tort plaintiffs the material benefits of a meaningful appeal; it would also erode the legitimacy of the judicial system in much the same way that qualified immunity does, by sending a signal that constitutional tort suits are not worth judges' time—or, worse, that judges actively support impunity for government officials who violate the Constitution.[280]

2. Lightened Scrutiny

In addition to dramatically expanding summary disposition, the courts of appeal have managed their exploding caseload by relaxing their scrutiny of district court decisions. The explanation is straightforward. Identifying and explaining errors in the decision under review requires more time and effort than affirming the correctness of their reasoning.[281] It is

277. *See* REYNOLDS & RICHMAN, *supra* note 155, at 119–120 (describing the types of cases typically relegated to Track Two).

278. *See id.*; *supra* note 105 (collecting sources documenting racial disparities in police misconduct).

279. *See supra* note 274 and accompanying text.

280. McAlister, *supra* note 142, at 562 ("Decisions devoid of any positive procedural justice experiences carry the potential to inflict harm; they marginalize vulnerable litigants seeking relief in a court that is, effectively, their last resort.").

281. *See* POSNER, *supra* note 140, at 345 ("If the courts of appeals become more intrusive in their review, this will . . . increase their workload . . . .").

therefore unsurprising that the rate at which the courts of appeal reverse district court decisions has dropped by more than half since the 1960s.[282] Of course, correlation is not necessarily causation, no matter how intuitive the causal link between the variables in question.[283] But there is compelling evidence that rising caseloads do, in fact, cause lower reversal rates.

After the September 11 attacks of 2001, accelerated streamlining of deportations flooded the Second and Ninth Circuits with tens of thousands of appeals from decisions of the Board of Immigration Appeals.[284] This, as Bert Huang has explained, created a natural experiment.[285] None of the other circuits experienced this sudden spike in immigration appeals.[286] Those circuits could therefore serve as a control group to evaluate the causal impact of the surge in immigration appeals on reversal rates in the Second and Ninth Circuits. Huang found that, "when flooded by the agency cases, the affected circuit courts began to reverse district court rulings less often . . . . In these circuits, it seems, deference increased, tilting the balance of authority toward the district courts."[287] In other circuits, meanwhile, reversals remained steady. On this basis, Huang concludes that the spike in immigration appeals *caused* the Second and Ninth Circuits to reverse in fewer civil cases.[288]

The precise causal mechanisms at work remain opaque, but Huang's study sheds significant light on the possible effects of abolishing qualified immunity. First, it suggests that the courts of appeal are likely to respond to a substantial increase in the volume of constitutional tort litigation by increasing their deference to district court decisions.[289]

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282. REYNOLDS & RICHMAN, *supra* note 155, at 122.

283. *See* Guthrie & George, *supra* note 244, at 361 (making this observation about caseloads and reversal rates).

284. Bert I. Huang, *Lightened Scrutiny*, 124 HARV. L. REV. 1109, 1123–24 (2011).

285. *Id.*

286. *Id.*

287. *Id.* at 1115.

288. *Id.* at 1123–27.

289. *See id.* at 1130–33 (demonstrating that courts of appeal had lower reversal rates in periods when case numbers surged).

Whether this hurts or helps constitutional tort plaintiffs largely depends on the distribution of district court errors in such cases. If the district courts err more frequently in favor of government defendants (as the courts of appeal define error), then a relaxation of appellate scrutiny will hurt constitutional tort plaintiffs. If the district courts err more frequently in favor of plaintiffs, then relaxation of appellate scrutiny will hurt defendants.

This, however, assumes that appellate scrutiny is relaxed equally across the board. There is good reason to doubt that will be the case. As Reynolds and Richman have shown, the courts of appeal already accord higher priority to the interests of government litigants in managing their oral argument calendar and determining which decisions to publish.[290] If an increasing caseload requires appellate judges to relax their scrutiny of district court decisions, it seems likely that they will continue to show relatively greater solicitude for appeals brought by government defendants than those brought by constitutional tort plaintiffs. This would tip the scales in favor of the former, regardless of the distribution of district court errors. It might also skew the development of the law in a pro-government direction, with binding circuit precedent frequently highlighting errors against the government, while errors in the government's favor languish in the obscurity of unpublished or otherwise cursory affirmances.[291] As Margaret Lemos has pithily observed, "[T]he law is shaped by the cases judges are asked to decide."[292] She might have added "the cases that judges choose to prioritize."

There is some good news in Huang's study for constitutional tort plaintiffs. Recall that the spike in immigration cases in the Second and Ninth Circuits reduced

290. *See* REYNOLDS & RICHMAN, *supra* note 155, at 116, 119–21 (showing that claims by prisoners or the poor are deemed less important and disproportionately subject to "track-two" unpublished decisions over more important litigants such as the government or large corporations, which are likely to receive the full Learned Hand Treatment).

291. *See* McAlister, *supra* note 142, at 538 ("Decisional atrophy disproportionately affects pro se litigants because their cases are more likely to receive the second-class treatment that produces the poorly or lightly reasoned unpublished decisions. . . .").

292. Lemos, *supra* note 152, at 784–85.

their reversal rates *in civil cases*.[293] The spike may also have reduced the reversal rate in immigration appeals, but Huang does not say one way or the other.[294] For present purposes, the important point is that the Second and Ninth Circuits chose to relieve at least some of the pressure created by the immigration surge by changing their handling of a *different* category of cases. Courts confronted with a flood of constitutional tort litigation following the demise of qualified immunity will have the same choice. As the proximate cause of a new strain on judicial capacity, these cases will be a highly salient target for reduced judicial attention. But that is not inevitable. Compromise may be unavoidable, but constitutional tort cases need not bear the full brunt of it.

3. District Courts

Up to this point, our focus has been largely on the courts of appeal. For a variety of reasons, the crisis of volume that has prevailed since the 1960s has fallen more heavily on them than on the federal district courts.[295] But those courts, too, have heavy caseloads and limited resources.[296] Faced with the sudden shock of a flood of new constitutional litigation, they, too, will be forced to make the same judicial resources stretch further. But owing to their different place in the judicial hierarchy, district courts have different tools at their disposal.

Those tools are, in fact, considerably more numerous than the tools available to the courts of appeal. This is because "a district judge may rule in a single case on multiple occasions and on different types of questions, only a few of which could be dispositive but all of which affect the case's progress and ultimate outcome."[297] Most of these rulings are "less formal, less visible, and more discretionary than the traditional judicial activities of holding hearings, deciding motions, and

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293. Huang, *supra* note 285, at 1137.

294. *Id.*

295. *See, e.g.*, Menell & Vacca, *supra* note 26 (describing the unique and longstanding crisis of volume in the courts of appeals); Levy, *Judicial Attention as a Scarce Resource*, *supra* note 153 (same).

