



Spring 2024

Piercing the Procedural Veil of Qualified Immunity: From the Guardians of Civil Rights to the Guardians of States' Rights

Leo Yu

Southern Methodist University, Dedman School of Law, peiy@smu.edu

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/wlulr>



Part of the [Civil Procedure Commons](#), [Civil Rights and Discrimination Commons](#), and the [Courts Commons](#)

Recommended Citation

Leo Yu, *Piercing the Procedural Veil of Qualified Immunity: From the Guardians of Civil Rights to the Guardians of States' Rights*, 81 Wash. & Lee L. Rev. 775 ().

Available at: <https://scholarlycommons.law.wlu.edu/wlulr/vol81/iss2/7>

This Article is brought to you for free and open access by the Washington and Lee Law Review at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Washington and Lee Law Review by an authorized editor of Washington and Lee University School of Law Scholarly Commons. For more information, please contact christensena@wlu.edu.

Piercing the Procedural Veil of Qualified Immunity: From the Guardians of Civil Rights to the Guardians of States' Rights

Leo Yu*

Abstract

Scholars have found that, despite a split on the burden of proof for qualified immunity, courts agreed that defendants must bear the burden of pleading to raise qualified immunity as a defense. This Article is the first to find that, over the past decade, this established consensus has been disrupted, culminating in a fresh circuit split.

This Article investigates twelve Federal Courts of Appeals' qualified immunity rulings on 42 U.S.C. § 1983 and finds that six have required plaintiffs to anticipate defendants' qualified immunity arguments at the pleading stage, essentially treating the negating of qualified immunity as an element of § 1983. This Article criticizes this approach, as it distorts the rule-of-law value of the Federal Rules of Civil Procedure, and it cannot be reconciled with the statutory text and the original intent of the forty-second Congress in enacting the Civil Rights Act of 1871.

* Assistant Clinical Professor of Legal Writing, Research and Advocacy (ORCID: 0000-0001-8181-269X). Southern Methodist University, Dedman School of Law. I have received many supports during the writing of this Article, including Alan Chen, Jessica Weaver, Jenia Turner, Hillel Bavli, Allison Tait, Zina Makar, Emmanuel Arnaud, Matthew Boaz, J.P. Collins, Katherine Mims Crocker, Amy Kimpel, Noah Smith-Drelick, Madalyn K. Wasileczuk, Marissa Jackson Sow, Riley Keenan, Luke Norris, and the Richmond Junior Faculty Forum.

This new circuit split should not be understood as merely a procedural split regarding the pleading burden. Courts often take advantage of procedural law's elusive nature and use it as a veil to shield judicial activism. This circuit split is another example. Behind the veil of the pleading allocation is a clear policy agenda: anti-civil rights and unconditionally pro-law enforcement.

Yet, one subtle, albeit salient, theoretical strand remains underexplored: the undertones of states' rights embedded within the contemporary qualified immunity jurisprudence. Both the Rehnquist and Roberts Courts exhibited a predilection for interpreting the objective knowledge test in a manner favorable to law enforcement, leading to a predicament the Reconstruction Congress once grappled with: the enforceability of a federal right today often hinges upon a state actor's acknowledgment of that right. Such an outcome, far from being serendipitous, resonates with the Court's overt pro-states' rights disposition on many civil rights matters. Thus, the contemporary qualified immunity jurisprudence reflects a departure from the vision of the Reconstruction Congress, which envisioned federal courts as guardians of civil rights. The prevailing sentiment of the Court suggests a reimagining of a new role for federal courts: guardians of states' rights.

Table of Contents

INTRODUCTION	777
I. QUALIFIED IMMUNITY AND AFFIRMATIVE DEFENSE: AN UNSETTLED ASSOCIATION	788
A. <i>Affirmative Defense: Its Common Law Root and Its Federal Adoption</i>	789
B. <i>Burden of Proof: A Century-Long Debate</i>	791
C. <i>How the Mess Started: From a Clear Supreme Court Ruling to a 5-5-2 Circuit Split</i>	792
1. <i>Gomez and Harlow: A Clear Ruling and a Seed of Confusion</i>	793
2. <i>A 5-5-2 Tally</i>	796
II. FROM AN AFFIRMATIVE DEFENSE TO AN ELEMENT	797
A. <i>Ashcroft v. al-Kidd: Let the Water Be Muddier</i>	798