296. Moore, *supra* note 252, at 1202.

297. Pauline T. Kim et al., *How Should We Study District Judge Decision-Making?*, 29 WASH. U. J.L. & POL'Y 83, 85 (2009).

conducting trials."[298] They are even less visible than the notoriously opaque docket management practices of the courts of appeal. For this reason, the empirical literature on district court responses to caseload pressures remains decidedly sparse. They are simply much more difficult to study than the courts of appeal.[299]

Nevertheless, there is ample theoretical reason to believe that district judges "have a strong incentive to find ways to take control of and manage the cases that appear on their individual dockets,"[300] especially in the face of increased caseloads. They also have the tools to do so, many of which go under the general heading of "case management."[301] As Steven Gensler describes it, this process "typically begins with the judge issuing a case-management order that sets a detailed schedule based on the particular needs of the case. As the case goes forward, the federal judge can continue to exercise control by, among other things, closely managing the scope, timing, and sequence of discovery and dispositive motions."[302]

Restrictive discovery orders, explicitly encouraged by 2015 amendments to the Federal Rules of Civil Procedure, play an especially important role in modern case management.[303] The result is that plaintiffs are, with some indeterminate frequency, denied the opportunity "to discover the facts needed to prove their cases at trial, to defeat dispositive motions, or to advocate for fair settlements."[304] This is an especially serious problem in cases where defendants possesses most or all of the information that plaintiffs need to substantiate their claims—an information asymmetry that characterizes many constitutional tort suits.[305] At the same time, the available

298. Steven S. Gensler, *Judicial Case Management: Caught in the Crossfire*, 60 DUKE L.J. 669, 678 (2010).

299. Kim et al., *supra* note 297, at 84–86.

300. Gensler, *supra* note 298, at 676.

301. The classic academic study—and critique—of this approach to judging is Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

302. Gensler, *supra* note 298, at 671.

303. *See* FED. R. CIV. P. 26(b)(1), (g) (defining proportionality factors and other limits to the scope of discovery).

304. Mark Spottswood, *The Perils of Productivity*, 48 NEW ENG. L. REV. 503, 528 (2014).

305. *See, e.g.*, Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 45

empirical evidence suggests that "[i]ntensive and early case management . . . may in fact increase overall litigation costs by making more work for attorneys."[306] Both dynamics not only tend to speed the resolution of cases, to the advantage of defendants; they also reduce the expected benefit of bringing suit and thus tend to reduce the volume of litigation going forward. It is therefore little surprise that more aggressive case management has often been advocated—and explained—as a response to rising caseloads.[307]

Beyond case management, district courts possess a familiar array of procedural tools for quickly dispensing with cases at the outset. In particular, modern justiciability doctrine and the "plausibility pleading" regime established by *Bell Atlantic Corp. v. Twombly*[308] and *Ashcroft v. Iqbal*[309] both afford district judges ample discretion to restrict access to court in the face of rising caseloads.[310] Justiciability is likely to play only a marginal role in constitutional tort suits that would previously have been barred by qualified immunity. By definition, these are suits for money damages, which seldom pose serious justiciability questions.[311] But raising the de facto bar for surviving a 12(b)(6) motion to dismiss under *Twombly* and *Iqbal* is another matter.

Even before the Supreme Court increased the stringency of pleading standards in those decisions, constitutional tort suits were already substantially more likely than other civil

(2010) (arguing that information asymmetry harms plaintiffs in many litigation contexts, especially in "actions challenging the conduct of large institutions"); A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1, 24 (2009) ("[I]n any case depending on subjective motivation or concealed activities the plausibility pleading standard will . . . . [exclude] claims whose merit depends on information the plaintiff may not yet have.").

306. Spottswood, *supra* note 304, at 529.

307. *Id.*; Gensler, *supra* note 298, at 727–28.

308. 550 U.S. 544 (2007).

309. 556 U.S. 662 (2009).

310. *See* Miller, *supra* note 305, at 33 (arguing that *Twombly* and *Iqbal* introduce highly subjective factors into Rule 12(b)(6) motion practice that are becoming a determinative factor of "whether a plaintiff will be allowed to proceed to discovery").

311. *See, e.g.*, Evan Tsen Lee & Josephine Mason Ellis, *The Standing Doctrine's Dirty Little Secret*, 107 NW. U. L. REV. 169, 178 (2012) ("[T]he Court has said that 'pocketbook' or 'wallet' injury always qualifies [for Article III standing].").

suits to be dismissed at the pleading stage.[312] Under the new plausibility regime, the Supreme Court invites district court judges to "to draw on [their] judicial experience and common sense" to determine whether a plaintiff's complaint crosses the threshold separating "mere possibility" from "plausibility."[313] One leading empirical analysis found that this change negatively affected at least 18.1 percent of constitutional tort suits that faced a 12(b)(6) motion to dismiss.[314] It would not be at all surprising if district courts faced with a sudden flood of such litigation following the demise of qualified immunity relied on the cloak of "judicial experience and common sense" to dismiss even more of these suits. Doing so would not only clear already filed cases from the docket; it would also reduce the expected benefit of bringing more cases of this kind in the future.

Of course, as with the courts of appeal, this outcome is not inevitable. As Margaret Lemos puts it, "The risk of judicial backlash is just that: a risk."[315] The district courts might respond to an influx of new constitutional tort suits by raising procedural hurdles to their success. But those courts might also respond by changing their handling of a *different* category of cases, just as the Second and Ninth Circuits did when faced with a spike in immigration appeals. Lemos thinks this unlikely: "[J]udges are prone to react with hostility to any marked increases in the number of claims filed under a given statute, especially if they were not favorably inclined toward those claims in the first place."[316] But judges' inclinations are not static. They change with the composition of the judiciary, and at least sometimes, with the social and cultural context in which the judiciary operates.

312. Jonah B. Gelbach, *Locking the Doors to Discovery? Assessing the Effects of* Twombly *and* Iqbal *on Access to Discovery*, 121 YALE L.J. 2270, 2332 (2012).

313. *Id.* at 2283 (quoting *Iqbal*, 550 U.S. at 679).

314. *Id.* at 2332.

315. Lemos, *supra* note 152, at 845.

316. *Id.* at 785.

4. Substantive Rights

After all this discussion of procedure and case management, it is necessary to say a few words about the scope of substantive rights. In contrast to the Supreme Court, lower courts have limited freedom to manage their dockets by restricting the substantive scope of constitutional rights.[317] Under principles of vertical stare decisis, the courts of appeal are bound to follow Supreme Court precedent.[318] District courts are bound to follow both Supreme Court and circuit precedent.[319] And most empirical studies show that compliance is fairly robust.[320]

By contrast, on almost all of the procedural questions discussed above, lower courts enjoy wide, if not complete, discretion. Courts of appeal and district courts exercise essentially unfettered authority to decide which of their opinions will be published, which cases and motions will receive oral argument, and which questions to delegate to their administrative staff.[321] Both case management decisions and the application of pleading standards are formally reviewable, the former for abuse of discretion and the latter de novo.[322] But in both cases, the standards in question call for case-specific judgments of degree that the Supreme Court generally has almost zero interest in supervising.[323] With respect to case

317. *See, e.g.*, Caminker, *supra* note 248, at 818 ("[L]ongstanding doctrine dictates that a court is *always* bound to follow a precedent established by a court 'superior' to it.").

318. *Id.*

319. *Id.*

320. *See, e.g.*, Pauline T. Kim, *Lower Court Discretion*, 82 N.Y.U. L. REV. 383, 395 (2007) ("[M]ost systematic studies have found defiance to be rare and compliance the norm.").

321. *See generally* Levy, *Judicial Attention as a Scarce Resource*, *supra* note 153 (cataloging the wide range of approaches the courts of appeals have developed exercising this discretion).

322. *See*, *e.g.*, Rosario-Diaz v. Gonzales, 140 F.3d 312, 315 (1st Cir. 1998) ("[Courts] examine the trial judge's case-management decisions under an abuse of discretion rubric. . . ."); Smith v. United States, 561 F.3d 1090, 1098 (10th Cir. 2009) ("The legal sufficiency of a complaint if a question of law, and a Rule 12(b)(6) dismissal is reviewed de novo.").