B.	<i>The Elementary Approach: From a Defense to an Element</i>	800
1.	The Fifth Circuit: <i>Backe v. LeBlanc</i> and <i>Carswell v. Camp</i>	801
2.	The Sixth Circuit: <i>Johnson v. Moseley</i>	805
3.	The Eighth Circuit: <i>Payne v. Britten</i> and <i>Faulk v. City of St. Louis</i>	807
4.	The D.C. Circuit: <i>Taylor v. Reilly</i> and <i>Jones v. Kirchner</i>	811
III.	THE FLAWS OF THE ELEMENTARY APPROACH	815
A.	<i>The Rule-of-Law Values of the Federal Rules of Civil Procedure</i>	815
B.	<i>The Elementary Approach and the Text of § 1983</i>	819
1.	The Old Textualism v. The Elementary Approach	820
2.	The New Textualism v. The Elementary Approach	822
a.	<i>The Context of the Statute</i>	822
b.	<i>Statutory Purpose</i>	824
IV.	PIERCING THE PROCEDURAL VEIL: FROM GUARDIANS OF CIVIL RIGHTS TO GUARDIANS OF STATES' RIGHTS	827
A.	<i>Qualified Immunity and the Rehnquist Court</i>	828
B.	<i>Qualified Immunity and the Roberts Court</i>	834
	CONCLUSION.....	841

INTRODUCTION

Qualified immunity is a court-created monster in our legal system.

Decades ago, the Supreme Court created qualified immunity to shield government officials from civil rights lawsuits so long as “their conduct does not violate clearly established . . . constitutional rights of which a reasonable person would have known.”¹ It was an ambitious creation. As

1. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); see Alan K. Chen, *The Facts About Qualified Immunity*, 55 EMORY L.J. 229, 229 (2006) [hereinafter

Alexander Reinert observed, this creation was not based on the Constitution or any statute, and its common law ground is not firm either.² Joanna Schwartz concluded that the contours of qualified immunity's protections are shaped by policy considerations more than anything else.³ Alan Chen further pointed out that the policy justification behind qualified immunity was relatively simple: limiting the social costs of civil rights claims against public officials.⁴ The Court was concerned that the increased number of civil rights lawsuits would impose harassment, distraction, and liability against government officials when they perform their duties;⁵ hence, the Court must come to the rescue. The fear of judicial activism suddenly evaporated.⁶

The seemingly simple elements of qualified immunity—a violation of a federal right, and that the federal right is clearly

Chen, *The Facts About Qualified Immunity*] (explaining that qualified immunity is a “judicially-created doctrine that often protects public officials from damages actions for the violation of constitutional rights”).

2. Alexander Reinert concluded that the alleged common foundation for qualified immunity is seriously flawed. See Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*, 111 CAL. L. REV. 201, 228 (2023)

To sum up, the Supreme Court's use of the Derogation Canon up until and contemporaneously with the Reconstruction Congress betrayed no suggestion that it would incorporate common law defenses into new statutory causes of action, absent express legislative direction to the contrary. If we take seriously the Court's declaration that its interpretation of Section 1983 is guided by the understanding of the Reconstruction Congress when it enacted the statute, it follows that the Court should not rely on the Derogation Canon that legislators at the time would not have expected to apply to Section 1983.

3. See Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 8 (2017).

4. See Chen, *The Facts About Qualified Immunity*, *supra* note 1, at 230.

5. See *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (“Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.”).

6. See generally David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. PA. L. REV. 23 (1989). Rudovsky argued that the Supreme Court exercised judicial activism to impose Justice Frankfurter's narrow view on the Civil Rights Act of 1871 in his dissenting opinion in *Monroe v. Pape*, 365 U.S. 167 (1961). See Rudovsky, *supra*, at 30.

established—turns out to be anything but simple in its application.⁷ Is this a question of law, a question of fact, or both?⁸ Does a litigant need to raise one prong first, then the other? Who bears the burden of proof?⁹ Which stage of a lawsuit should a party present it?¹⁰ Can it be waived? The Supreme Court attempted to answer some of the questions, but its answers often led to more confusion.¹¹ Judge Charles Wilson from the Eleventh Circuit stated that this policy-based creation puzzles generations of lower courts and “[p]roperly applying the law of qualified immunity is . . . a philosophical challenge.”¹²

7. See Chen, *The Facts About Qualified Immunity*, *supra* note 1 (“While articulating the qualified immunity test is relatively easy, applying it is not.”).

8. See Teressa E. Ravenell, *Hammering in Screws: Why the Court Should Look Beyond Summary Judgment When Resolving Section 1983 Qualified Immunity Disputes*, 52 VILL. L. REV. 135, 150 (2007) (arguing that the vagueness of this issue is likely due to the Supreme Court’s failure to establish an ultimate rule that distinguishes factual findings and legal conclusions).

9. See *id.* at 137 (discussing different circuits’ approaches to the burden of proof).

10. See *id.* at 149 (“Noting that ‘[n]either the text of § 1983 or any other federal statute, nor the Federal Rules of Civil Procedure, provide any support for imposing the clear and convincing burden of proof on plaintiffs either at the summary judgment stage or in the trial itself,’ . . .”).

11. Chen observed that the Supreme Courts spent more than four decades attempting to clarify procedural confusion regarding qualified immunity, but it failed. See Chen, *The Facts About Qualified Immunity*, *supra* note 1, at 231. For example, The Court once declared that qualified immunity was a pure question of law and should be resolved at the earlier stage of litigation. *Id.* But the Court then recognized qualified immunity’s factual nature and demanded a reasonableness analysis in determining a government official’s knowledge. See *Id.* The Court once required litigants to raise the first prong first, then the second. *Id.* But it quickly backtracked, overruled its precedent, and ruled that lower courts should feel free to decide. See *id.*

Over the past four decades, the Court has devoted an extraordinary amount of energy struggling to define and to clarify the procedures under which parties litigate, and lower courts adjudicate, officials’ immunity claims. This effort has been largely unsuccessful . . . the Court either consciously ignores or fails to comprehend the unavoidable tension between early termination of civil rights suits and the inherently fact-based nature of the reasonableness inquiry that lies at the heart of qualified immunity’s analytical framework.

12. Charles R. Wilson, “*Location, Location, Location*”: *Recent Developments in the Qualified Immunity Defense*, 57 N.Y.U. ANN. SURV. AM. L. 445, 447 (2000).

The burden of proof is perhaps the most confusing space in the qualified immunity world. The Supreme Court, in *Gomez v. Toledo*,¹³ ruled that qualified immunity is an affirmative defense.¹⁴ But two years later, in *Harlow v. Fitzgerald*,¹⁵ the Court ruled that qualified immunity's affirmative defense nature did not lead to any conclusion regarding allocating the burden of proof.¹⁶

The two rulings contradict each other. Affirmative defense is a well-defined procedural concept in common law adopted by the Federal Rules of Civil Procedure.¹⁷ It is a *defendant's* assertion of facts and argument that, if true, will defeat the plaintiff's claim, even if all the allegations in the complaint are true.¹⁸ In other words, there is no dispute that defendants shall bear the burden of proof concerning affirmative defense, and defendants are expected to raise it and to prove it throughout the case.¹⁹ Thus, it is quite confusing to see that the Supreme Court labeled qualified immunity as an affirmative defense, yet, explicitly carved out the attached burden of proof allocation.

Nevertheless, the Supreme Court has shown no interest in resolving this confusion. Chen observed, "The Supreme Court has never clarified whether the plaintiff or the defendant bears the burden of persuasion on the defense of qualified

13. 446 U.S. 635 (1980).

14. *See id.* at 640–41 ("Our conclusion as to the allocation of the burden of pleading is supported by the nature of the qualified immunity defense.").

15. 457 U.S. 800 (1982).

16. *See id.* at 815 n.24 ("[T]he Court's analysis indicates that 'immunity' must also be pleaded as a defense in actions under the Constitution and laws of the United States.").

17. *See* FED. R. CIV. P. 8(c)(1)

In responding to a pleading, a party must affirmatively state any affirmative defenses, including: accord and satisfaction; arbitration and award; assumption of risk; contributory negligence; duress; estoppel; failure of consideration; fraud; illegality; injury by fellow servant; laches; license; payment; release; res judicata; statute of frauds; statute of limitations; and waiver. (emphasis added).

18. *See Affirmative Defense*, BLACK'S LAW DICTIONARY (11th ed. 2019).

19. *See* Ugo Colella & Adam Bain, *The Burden of Proving Jurisdiction Under the Federal Tort Claims Act: A Uniform Approach to Allocation*, 67 FORDHAM L. REV. 2859, 2886 (1999) (recognizing that it is common knowledge that "plaintiffs bear the burden of proving their causes of action and defendants bear the burden of proving affirmative defenses").

immunity.”²⁰ Kenneth Duvall came to the same conclusion and conducted a full-circuit survey, finding that circuit courts have an even split on this issue.²¹ It is a 5-5-2 tally: five circuits put the entire burden of proof of qualified immunity to the plaintiff, five circuits put this burden to the defendant, and the rest bifurcated the two prongs of qualified immunity and assigned the plaintiff and the defendant to prove each of them respectively.²² What a mess.

But a qualified immunity mess has no limit. In 2011, the Supreme Court issued *Ashcroft v. al-Kidd*,²³ in which Justice Scalia, for the Court, held that a *plaintiff* must “plead[] facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was clearly established at the time of the challenged conduct.”²⁴ This ruling appears to overrule *Gomez* and revoke qualified immunity’s affirmative defense status.²⁵ But Scalia did not mention anything about *Gomez* in his opinion.

Al-Kidd triggered a new wave of confusion. This Article has found that, in recent years, six federal circuits—the Fifth,²⁶ the

20. Alan K. Chen, *The Burdens of Qualified Immunity: Summary Judgment and the Role of Facts in Constitutional Tort Law*, 47 AM. U. L. REV. 1, 91 (1997) [hereinafter Chen, *The Burdens of Qualified Immunity*].