323. *See, e.g.*, Baude, *supra* note 3, at 85 (noting the Supreme Court's general disinclination to review case-specific, fact-bound questions).

management decisions, the harmless error rule gives district court judges even wider latitude.[324]

For all of these reasons, the literature on lower-court efforts to manage their limited capacity largely focuses on these procedural tools. But it would be a mistake to overlook the substantive levers at their disposal. The precedents that bind lower-court judges limit their freedom to restrict constitutional rights, but limit is not the same as eliminate. Even the clearest Supreme Court decisions contain some gaps and ambiguities, and many are shot through with them. This is particularly true in areas like constitutional criminal procedure where many of the Supreme Court's decisions are cast in the form of vague standards.[325] In such areas, the lower courts will often have sufficient freedom to reshape the substantive contours of constitutional doctrine to consider this as one viable tool among many for managing their limited judicial capacity.

The logic is simple and largely tracks the way the Supreme Court uses substantive doctrine to protect its limited capacity.[326] Making substantive law less generous to plaintiffs reduces the expected benefits of filing suit and thus reduces the volume of litigation. As with the procedural tools discussed above, the perceived threat of a future surge in constitutional tort litigation may be sufficient to trigger preemptive action along these lines, even if the surge never materializes. But if and when the lower courts take such action, they can allocate their limited capacity in any number of ways. They might reduce the volume of constitutional tort litigation by narrowing the substantive constitutional rights asserted in such actions. But they might instead narrow some other class of rights, in effect diverting resources from that category of cases to constitutional tort suits.

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324. *See* Carrie E. Johnson, *Rocket Dockets: Reducing Delay in Federal Civil Litigation*, 85 CALIF. L. REV. 225, 258–59 (1997) (describing how the harmless error rule makes appellate review of case-management decisions even more deferential).

325. *See generally* Thomas Y. Davies, *The Supreme Court Giveth and the Supreme Court Taketh Away: The Century of Fourth Amendment "Search and Seizure" Doctrine*, 100 J. CRIM. L. & CRIMINOLOGY 933 (2010).

326. *See supra* Part II.D.

5. Feedback Effects

A final, crucially important wrinkle requires attention. As Joanna Schwartz has emphasized, all of the capacity management tools discussed above are merely individual components "in an expansive collection of people, rules, and practices that interact."[327] To understand how changes to one aspect of this legal "ecosystem" will play out, it is necessary to consider how they will interact with other aspects of the system, which may counterbalance those changes or amplify them, "dramatically shifting [the ecosystem's] friendliness or hostility to civil rights litigation over time."[328]

This Article is an exploration of one possible and extremely important counter-balancing effect. If the demise of qualified immunity triggers—or is perceived to trigger—a flood of new constitutional litigation, the limited capacity of the lower courts may well trigger offsetting procedural or substantive reactions that leave constitutional tort plaintiffs little better off than they were under the current qualified immunity regime. But Schwartz's ecosystem analogy suggests that the story may not end there. If the lower courts' reaction is disproportionate to the surge of cases unleashed by the abolition of qualified immunity, or if the lower courts react preemptively to a surge of cases that would never have materialized, they may trigger feedback effects that leave constitutional tort plaintiffs even worse off than they were under qualified immunity.

There are too many possible scenarios to sketch even a fraction of them here, but one of the simplest and worst cases hinges on the role of a flourishing and sophisticated civil rights bar. Good plaintiffs' lawyers are a crucial part of any civil rights ecosystem.[329] Without them, little else matters. Sympathetic judges, favorable doctrine, and compelling facts will do plaintiffs no good without effective representation.[330]

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327. Schwartz, *Civil Rights Ecosystems*, *supra* note 148, at 1593.

328. *Id.* at 1545.

329. *See id.* at 1563.

330. *See, e.g.*, *id.* at 1559 ("[T]he number of plaintiffs' lawyers willing to take civil rights cases—and the expertise of those lawyers—likely play a significant role in the number of suits filed and the ultimate success of those claims.").

But even a flourishing civil rights bar in a hospitable jurisdiction is a fragile thing. Civil rights cases are risky and only a small subset are seriously lucrative.[331]

Now, imagine that Congress or the Supreme Court abolishes qualified immunity. Fearing a flood of litigation, the lower courts begin employing a combination of procedural and substantive tools to protect their limited capacity. Miraculously, they get the calibration just right, making it no more or less difficult to bring a constitutional tort suit on average. But there is one small hitch. The average effects of the docket-protective changes mask an important differential effect. It is now slightly easier to bring low-value claims but slightly harder to bring the high-value claims that are essential to the financial viability of a sophisticated civil rights bar. Given the small margins on which these firms operate, this small change is enough to put several of them out of business, making it dramatically more difficult for constitutional tort plaintiffs to successfully pursue their claims. Thus can a small change in one element of a civil rights ecosystem lead to a large change in outcomes.

C. *Summing Up*

There is a great deal we do not—and cannot—know for certain about qualified immunity and the capacity of the lower federal courts. We do not know whether qualified immunity will be abolished or limited or maintained in its present form. If the doctrine is merely limited, we do not know what the new limits will be or how those limits will be applied by the judges and juries charged with applying them. We do not know how many new constitutional tort filings the limitation or abolition of qualified immunity will trigger. We do not know how lower-court judges will perceive this risk. We do not know whether they will act preemptively to stave it off. If a flood of constitutional tort litigation materializes, we do not know how courts will manage this new demand on their limited capacity.

Despite this uncertainty, there is strong reason to suspect that the judicial capacity constraints of lower federal courts

331. *See* Schwartz, *Selection Effects*, *supra* note 138, at 1143 ("Indeed, many attorneys described civil rights litigation as a very financially risky line of work. . . .").

will play a decisive role in shaping the future of constitutional tort litigation if and when qualified immunity is significantly curtailed. We know that lower federal courts are obligated to decide every case presented to them. We know that those courts are already under tremendous strain. We know that judicial decisions increasing the expected benefit of filing constitutional tort suits have substantially increased the volume of litigation in the past. We know that past demands on scarce judicial resources have led the lower courts to develop an array of tools, procedural and substantive, for allocating those resources. We know that substantial new demands on the lower courts will force them to stretch those scarce resources even farther. We know that the available tools for doing so have the potential to replicate many of the effects of qualified immunity and to do so all but invisibly. They may even make constitutional tort plaintiffs worse off than they were under qualified immunity. Finally, we know that federal courts have a wide range of choice in deploying these tools and that this outcome is not inevitable.

IV. IMPLICATIONS

In the face of such knowledge, it would be a serious mistake for advocates of governmental accountability to limit their vision to the dismantling of qualified immunity. That is a tall enough order, to be sure. But if and when qualified immunity is dismantled, that is very likely to be merely Round One in the battle for constitutional accountability. Round Two will involve persuading the lower courts and perhaps also the Supreme Court not to claw back the gains of abolishing or limiting qualified immunity in the service of judicial capacity. If anything, this will be an even taller order. Imagine knocking out a champion prizefighter only to be confronted with her ghost—elusive, spectral, omnipresent, and unrelenting. Such is the nature of the challenge that will follow in the wake of qualified immunity reform.

Meeting that challenge will require sustained thinking and action of a different character than most critics of qualified immunity have yet contemplated. As a first step in that direction, this Part surveys several possible paths forward. We begin with legal challenges to capacity-management tools and expanding the judiciary, which we regard as decidedly

unpromising. We then turn to case management reform and popular mobilization. Neither will be easy or problem-free. Nor is either likely to be sufficient on its own. But in combination, we believe they hold significant promise.