21. See Kenneth Duvall, *Burdens of Proof and Qualified Immunity*, 37 S. ILL. U. L.J. 135, 143–45 (2012).

22. See *id.*

23. 563 U.S. 731 (2011).

24. *Id.* at 735.

25. See *id.* at 773.

26. See *Backe v. LeBlanc*, 691 F.3d 645, 648 (5th Cir. 2012)

[A] plaintiff seeking to overcome qualified immunity must plead specific facts that both allow the court to draw the reasonable inference that the defendant is liable for the harm he has alleged and that defeat a qualified immunity defense with equal specificity. After the district court finds a plaintiff has so pled, if the court remains ‘unable to rule on the immunity defense without further clarification of the facts,’ it may issue a discovery order ‘narrowly tailored to uncover only those facts needed to rule on the immunity claim.’

e.g., *Carswell v. Camp*, 54 F.4th 307, 310 (5th Cir. 2022) (reversing the district court for deferring the qualified immunity ruling to summary judgment).

Sixth,²⁷ the Eighth,²⁸ the Tenth,²⁹ the Eleventh,³⁰ and the D.C. Circuit³¹—have followed *al-Kidd* and required the plaintiff to *anticipate* and *overcome* the defendant’s future qualified immunity argument by asserting sufficient facts at the *pleading* phase of a case brought under 42 U.S.C. § 1983. Five

27. See *Johnson v. Moseley*, 790 F.3d 649, 653 (6th Cir. 2015) (“Plaintiff is thus obliged to plead facts that, viewed in the light most favorable to him, make out a violation of a constitutional right . . . that a reasonable officer confronted with the same situation would have known that his conduct violated that right.”); see also *Courtright v. City of Battle Creek*, 839 F.3d 513, 518 (6th Cir. 2016) (“The first step is to determine if the facts alleged make out a violation of a constitutional right. The second is to ask if the right at issue was ‘clearly established’ when the event occurred such that a reasonable officer would have known that his conduct violated it.”).

28. See *Dillard v. O’Kelley*, 961 F.3d 1048, 1052 (8th Cir. 2020) (“To defeat a motion to dismiss based on qualified immunity, Plaintiffs must ‘plead[] facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was “clearly established” at the time of the challenged conduct.’”(quoting *al-Kidd*, 563 U.S. at 735)); e.g., *Payne v. Britten*, 749 F.3d 697, 702 (8th Cir. 2014); *Faulk v. City of St. Louis*, 30 F.4th 739, 742 (8th Cir. 2022).

29. See *Est. of Lockett v. Fallin*, 841 F.3d 1098, 1107 (10th Cir. 2016) (“In resolving a motion to dismiss based on qualified immunity, a court must consider whether the facts that a plaintiff has alleged make out a violation of a constitutional right, and whether the right at issue was clearly established at the time of defendant’s alleged misconduct.” (citation omitted)).

30. See *Echols v. Lawton*, 913 F.3d 1313, 1319 (11th Cir. 2019) (“To overcome qualified immunity, a plaintiff must ‘plead[] facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was “clearly established” at the time of the challenged conduct.’” (quoting *al-Kidd*, 563 U.S. at 735)).

31. See, e.g., *Taylor v. Reilly*, 685 F.3d 1110, 1113 (D.C. Cir. 2012) (“[W]e begin (and end) with an examination of whether the right the plaintiff asserts was ‘clearly established’ at the time of his 2001 and 2005 parole hearings.”); *Daugherty v. Sheer*, 891 F.3d 386, 392 (D.C. Cir. 2018) (“[Plaintiffs] have failed to allege that [Defendants] violated any clearly established right.”); *Jones v. Kirchner*, 835 F.3d 74, 86 (D.C. Cir. 2016).

circuits—the Second,³² the Third,³³ the Fourth,³⁴ the Seventh,³⁵ and the Ninth³⁶—did not follow the *al-Kidd* pleading requirement and still require defendants to plead qualified immunity. The First Circuit’s position is currently unclear.³⁷ Thus, it is a 6-5-1 tally on the burden of pleading in qualified immunity cases.

This Article focuses on the six jurisdictions that have required plaintiffs to plead qualified immunity. Compared to the five jurisdictions that put the burden of proof on plaintiffs, the six circuits here have taken an even more pro-defendant position.³⁸ Burden of proof is an evidentiary issue with a factual component, which explains why many qualified immunity cases are resolved at the summary judgment phase following

32. The Second Circuit expressly disfavors resolving qualified immunity issues at the pleading stage, because doing so would trigger a “more stringent standard applicable to this procedural route.” *Sabir v. Williams*, 52 F.4th 51, 63 (2d Cir. 2022), *cert. denied*, 143 S. Ct. 2694 (2023) (internal quotation omitted); *see id.* at 64 (“[A]dvancing qualified immunity as grounds for a motion to dismiss is almost always a procedural mismatch.” (internal quotation omitted)); *see also* *Brown v. Halpin*, 885 F.3d 111, 117 (2d Cir. 2018) (“A *defendant* presenting an immunity defense on a motion to dismiss must therefore show not only that ‘the facts supporting the defense appear on the face of the complaint,’ but also that ‘it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief.’” (emphasis added)).

33. *See* *Thomas v. Independence Township*, 463 F.3d 285, 293 (3d Cir. 2006) (“[A] plaintiff has no obligation to plead a violation of clearly established law in order to avoid dismissal on qualified immunity”).

34. *See* *Cloaninger ex rel. Est. of Cloaninger v. McDevitt*, 555 F.3d 324, 332 n.10 (4th Cir. 2009) (“The burden of pleading qualified immunity lies on the defendants.”).

35. *See* *Tamayo v. Blagojevich*, 526 F.3d 1074, 1090 (7th Cir. 2008) (“The plaintiff is not required initially to plead factual allegations that anticipate and overcome a defense of qualified immunity.”).

36. *See* *Chavez v. Robinson*, 817 F.3d 1162, 1169 (9th Cir. 2016) (“Our resolution does not impose a heightened pleading standard for plaintiffs proceeding IFP, nor does it require plaintiffs to anticipate or plead around qualified immunity defenses in their complaints.”).

37. There do not appear to be strong First Circuit cases that address the pleading burden for qualified immunity. *Cf.* *Marrero-Mendez v. Calixto-Rodriguez*, 830 F.3d 38, 43 (1st Cir. 2016). In this case, the court recognized the Supreme Court’s *al-Kidd* ruling as to its validity regarding the two-prong nature of qualified immunity, but it did not specifically adopt the pleading burden from *al-Kidd*. *See id.* This is also the only First Circuit case that appears to address *al-Kidd* at the pleading stage.

38. *See supra* notes 26–31 and accompanying text.

discovery.³⁹ But the six circuits here treat qualified immunity as a *pure* question of law—a position the Supreme Court has not expressly endorsed—and directly align qualified immunity to a plaintiff's cause of actions on its face. A plaintiff is burdened to plead sufficient facts to negate a defense at the very beginning of a case before the defendant even raises it, and the failure to do so may cause a 12(b)(6) dismissal.⁴⁰ This Article names the six circuits' new approach *the elementary approach*, as these courts treat qualified immunity as an element of a plaintiff's cause of action in civil rights litigation, often in the form of a § 1983 claim.

This elementary approach cannot be explained in the context of an affirmative defense or a burden of proof from any perspective. If qualified immunity is an affirmative defense, as the Supreme Court ruled in *Gomez*, lower courts have no ground to require a plaintiff to negate this defense in the pleading phase before a defendant raises it.⁴¹ The traditional burden of proof analysis also cannot provide a meaningful explanation because it is not quite clear whether the burden of pleading is even a part of the two-prong burden of proof structure, either as a burden of production or burden of persuasion.⁴²

Only the Supreme Court can resolve this issue. Nevertheless, the Court chose silence. The Court is aware of this absurdity, as similar issues have come to the Court twice in the past six years, but it rejected certiorari both times without any comment, leaving this confusion up in the air.⁴³

Perhaps confusion is what the Supreme Court intends to maintain. Roger Dworkin observed that courts frequently took advantage of the complex and inconclusive nature of the burden of proof and manipulated it to achieve their goals: to change the

39. See Chen, *The Facts About Qualified Immunity*, *supra* note 1, at 229 (concluding that unlike absolute immunity, qualified immunity is tied to “a more context-specific examination of an official’s conduct in a particular situation as measured against the background of existing constitutional law”).

40. See *supra* notes 26–31 and accompanying text.

41. See *supra* note 21, at 137.

42. See Duvall, *supra* note 21, at 137 (describing the two prongs of the burden of proof).

43. See *Daugherty v. Sheer*, 891 F.3d 386 (D.C. Cir. 2018), *cert. denied*, 139 S. Ct. 1294 (2019) (mem.); *Anderson v. City of Minneapolis*, 934 F.3d 876 (8th Cir. 2019), *cert. denied*, 141 S. Ct. 110 (2020) (mem.).

law and to advance a policy agenda.⁴⁴ In other words, the burden of proof often serves as a veil for judicial activism when courts are too shy to admit it.⁴⁵ Shirin Sinnar further argued that the Supreme Court's *Ashcroft v. Iqbal*⁴⁶ ruling operated as a "disguise of a procedural decision" regarding the pleading standard; but in reality, it provided a foundational narrative of race and security and triggered the change of many substantive laws that particularly affect minority groups.⁴⁷