A. *Equilibration Redux*

Before beginning our survey, it will be helpful to revisit "the equilibration thesis"[332] that has informed much of the best and most familiar scholarship on qualified immunity in recent years. As Richard Fallon explains it, this thesis "holds that courts, and especially the Supreme Court, decide cases by seeking what they regard as an acceptable overall alignment of doctrines involving justiciability, substantive rights, and available remedies."[333] As to qualified immunity specifically, Fallon suggests that "system designers should view official immunity, including qualified immunity, not as a regrettable necessity, but as a valuable, adaptable device for achieving the best overall regime of substantive rights, rights to sue for tort remedies, and immunity defenses."[334] This observation is normative, but Fallon strongly implies that courts in fact view qualified immunity in these terms.[335]

The upshot is that critics of qualified immunity should be careful what they wish for: "[I]f the costs of the Supreme Court rulings in cases such as *Brown v. Board of Education*[336] and *Miranda v. Arizona*[337] had included damages remedies . . . the Court might have felt unable to decide *Brown* and *Miranda* as it did."[338] Put more generally, the abolition of qualified immunity might leave constitutional tort plaintiffs with fewer and less robust rights to enforce. This useful cautionary note has been sounded by numerous other scholars, and it bears a

332. Fallon, *The Linkage Between Justiciability and Remedies*, *supra* note 237, at 637.

333. *Id.*; *see also* Levinson, *Rights Essentialism and Remedial Equilibration*, *supra* note 235, at 873 ("[C]onstitutional rights are inevitably shaped by, and incorporate, remedial concerns.").

334. Fallon, *Bidding Farewell*, *supra* note 62, at 965.

335. *Id.*

336. 347 U.S. 483 (1954).

337. 384 U.S. 436 (1966).

338. Fallon, *Bidding Farewell*, *supra* note 62, at 968.

passing resemblance to the central thesis of this Article.[339] The prospect that judges will take countermeasures to stem the flood of litigation triggered by qualified immunity's demise is indeed a form of equilibration. But our argument departs from the work of the equilibration theorists in two crucial respects.

First, those theorists are principally concerned with the *substantive* equilibrium produced by the interaction of justiciability doctrine, rights, immunities, and remedies. If courts limit immunities or relax justiciability requirements, the equilibration theorists worry that judges will feel compelled to constrict either rights or remedies to maintain the same rough balance between the substantive jurisprudential goods of deterrence, compensation, and zealous conduct of government business.[340] Our focus, by contrast, is on the *workload* equilibrium produced by the interaction of pleading standards, district and appellate court case management and publication practices, rights, and qualified immunity. If Congress or courts abolish or curtail qualified immunity, we worry that judges will feel compelled to adopt offsetting measures—procedural, substantive, or both—to safeguard their limited capacity.

Second, equilibration theorists largely treat the status quo equilibrium as fixed and assume that the options for maintaining that equilibrium are domain-specific. If damages remedies were available in *Brown* or *Miranda*, the rights established *in those cases* would have to be narrowed or abandoned, almost mechanically, as necessary to maintain the status quo equilibrium. As a descriptive matter, this may or may not be plausible, but it tends to induce an attitude of fatalistic resignation.

Our argument, by contrast, emphasizes the wide degree of choice judges possess in maintaining their workload equilibrium, both as to the importance they assign particular categories of cases and the tools they employ to manage any new surge in the volume of litigation. If the abolition of qualified immunity triggers a flood of constitutional tort suits, one possible outcome is that the lower courts will relegate

339. *E.g.*, Levinson, *Rights Essentialism and Remedial Equilibration*, *supra* note 235.

340. *See* Fallon, *Bidding Farewell*, *supra* note 62.

those cases to Track Two, effectively recreating qualified immunity by another name. But another possibility is that courts might relegate *a different category of cases* to Track Two—or otherwise divert resources from other areas—to make room for the influx of new cases. Recognizing this range of judicial choices is what makes it possible to discuss potential paths forward, as we do in the remainder of this Part.

B. *Dead Ends*

We begin our discussion with two apparently attractive approaches that strive to confront the judicial capacity problem directly. If judges respond to the abolition of qualified immunity by relegating constitutional tort suits to Track Two or otherwise recreating qualified immunity by another name, that response might itself be challenged as unconstitutional or otherwise unlawful.[341] Alternatively, and even better, the lower courts could be substantially expanded to eliminate the crisis of volume that presently requires them to carefully husband their limited capacity.[342] Unfortunately, both of these approaches turn out to be dead ends.

1. Legal Challenges

To most people without legal training, it must surely seem deeply wrong for federal judges to avoid their duty to decide cases and "administer justice without respect to persons"[343] through procedural legerdemain. It must seem doubly wrong for judges to do this for the apparently self-interested purpose of easing their own workloads at the expense of litigants' constitutional rights. One is reminded of the reaction of Mr. Bumble from *Oliver Twist*: "If the law supposes that, the law is a ass—a idiot."[344]

Many legal commentators have shared this reaction, and several have advanced creative legal arguments against the

341. *See* REYNOLDS & RICHMAN, *supra* note 155, at 72–82 (summarizing the constitutional challenges to the two-track system and concluding that those challenges have failed and similar arguments will likely fail too).

342. *See* Menell & Vacca, *supra* note 26 (advocating this approach).

343. 28 U.S.C. § 453.

344. CHARLES DICKENS, OLIVER TWIST 425 (Random House 2015) (1838).

system of judicial triage discussed in Part II.[345] Most of these have sounded in equal protection and due process.[346] Some have emphasized the disparity in treatment between Track Two cases and those receiving the Learned Hand treatment.[347] Others have emphasized the due process right to a reasoned explanation, ostensibly denied by cursory unpublished opinions and orders.[348] Still others have emphasized the inconsistency between the very idea of non-precedential decisions and rule-of-law values, including the basic obligation to treat like cases alike.[349]

These arguments suffer from three key flaws as a response to the risk that judges will recreate qualified immunity by another name. First, they have almost no chance of success under presently prevailing doctrine.[350] When such arguments have been raised in the past, courts have greeted them with uniform disfavor.[351] Second, even if successful, these arguments would likely benefit only a smattering of individual plaintiffs when the real problem is a systemic one. Third, none of these arguments grapples with the basic reality that the lower federal courts are burdened by far more cases than they could possibly resolve through the Learned Hand model or its district-court equivalent. Even an authoritative Supreme Court decision declaring judicial triage unconstitutional would not change this, and the lower courts would very likely find other coping mechanisms.

There is yet another problem. The constitutional arguments in question are, at best, applicable to a subset of the capacity-management tools canvassed in Part II. They have no purchase at all against aggressive case management practices, subtle tightening of pleading standards, de facto—and likely

345. *See* REYNOLDS & RICHMAN, *supra* note 155, at 72–80 (canvassing these arguments).

346. *Id.*

347. *Id.*

348. *See id.* at 73 (noting that this argument similarly failed because the Constitution only requires a fair decision, not an explanation).

349. *See id.* at 75–80 (examining the argument that "Article III required *every* decision to have precedential status," including unpublished decisions, and the argument's ultimate demise).

350. *See supra* note 341.

351. *Id.*

disparate—lightened scrutiny, or changes in the scope of substantive rights motivated by judicial capacity concerns. For all of these reasons, we do not think that legal challenges hold much promise as strategy for Round Two of the battle over qualified immunity.

2. More Judges

Another, even more straightforward, response to the problem would be for Congress to expand the number of lower court judges, perhaps including magistrate judges.[352] Many commentators have advocated for this over the years,[353] and Congress has several times expanded the number of judges during the crisis of volume, but it has not done so in many years, and the judges it added in the past have not kept pace with exploding federal dockets.[354] If the problem for constitutional tort litigation and other disfavored classes of cases is that there are too many cases per lower-court judge, why not hire more judges? In their landmark study of the crisis of volume, Reynolds and Richman describe this as "the single most obvious solution to the caseload glut."[355] They were writing about the courts of appeal,[356] but the same argument would seem to hold for the district courts.