The elementary approach is a good example. When courts require plaintiffs to assert sufficient facts to defeat qualified immunity at the pleading phase of a § 1983 action, qualified immunity becomes an inseparable element of the plaintiff's cause of action.⁴⁸ Under this approach, qualified immunity effectively defines the scope of a plaintiff's substantive federal right at the beginning of the case. A plaintiff's claim cannot move forward unless the plaintiff provides sufficient facts to support the two elements of § 1983 *and* additional facts to negate qualified immunity. Specifically, a plaintiff not only needs to plead a federal right violation, but she also needs to plead that the federal right is so clearly established—often functionally identical to a precedent—that it undisputedly puts the violator on notice.⁴⁹ In this way, a plaintiff's § 1983 case has

44. See Roger B. Dworkin, *Easy Cases, Bad Law, and Burden of Proof*, 25 VAND. L. REV. 1151, 1151 (1972) ("The burden of persuasion does not aid the trier of fact . . . it provides appellate courts an unnecessary device for hiding their substantive decisions. This 'benefit' is gained at the cost of substantial confusion and undoubtedly increases significantly the time lawyers must spend researching cases and judges deciding them.").

45. See *id.* at 1168–73. Dworkin used a well-known torts case *Summers v. Tice*, 199 P.2d 1 (Cal. 1948) to illustrate how a court used the burden of proof as the "smokescreen" to hide the court's "judicial legislation": to change the substantive part of negligence law, requiring the defendants instead of plaintiffs to prove causation. *Id.* at 1173, 1174. This burden of proof smokescreen provided a procedural veil on the court's true agenda.

46. 556 U.S. 662 (2009).

47. See Shirin Sinnar, *The Lost Story of Iqbal*, 105 GEO. L.J. 379, 428–29 (2017) ("Moreover, critics observed that the Court's invitation to evaluate pleadings based on 'judicial experience and common sense' licensed judges to draw on intuitions that might differ based on race, gender, or other identities.").

48. See *infra* Part II.B.

49. See *Zadeh v. Robinson*, 928 F.3d 457, 479 (5th Cir. 2019) (Willett, J., dissenting) ("Merely proving a constitutional deprivation doesn't cut it;

become much more difficult, as the scope of the federal rights has been drastically diminished.

The root of lower courts' commitment to qualified immunity is the Supreme Court. The Supreme Court has been the most significant advocate for qualified immunity—the monster it created.⁵⁰ Mountains of criticism regarding qualified immunity from scholars and communities—especially the African-American community—have not resulted in any progress.⁵¹ William Baude found that nearly all the Supreme Court's qualified immunity cases resulted in favor of the officials.⁵² Furthermore, qualified immunity has developed an ideology-resistant, solid nature during the Roberts Court.⁵³ Qualified immunity rulings from the Court often come in a firm majority, with Democrat and Republican nominees condoning its application in favor of law enforcement.⁵⁴ The Court has sent a strong and united signal to lower courts: the Court does not want to see more civil rights cases emerge, especially those demanding damages against law enforcement. This signal

plaintiffs must cite functionally identical precedent that places the legal question 'beyond debate' to 'every' reasonable officer.”).

50. See *Zadeh*, 928 F.3d at 480 (“[Qualified immunity] enjoys special favor at the Supreme Court, which seems untroubled by any one-sidedness.”).

51. See Schwartz, *supra* note 3, at 6; John C. Jeffries, Jr., *What's Wrong with Qualified Immunity?*, 62 FLA. L. REV. 851, 869 (2010) (“Today, the law of qualified immunity is out of balance, particularly in the context of rights defined generally without particularizing rules and doctrines”); William Baude, *Is Qualified Immunity Unlawful?*, 106 CAL. L. REV. 45, 88 (2018) (“[The] restrictions imposed by qualified immunity have been wrongly imposed by the Court, not implied by the statute or the common law.”); Andrea Januta et al., *Rooted in Racism*, REUTERS INVESTIGATES (Dec. 23, 2020), <https://perma.cc/GC9D-HGDY> (“Qualified immunity, entwined with the U.S. history of racism and the struggle against it, emerged during the civil rights movement.”).

52. Baude, *supra* note 51, at 82.

53. See *id.* at 81–82 (“Even if the Court refuses to overrule qualified immunity, it might tinker with the doctrine more incrementally. Some suggest that this has already happened, arguing that after *Harlow* the Court reformulated the qualified immunity to subtly strengthen it, or that the Roberts Court is now doing the same thing.”).