There are serious questions about the desirability and implementation of this proposal. As Reynolds and Richman freely concede, only a "radical" increase in the number of judges would eliminate the enormous strain on judicial capacity that the federal courts are currently laboring under.[357]

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352. *See, e.g.*, Levy, *Judicial Attention as a Scarce Resource*, *supra* note 153, at 404 ("[S]cholars, along with other academics and judges, have called for changes to the courts' constraints—an increase in the number of judges or a decrease in the number of cases.").

353. *See* William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273, 278 (1996) ("[R]adical increase in the size of the federal appellate judiciary [is] the only way to maintain, or more accurately, regain the traditional appellate process in the circuit courts.").

354. *See* Levy, *Judicial Attention as a Scarce Resource*, *supra* note 153, at 412 ("Congress has not created new judgeships sufficient to keep pace with growing dockets . . . .").

355. REYNOLDS & RICHMAN, *supra* note 155, at 167.

356. *See supra* note 245.

357. *See* REYNOLDS & RICHMAN, *supra* note 155, at 6.

But as Marin Levy notes, "[M]ore than two-thirds of [federal appellate judges] reported that they believed the maximum number of judges for a court to 'function[] as a single decisional unit,' creating a cohesive body of law, is between eleven and seventeen."[358] As Levy also notes, the implementation of judicial expansion raises a number of tricky questions.[359] The most notable is how quickly the new judgeships should be filled—all at once by the currently sitting President or gradually over time.[360] In today's polarized political climate, the former would immediately be tarred as court-packing, eliciting howls of protest from the opposing party.[361] The latter would do far less to address the judicial capacity problem.

The most serious difficulty is simply that significant judicial expansion seems unlikely to pass Congress anytime soon. Sitting federal judges have lobbied strenuously against it for decades, apparently fearing a loss of the prestige that comes with exclusivity.[362] And Congress has displayed little interest in the matter.[363] Certainly, no divided or out-party-controlled Congress would pass such legislation, gifting an opposing President with a raft—or even a handful—of new judicial appointments. Even a unified Congress would have trouble passing it unless and until the

358. Marin K. Levy, *Judging Justice on Appeal*, 123 YALE L.J. 2386, 2405–06 (2014) [hereinafter Levy, *Judging Justice on Appeal*] (second alteration in original); *see* Ryan W. Copus, *Statistical Precedent: Allocating Judicial Attention*, 73 VAND. L. REV. 605, 609 (2020) ("Judging is a social, collective enterprise. In order to apply and develop a coherent system of law, judges need attend to not only their own cases, but also to *one another*.").

359. *See* Levy, *Judging Justice on Appeal*, *supra* note 358, at 2403.

360. *See id.*

361. *Cf.* Jeannie Suk Gerson, *What Democrats Achieve by Threatening to Pack the Supreme Court*, NEW YORKER (Oct. 28, 2020), https://perma.cc/FY6F-TP4T (noting that if the number of Justices were increased at this "politically polarized moment," it would "constitute such a frank acknowledgment of partisanship").

362. *See* REYNOLDS & RICHMAN, *supra* note 155, at 143 ("[S]ubstantial increases on the number of circuit judgeships will reduce the prestige of the position and thus diminish the pool of distinguished attorneys willing to serve on the bench.").

363. *See* Levy, *Judging Justice on Appeal*, *supra* note 358, at 2406 (explaining that Congress "appears to have little interest in expanding the bench").

Senate abolishes the filibuster. And that puts to one side the firestorm that charges of court-packing would be likely to raise.

Perhaps the best hope for serious reform lies in Peter Menell and Ryan Vacca's proposal "for Congress to establish a judiciary reform commission tasked with developing a judiciary reform act that would not go into effect until 2030."[364] By delaying the effective date of reform, Menell and Vacca hope to place the commissioners "behind a veil of ignorance that would enable them to focus on the best interests of future generations of citizens (including judges and practitioners), while at the same time drawing upon their own experiences."[365] This logic has real force, but the proposal still strikes us as a serious long shot, given the intensity of partisan feeling surrounding judicial appointments.[366] A delay of ten years also significantly reduces its appeal as a strategy for Round Two, especially since the final result could well be a phased expansion that would spread new judicial appointments over several presidential administrations. To paraphrase John Lennon, the recreation of qualified immunity by another name is what happens when you are busy making other plans.[367]

C. *Paths Worth Exploring*

We now turn to two approaches that strike us as more promising. Rather than sacrificing decisional quality or procedural rigor to cope with a flood of new constitutional litigation, judges might be persuaded to respond to the abolition of qualified immunity by increasing the efficiency of their case-management practices. Alternatively, or in addition, critics of qualified immunity might continue working with social movements to highlight the importance of constitutional tort suits not only to the traditional objectives of corrective justice and deterrence of law-breaking but also to the

364. Menell & Vacca, *supra* note 26, at 879.

365. *Id.*

366. *See* Keith E. Whittington, *Partisanship, Norms, and Federal Judicial Appointments*, 16 GEO. J.L. & PUB. POL'Y 521, 521 (2018) ("The politics of federal judicial appointments is as heated and as high-profile now as it has ever been in American history.").

367. *See* JOHN LENNON, BEAUTIFUL BOY (DARLING BOY) (Geffen Records 1981) ("Life is what happens to you while you're busy making other plans.").

sociological legitimacy of the American constitutional project. Neither of these approaches amounts to anything like a panacea. But together, they offer the best hope of winning Round Two and replacing qualified immunity with a constitutional tort system consistent with equal justice under law.

1. Case Management Reform

As with any resource allocation problem, federal courts faced with a flood of new qualified immunity suits will have two essential choices. They can engage in yet more extensive triage, further reducing the quality of judicial process afforded to the average case.[368] Or they can find creative ways to use their resources more efficiently. Likely, they will need to do both. But the more they do of the latter, the less they will need to do of the former.[369] Of course, it is easier to talk about increasing efficiency than actually to do so. The lower federal courts are an enormous and, in most respects, quite a decentralized bureaucracy.[370] To meaningfully increase the efficiency of the system as a whole is no small task. But there is some empirical evidence that it can be done.

In an intriguing extension and critique of Bert Huang's study of the Second and Ninth Circuits, Shay Lavie found that the Second Circuit reduced its reversal rate in response to the post-9/11 surge in immigration appeals, but the Ninth Circuit did not.[371] He persuasively attributes this discrepancy to the Ninth Circuit being "a more innovative, flexible court of appeals. It has leveraged its ongoing workload difficulties to develop 'organizational resiliency against changes' in its

368. *See* Shay Lavie, *Appellate Courts and Caseload Pressure*, 27 STAN. L. & POL'Y REV. 57, 68 (2016) (stating that courts can use "milder weapons" to fight caseload pressures, such as "working more efficiently and/or changing their procedures").

369. *See id.* (explaining that while "[w]orkload pressure should affect courts . . . appellate courts and judges have a rich repertoire of mechanisms to choose from, from working more efficiently, to changing their procedures and reducing decision quality").

370. *See* Levy, *The Mechanics of Federal Appeals*, *supra* note 245, at 318 ("Judges themselves acknowledge that they are unacquainted with the case-management practices of courts outside their own.").