54. See generally *Taylor v. Barkes*, 575 U.S. 822 (2015) (per curiam); *White v. Pauly*, 580 U.S. 73 (2017) (per curiam) (Ginsburg, J., concurring); *Mullenix v. Luna*, 577 U.S. 7 (2015) (per curiam) (Sotomayor, J., dissenting); *Wood v. Moss*, 572 U.S. 744 (2014) (unanimous opinion by Ginsburg).

encourages lower courts to issue more pro-law-enforcement opinions on qualified immunity.⁵⁵

This Article further argues that the pro-law-enforcement stance is not the only thing that stands behind the veil of the Supreme Court's procedural rulings regarding qualified immunity. The Court's enthusiasm to stretch the realm of qualified immunity uncoincidentally converges with another judicial trait of the Roberts Court: the support of states' rights. The Court's generous application of the objective knowledge test on qualified immunity has a subtle states' rights tone: it allows state actors to decide the scope of a previously established federal right and deny federal law enforcement at their convenience. The states' rights tone in qualified immunity is consistent with the Roberts Court's recent civil rights rulings regarding voting rights, interstate commerce, and reproductive rights, in which the Court expressly demonstrated its commitment to honoring states' rights, even when such devotion would render equal protection and due process of law unenforceable. The Roberts Court does not believe that federal courts need to serve as people's civil rights guardians, as the Reconstruction Congress envisioned; instead, the Court today embraces an opposite role: the guardians of states' rights.

This leads to the last conclusion of this Article that movement lawyering is the only plausible way to abolish qualified immunity. Civil rights litigants and activists should invest more resources in advocating for state legislatures to denounce qualified immunity through legislation, which several states have done. We simply cannot leave the qualified immunity monster out any longer and expect its master—the judiciary—to come to the rescue. It is time for people to take over the action plan and put the monster back in its cage.

This Article has four parts. Part I provides the definitions of affirmative defense and burden of proof and explains how the convergence of the two led to a series of confusion among all jurisdictions. Part II demonstrates how the Supreme Court's *al-Kidd* ruling exacerbated the chaos on qualified immunity's burden of pleading, and led to a new 6-5-1 circuit split. This Part also provides in-depth case studies on four federal circuits—the

55. See *Cole v. Carson*, 935 F.3d 444, 473 (5th Cir. 2019) (Willett, J., dissenting) (“[W]e would be ill advised to treat the reform of immunity doctrine as something for this court rather than that Court.”).

Fifth, the Sixth, the Eighth, and the D.C. circuit—and illustrates how the lower court broadly interpreted *al-Kidd* and made the negating of qualified immunity an element of a plaintiff's § 1983 claim. In Part III, this Article criticizes the elementary approach, and argues that this approach harms the rule of law value of the Federal Rules of Civil Procedure, and it also cannot consolidate with the text or the statutory purpose of the Civil Rights Act of 1871,⁵⁶ a Reconstruction era legislation that created § 1983. Part IV focuses on the judicial activism behind the Supreme Court's procedural rulings on qualified immunity. During the Rehnquist Court, the theme behind the Court's support of qualified immunity was the Law-and-Order politics.⁵⁷ The Roberts Court inherited it, with an additional theme: to empower states, and erase the “guardian[s] of civil rights” character from the federal court system.⁵⁸

I. QUALIFIED IMMUNITY AND AFFIRMATIVE DEFENSE: AN UNSETTLED ASSOCIATION

The association between affirmative defense and qualified immunity is a myth. Despite the clear language in *Gomez* characterizing qualified immunity as an affirmative defense, the Supreme Court has never been fully committed to this association.⁵⁹ The Court's unwillingness to acknowledge this association is likely due to an affirmative defense's settled burden of proof allocation—a defendant alone is expected to carry the burden from the beginning, and this contradicts the Court's pro-defendant approach in civil rights litigation.⁶⁰ The

56. 42 U.S.C. § 1983.

57. See Staci Rosche, *How Conservative is the Rehnquist Court? Three Issues, One Answer*, 65 *FORDHAM L. REV.* 2685, 2722 (1967) (“[T]he Rehnquist Court's primary concern with protecting the majority's constitutional rights from government intrusion, while simultaneously sacrificing criminal constitutional rights to the majority's interest in law and order.”).

58. Sylvia R. Larzos Vargas, *Does a Diverse Judiciary Attain a Rule of Law That Is Inclusive?: What Grutter v. Bollinger Has to Say About Diversity on the Bench*, 10 *MICH. J. RACE & L.* 101, 102 (2004).

59. See Chen, *The Facts About Qualified Immunity*, *supra* note 1, at 6 (recognizing the Supreme Court's “reluctance to acknowledge this basic conceptual problem”).