371. *See* Lavie, *supra* note 368, at 60.

docket, 'institut[ing] much cutting-edge experimentation,' which has resulted in innovative time-management practices."[372]

Those practices include: "mini en bancs," in which only a fraction of active judges participate; sharing of bench memoranda across chambers; and unusually heavy usage of visiting judges.[373] The Ninth Circuit also increased the number of oral arguments heard by each panel of judges and developed an innovative "priority algorithm" to determine the sequence in which cases should be heard and to group similar cases before a single panel.[374] As a result of this flexible and innovative culture, Lavie concludes, the Ninth Circuit was able to withstand the surge in immigration appeals without reducing its scrutiny of district court decisions.[375] Lacking such a culture, the Second Circuit was not able to do so.[376]

Lavie's analysis suggests that reducing procedural and decisional quality is not the only possible response to increased judicial workloads. In at least some circumstances, efficiency-enhancing innovation is a viable alternative. In even more circumstances, it should represent a valuable complement to other capacity-management tools. The Ninth Circuit's creative uses of technology are especially intriguing in this regard because the power of potentially applicable technologies continues to grow at a rapid pace.[377] One interesting illustration is Ryan Copus's recent proposal to use machine learning techniques that he calls "statistical precedent" to identify those cases most in need of full-blown,

372. *Id.* at 61.

373. *Id.* at 61 n.13.

374. *See id.* at 85 n.145 (explaining the priority algorithm).

375. *Id.* at 82.

376. *Id.* at 88. Somewhat paradoxically, Lavie suggests that it was the Ninth Circuit's well-established willingness to cut procedural corners (e.g., the frequency of oral argument and the role of staff attorneys) that enabled it to absorb the caseload surge without sacrificing the quality of its decisions. *Id.* at 60–61. The Second Circuit, by contrast, had historically prided itself on a refusal to cut such corners, in particular with respect to oral argument. *Id.* at 60. Unable to bend in the face of an overwhelming caseload spike, it broke. *Id.* at 61.

377. *See AI and the Courts*, AM. ASSOC. FOR THE ADVANCEMENT OF SCI., https://perma.cc/R4BX-9ZMX (describing modern advancements of technology pertaining to the U.S. court system).

Learned-Hand-style appellate review.[378] We have some concerns about the tendency of such an approach to entrench the failures of the existing system of judicial triage, a risk Copus candidly acknowledges.[379] But such approaches certainly deserve further exploration.

The question of how to encourage courts to undertake efficiency-enhancing case-management reform is more difficult. Lavie attributes the Ninth Circuit's relatively successful management of its caseload spike to a distinctive circuit culture, which grew out of a series of prior case-management challenges and failures.[380] The existence and resilience of diverse cultures across the circuits has been noted by other scholars of judicial administration, who attribute this phenomenon to some combination of random variation, functional differences, and path dependence.[381] But if these circuit-specific norms are the primary driver of case-management innovation, it is not clear what might be done to encourage more of it. The best, if imperfect, answer is probably to encourage more extensive sharing of information across circuits. Agencies like the Federal Judicial Center and the Administrative Office of United States Courts also have a role to play, as do the academics who work with them.

This will certainly not be a walk in the park. We are not entirely confident its prospects for success exceed those of expanding the judiciary. But it has three principal advantages over that proposal. First, it has not been vigorously pressed for decades without success. Second, it does not have to run the gauntlet of congressional gridlock. And third, the potential for

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378. *See* Copus, *supra* note 358, at 611 ("[A] system of *statistical precedent* can help the courts more fairly and effectively allocate attention, thereby promoting the courts' error-correcting and law-developing functions.").

379. *See id.* at 660 ("More worrisome is the possibility that statistical precedent helps to cement historical judicial failures to identify decisions that both past and present judges would—if they paid more attention—agree are in error.").

380. Lavie, *supra* note 368, at 73.

381. *See id.* at 71–72 ("[A]s courts of appeals enjoy relative freedom in designing their internal procedures, the background differences had translated into different rules and norms."); Mitu Gulati & C.M.A. McCauliff, *On* Not *Making Law*, 61 LAW & CONTEMP. PROBS. 157, 161 (1998) (discussing the varying norms between circuits).

harnessing the power of emerging technologies is already impressive and growing by the year. For all of these reasons, we believe this path forward deserves further exploration.

2. Social and Popular Movements

We have saved the most promising, but also the most difficult, approach for last. If qualified immunity is abolished or curtailed, how judges respond to an actual or perceived flood of constitutional tort litigation will be determined largely by their collective views about the importance of these suits.[382] There is significant reason to worry that many, if not most, federal judges today view constitutional tort litigation as relatively unimportant and more than usually likely to give rise to frivolous claims.[383] If this is and remains the case, it seems more likely than not that the lower federal courts will respond to the abolition or reform of qualified immunity by recreating its practical equivalent by another name, consciously or unconsciously motivated by judicial capacity concerns.

There are two ways for advocates of governmental accountability to flip this script: (1) advocate for the appointment of judges who hold different views (and elect officials who will appoint and confirm them); and (2) reshape the cultural environment in which current judges live and from which they derive their intuitions about what cases and issues merit the attention of busy federal courts. Both efforts are crucial and both are ongoing, to a greater extent than at any time in recent memory.[384] The political strategists, movement

382. *See* REYNOLDS & RICHMAN, *supra* note 155, at 119–20 (attributing judicial triage decisions to judges' sense of which cases are important and which are not).

383. *See generally* CHEMERINSKY, *supra* note 168 (recounting judicial hostility to constitutional litigation across a broad range of doctrines and domains).

384. *See, e.g.*, Jacqueline Thompson, *Public Defender Experience and Diversity Dominates at Biden's Judicial Nominees' First Hearing*, LAW.COM (Apr. 28, 2021), https://perma.cc/FT3F-FNS2 (noting dramatic increase in racial diversity and public-defender experience among President Biden's judicial nominees); Tierney Sneed, *Inside Democrats' Quest to Nominate Judges Who Break the Ex-Prosecutor Mold*, CNN (July 30, 2021), https://perma.cc/5LUX-2PGN (explaining the political groundwork behind this shift in judicial nominations).

leaders, and grassroots activists on the front lines do not need our advice about how to pursue this work most effectively. Instead, we limit ourselves to two points.

First, it would be all too easy for the energy behind these efforts to ebb or even collapse once qualified immunity is formally abolished or curtailed. The doctrine of qualified immunity has a name and a clear line of precedents behind it. It also has clear-cut victims, with names, and faces, and sympathetic—often tragic—stories to tell.[385] These kinds of simple, easily accessible symbols are the lifeblood of widespread popular political mobilization.[386] In contrast, the ghost of qualified immunity that threatens to replace it, indeed recreate it, will have no name or clear-cut victims. It will be virtually invisible, except to the relatively few who know enough to look. This will make it enormously challenging to sustain the current momentum in Round Two of the battle over qualified immunity. Those working in the trenches would do well to begin planning for this challenge now.

Second, both appointment and cultural change are crucial and proven avenues of influence. This is hardly a controversial point with respect to appointment. But it bears emphasis that not all appointments are created equal, even among nominees with strong track records of ideological loyalty to their party's broad jurisprudential agenda. Had President Trump and his advisors paid attention, it was easily foreseeable that Neil Gorsuch would vote differently than other staunch judicial conservatives in federal Indian law cases.[387] It was also easily foreseeable that Sonia Sotomayor would vote—and write—differently than Stephen Breyer or Merrick Garland in

385. *See, e.g.*, Kelsay v. Ernest, 933 F.3d 975, 982 (8th Cir. 2019) (granting qualified immunity where an officer used a takedown maneuver against a small woman, slamming her to the ground, and knocking her unconscious).

386. *See, e.g.*, KOMESAR, *supra* note 190, at 63 (emphasizing the role of "simple symbols" in driving mass political mobilization).

387. *Compare* McGirt v. Oklahoma, 140 S. Ct. 2452, 2459–82 (Justice Gorsuch delivering the majority opinion, joined by liberal Justices Ginsburg, Breyer, Sotomayor, and Kagan), *with id.* at 2482–2502 (Roberts, J., dissenting) (conservative Justices Alito, Kavanaugh, and Thomas joining Chief Justice John Robert's dissent).

qualified immunity cases.[388] Even in this hyper-polarized era, both major parties are bigger tents than is sometimes realized. Going forward, any Democratic judicial nominee is likely to favor the abolition or curtailment of qualified immunity.[389] But not all will feel strongly enough about the social importance of constitutional tort litigation to resist the de facto recreation of qualified immunity in the name of judicial capacity. Advocates of government accountability should be aware of this rather subtle distinction and would do well to monitor it closely. The ethnic diversity and professional backgrounds of President Biden's early judicial nominees, which include far more public defenders and civil-rights lawyers than the historical norm, are a significant step in this direction.[390]

The influence of a shifting cultural environment on judicial priorities may seem more dubious. Aren't the vast majority of federal judges mature adults of unusually well-settled worldviews? Hasn't the judicial nomination process selected ever more carefully for exactly such persons over the past several decades? Perhaps. But there is excellent reason to believe that social movements influence federal judges in much the same way they influence anyone else, by a sort of cultural osmosis.[391] This is a straightforward corollary of the truism that judges tend to reflect the views, background assumptions, and prejudices of their socioeconomic class.[392] When the outlook of that class changes, as it sometimes does in

388. *Compare* Mullenix v. Luna, 577 U.S. 7, 8–19 (2015) (per curiam) (holding that a state trooper was shielded by qualified immunity when he shot and killed a motorist fleeing from arrest), *with id.* at 26 (Sotomayor, J., dissenting) ("By sanctioning a 'shoot first, think later' approach to policing, the Court renders the protections of the Fourth Amendment hollow.").

389. *Cf.* Kisela v. Hughes, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) (severely criticizing qualified immunity).

390. *See* Mark Sherman & Darlene Superville, *Biden's Judges: More Diverse and More of Them*, AP (Aug. 2, 2021), https://perma.cc/Q22K-TSYQ.

391. Jack M. Balkin, *How Social Movements Change (or Fail to Change) the Constitution: The Case of New Departure*, 39 SUFFOLK U. L. REV. 27, 29 (2005) ("[W]e know that social movements do influence constitutional interpretation.").

392. *See, e.g.*, RICHARD A. POSNER, HOW JUDGES THINK 73 (2008) ("A judge's personal background characteristics, such as race and sex, and his personal and professional experiences are among the nonpolitical, nonlegalist factors that have been found to influence his decisions.").

response to social and popular movements, the outlook of judges changes too.[393]

Historical examples abound. Reva Siegel and various coauthors have written extensively about the influence of the civil rights and women's movements on the Supreme Court's constitutional decisions.[394] Lawrence Lessig has written about the influence of social movements on judges' sense of what is contestable and uncontestable, with particular reference to discrimination on the basis of sex and sexual orientation.[395] As he pithily sums up the point, "Judges can't, as it were, spit in the wind of what we all know is true."[396]

Of course, the "we" in this sentence is crucial. Black Americans and other marginalized groups have long known the realities of police harassment, brutality, and legal impunity.[397] They have more than known these realities; they have lived them. But thanks to the popular movement inspired by George Floyd, the rest of the country has begun to wake up to these deeply entrenched features of American life.[398] The shift in public polling within the first few weeks of the first

393. *See* BAUM & DEVINS, *supra* note 67, at 50 (explaining that "the Court's support for civil liberties in the face of public disapproval" during the Warren Court was caused in part by the "education of socialization of elites").

394. *See generally* Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943 (2003); Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1 (2003); Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297 (2001).

395. *See* Lawrence Lessig, *The Puzzling Persistence of Bellbottom Theory: What a Constitutional Theory Should Be*, 85 GEO. L.J. 1837, 1843 (1997) (discussing the rise "in equality claims by gays and lesbians").

396. *Id.*

397. *See, e.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 98 (2010) ("In every state across our nation, African Americans—particularly in the poorest neighborhoods—are subjected to tactics and practices that would result in public outrage and scandal if committed in middle-class white neighborhoods.").

398. Toluse Olorunnipa & Griff Witte, *Born with Two Strikes: How Systemic Racism Shaped Floyd's Life and Hobbled his Ambition*, WASH. POST (Oct. 8, 2020, 7:47 AM), https://perma.cc/NK2E-KSQM (explaining that Floyd's death prompted many Americans to "probe the broader question" of racist systems).

major protests was stunningly large.[399] But there are significant signs of regression and backlash, after those heady early days.[400] And rising crime rates have the potential to pull public attitudes further back toward complacency and uncritical support for law enforcement.[401] But if the impact is lasting, federal judges are unlikely to be immune.

The stakes for the future of constitutional tort litigation are profound. Judges who view such cases as simply part of the great mass of "boring, routine claims" that crowd their dockets are likely to behave accordingly—even, and perhaps especially, if qualified immunity is abolished or curtailed.[402] At the appellate level, such judges will relegate these cases to Track Two or acquiesce in such relegation. They will also subject appeals by individuals asserting their constitutional rights to more relaxed scrutiny than appeals brought by government officials. At the district-court level, such judges will subject constitutional tort suits to aggressive case management, making it more difficult for plaintiffs to obtain the evidence they need to pursue their claims and reducing the expected benefit of filing suit in the first place. They may also raise the de facto bar for pleading a plausible claim under *Twombly* and *Iqbal* or employ their own versions of the appellate triage system to limit the judicial attention accorded these cases.

By contrast, judges who have learned the lessons of the George Floyd era will understand, intuitively, that constitutional tort suits do not merely concern the

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399. *See, e.g.*, Nolan D. McCaskill, *'A Seismic Quake': Floyd Killing Transforms Views on Race*, POLITICO (June 10, 2020, 4:30 AM), https://perma.cc/D3TZ-UQTH ("Six in 10 white Americans now say racism is 'a big problem' in society, an enormous increase from polls taken when Barack Obama was president.").

400. *See, e.g.*, Audra D. S. Burch et al., *The Death of George Floyd Reignited a Movement. What Happens Now?*, N.Y. TIMES (Apr. 20, 2021), https://perma.cc/7XAU-Q7H6 (last updated June 25, 2021) (describing signs of backlash to the Black Lives Matter movement, including legislation that would protect the police); Pauly, *supra* note 6 (same).

401. Domenico Montanaro, *Rising Violent Crime is Likely to Present a Political Challenge for Democrats in 2022*, NPR (July 22, 2021, 5:01 AM), https://perma.cc/E7GD-46XP (discussing the "debate over [police] funding" and the "the rise in crime").

402. *See* Lemos, *supra* note 152, at 844–45 ("A judge who believes that a given type of claim is uninteresting or unimportant is unlikely to react favorably to an increase in the number of those claims filed in his court.").

compensatory and dignitary interests of individual litigants, important as those interests are. They also implicate the interests of the entire community and the legitimacy of the entire American constitutional project. At bottom, these cases are about legal accountability and the rule of law. The way they are handled by federal courts sends a powerful signal about the scope and limits of the community to which these principles apply. Federal judges who understand this will be far more likely to make constitutional tort cases a priority, even in the face of significant caseload pressures.[403]

Of course, we do not expect that the Black Lives Matter movement will transform staid, life-tenured federal judges into radical activists for racial justice. But that is not a prerequisite for positive change. The women's movement did not convert staid, life-tenured federal judges into radical feminists. But it did radically reshape the cultural environment in which those judges lived and worked, making it impossible for them to unsee many pernicious social realities that had previously flown beneath their radar.[404] The best and best-known example is hostile work environment sexual harassment, considered a radical notion when Catherine MacKinnon popularized the term in 1978,[405] but unanimously embraced by the Supreme Court less than ten years later.[406] While much work and

403. The coruscating opinion issued by U.S. District Judge Carlton Reeves in a "driving while Black" case shortly after George Floyd's death is an example of how judges' personal understanding of these issues can powerfully shape their work. *See* Jamison v. McClendon, 476 F. Supp. 3d 386, 423 (D. Miss. 2020) ("Overturning qualified immunity will undoubtedly impact our society. Yet, the status quo is extraordinary and unsustainable. Just as the Supreme Court swept away the mistaken doctrine of 'separate but equal,' so too should it eliminate the doctrine of qualified immunity.").

404. *See* Reva Siegel, *A Short History of Sexual Harassment*, *in* DIRECTIONS IN SEXUAL HARASSMENT LAW 8, 8 (Catherine A. MacKinnon & Reva B. Siegel eds., 2003) ("Responding on many fronts to the demands of the second-wave feminist movement, the American legal system began slowly to yield to this challenge, and for the first time recognized women's right to work free of unwanted sexual advances.").

405. *See* CATHERINE MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION 4 (1978) ("[S]exual harassment of women at work is sex discrimination in employment.").

406. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 73 (1986) (holding that a claim of "hostile environment" sexual harassment is a form of sex discrimination actionable under Title VII). Remarkably, the majority opinion

uncertainty remains, there is reason to hope that the present mass movements for racial justice will produce a similar shift in public and elite consciousness.

This prospect is complicated by the intense political polarization that prevails across American society today. As Lawrence Baum and Neal Devins explain in their excellent recent book, judges have always been strongly influenced by the social and cultural networks in which they are enmeshed.[407] But among political and professional elites these networks have become far more polarized along ideological lines.[408] In the past, liberal and conservative judges were often part of the same networks and, as a result, often subscribed to an elite consensus, especially on social issues, that diverged, sometimes sharply, from mainstream public opinion.[409] Today, liberal and conservative judges consume different news media; belong to different, ideologically oriented professional associations; and move in different, more ideologically homogenous social networks.[410]

The upshot is that the ongoing mass movements for racial justice are likely to influence the perceptions of liberal and conservative judges in different ways. Among at least some conservatives, this influence might reinforce, rather than disrupt, preexisting attitudes about race and policing. This is

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was written by then-Justice William Rehnquist, arguably the Court's most conservative member at the time.

407. *See* BAUM & DEVINS, *supra* note 67, at 9 ("Justices are members of society and their decision making, over time, will reflect changes in the world that the Justices inhabit.").

408. *See id.* at 2 ("[P]artisan and ideological polarization of the current era, polarization that has had its greatest effects in elite segments of American society, has changed the Court in important ways."); *see also* LAWRENCE BAUM, JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR 89 (2006) ("[M]ost federal appellate judges shared elite social origins. These origins affected judges' own values . . . .").

409. *See* BAUM & DEVINS, *supra* note 67, at 68 ("[M]ost Justices appointed by presidents of both parties came from higher-status families and had legal careers that made them part of an economic and social elite. Elites were not separated by partisan ideology at this time; instead, class status transcended party and ideology.").

410. *See id.* at 131 ("The development of more distinct conservative and liberal camps among social and political elites and the strengthening of the overlap between party and ideology have helped to bring about affective polarization.").

another way in which it is crucial to pay attention to the "we" in assessing "what we all know is true."

Still, there remains some overlap in the networks of liberal and conservative judges, and some evidence that consensus elite values continue to influence judges across the ideological spectrum.[411] Witness the ways in which conservative Justices Brett Kavanaugh, John Roberts, and Samuel Alito make a point of acknowledging the determined efforts of the LGBTQ movement.[412] Other telling, if anecdotal, examples point in the same direction. These include Mitt Romney's participation in a Black Lives Matter march in early June of 2020;[413] the public letter of support for racial justice from former President George W. Bush;[414] and the support of top military officials for renaming bases currently named for confederate generals.[415]

Our best guess is that political polarization will dampen and skew, but not eliminate, the long-term impact of the current movements for racial justice. But this is just a guess.

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411. *See id.* (explaining that before 1990 "most highly educated Republicans and Democrats converged on the very social issues that now divide the parties" and that "even in the current period of high elite polarization, there is a tendency . . . for pro-civil liberties decisions by the Court . . . .").

412. *See* Bostock v. Clayton County, 140 S. Ct. 1731, 1823 (2020) (Kavanaugh, J., dissenting) ("The Court has previously stated, and I fully agree, that gay and lesbian Americans 'cannot be treated as social outcasts or as inferior in dignity and worth.'"); *id.* at 1783 (Alito, J., dissenting) ("The updating desire to which the Court succumbs no doubt arises from humane and generous impulses."); Obergefell v. Hodges, 576 U.S. 644, 686 (2015) (Roberts, C.J., dissenting) (describing the fairness and policy arguments for same-sex marriage as having "undeniable appeal"). Of course, Chief Justice Roberts and Justice Gorsuch did not only offer sympathetic words; they joined the majority in *Bostock*. 140 S. Ct. at 1737.

413. *See* Paul LeBlanc & Ted Barrett, *Romney Marches in Floyd Protest 'To Make Sure People Understand That Black Lives Matter"*, CNN (June 7, 2020), https://perma.cc/WL4P-XMR7.

414. *See* Press Release, George W. Bush Presidential Ctr., Statement by President George W. Bush (June 2, 2020), https://perma.cc/JE93-JLNV ("It remains a shocking failure that many African Americans, especially young African American men, are harassed and threatened in their own country. It is a strength when protestors, protected by responsible law enforcement, march for a better future.").

415. *See* John Ismay, *The Army Was Open to Replacing Confederate Base Names. Then Trump Said No*, N.Y. TIMES (June 10, 2020), https://perma.cc/A97G-UWA3 (describing support of military leaders for base name changes).

Whether the George Floyd era will make a lasting impression on the racial consciousness of federal judges as a group very much remains to be seen. The obstacles ahead are daunting, but more than anything else, this is what it will take for advocates of governmental accountability to prevail in Round Two of the battle over qualified immunity.

CONCLUSION

Qualified immunity has entered a new era. After years of apparent impregnability, reform and even abolition of the doctrine are now squarely on the legislative agenda. How long this may take to achieve is anyone's guess. But the unexpectedness of this development has created a looming and largely unanticipated danger. If and when qualified immunity is abolished or reformed, there is good reason to believe this will unleash a flood of new constitutional tort litigation, creating serious docket-management problems for lower federal courts. Those courts are already staggering under an overwhelming caseload, and many of the tools available to them for managing it have the potential to recreate qualified immunity by another name. Even if no flood of cases actually materializes, judges anticipating it may take preemptive action that leaves constitutional tort plaintiffs little better off than they are under the current qualified immunity regime. Conceivably, plaintiffs could even end up worse off.

That is the bad news. The good news is that a judicial-capacity motivated backlash to qualified immunity's demise is merely possible, not inevitable. Lower federal courts have a wide array of options for managing an anticipated surge in new filings. Most notably, they might employ creative case management reforms, increasing the efficiency with which they process cases without sacrificing decisional quality. Alternatively, or in addition, judges might choose to divert resources from other categories of cases. But neither is likely to happen without a concerted effort. The time to prepare for such an effort is now.