60. See Michael E. Beyda, *Affirmative Immunity: A Litigation-Based Approach to Curb Appellate Courts' Raising Qualified Immunity Sua Sponte*, 89 *FORDHAM L. REV.* 2693, 2695 (2021) (discussing the qualified immunity

tension between the Court's pro-defendant approach and the affirmative defense's burden on defendants is demonstrated by Rehnquist's concurrence in *Gomez*, later adopted by the Court in *Harlow*.⁶¹ These two cases also triggered waves of confusion in lower courts, resulting in a complicated circuit split.⁶²

A. *Affirmative Defense: Its Common Law Root and Its Federal Adoption*

Affirmative defense is a well-established common law concept.⁶³ It is a "confession and avoidance" defense, which permits a defendant willing to admit that the plaintiff's declaration demonstrated a prima facie case to go on and allege additional new material that would defeat the plaintiff's otherwise valid cause of action.⁶⁴ It operates as a "bar to the right of recovery even if the general complaint were more or less

doctrine's "elaborate objective framework" that makes it harder for civil rights plaintiffs to sue for their damages when constitutional rights are violated).

61. See John M. Greabe, Iqbal, al-Kidd, and Pleading Past Qualified Immunity: What the Cases Mean and How They Demonstrate a Need to Eliminate the Immunity Doctrines from Constitutional Tort Law, 20 WM. & MARY BILL RTS. J. 1, 25–26 (2011) (analyzing how *Harlow* "undermined the policy reason identified in *Gomez* for treating qualified immunity as an affirmative defense").

62. See *id.* at 16 (identifying the circuit splits in applying rules to qualified immunity cases).

63. See Matthew J.M. Pelikan, *Plausible Defenses: Historical, Plain Meaning, and Public Policy Arguments for Applying Iqbal to Affirmative Defenses*, 96 MINN. L. REV. 1828, 1836 (2012) ("[A]ffirmative defenses are still governed by standards developed in a direct line from procedures of English common law.").

64. See 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1270 (4th ed. 2023) (describing affirmative defenses as a "lineal descendent of the common law plea by way of 'confession and avoidance'"); see also *Saks v. Franklin Covey Co.*, 316 F.3d 337, 350 (2d Cir. 2003) (defining affirmative defense as a "defendant's assertion raising new facts and arguments that, if true, will defeat the plaintiff's or prosecution's claim, even if all allegations in the complaint are true" (internal quotations omitted)); *Emergency One, Inc. v. Am. Fire Eagle Engine Co.*, 332 F.3d 264, 271 (4th Cir. 2003) (explaining affirmative defenses "share the common characteristic of a bar to the right of recovery even if the general complaint were more or less admitted to" (citation omitted)); John Bourdeau et al., *What Constitutes Affirmative Defense for Pleading Purposes*, in 5 CYCLOPEDIA OF FEDERAL PROCEDURE § 15:87 (3d ed. 1951) (discussing that the rule's purpose is to prevent surprise).

admitted to.”⁶⁵ Thus, it is a “Yes, but . . .” defense from a defendant seeking to justify, excuse, or mitigate the commission of the act.⁶⁶ Affirmative defense can be easily distinguished from the traditional defense, the traverse, which deals with denials that directly contradict elements of a plaintiff’s claim for relief.⁶⁷

The Federal Rules of Civil Procedure adopted common law affirmative defense and created a non-exhaustive list of affirmative defenses under Rule 8(c).⁶⁸ The rules requires that a defendant “must affirmatively state any avoidance or affirmative defense” in responding to a plaintiff’s pleading.⁶⁹ The Supreme Court clarified that Rule 8(c) serves the purpose of giving the plaintiff notice of the affirmative defenses and preserves an opportunity for the plaintiff to argue why the claim for relief should not be barred completely.⁷⁰

65. *Emergency One, Inc.*, 332 F.3d at 271 (citation omitted).

66. See Beyda, *supra* note 60, at 2704 (“[T]here is no technical requirement that the defendant need ‘confess’ to the plaintiff’s allegations.”); see also Duvall, *supra* note 21, at 141 (distinguishing an affirmative defense as a defense to liability, but not a defense from suit).

67. See WRIGHT & MILLER, *supra* note 64, § 1270 (“The pleader could not both deny the elements of the plaintiff’s substantive claim and use a confession and avoidance.”); see also Duvall, *supra* note 21, at 141 (“A defense from suit often comes in the form of an affirmative defense that admits the elements of the claim but seeks to justify, excuse, or mitigate the commission of the act.”).

68. FED. R. CIV. P. 8(c); see also *Jones v. Bock*, 549 U.S. 199, 212 (2007) (“Rule 8(c) identifies a non-exhaustive list of affirmative defenses that must be pleaded in response.”); WRIGHT & MILLER, *supra* note 64, § 1271 (“[I]n determining what defenses other than those listed in Rule 8(c) must be pleaded affirmatively, resort often must be had to considerations of policy, fairness, and in some cases probability.”).

69. Compared with common law, the Federal Rules of Civil Procedure provide some leeway for a defendant to plead an affirmative defense. FED. R. CIV. P. 8(c). Unlike common law, a defendant now may deny allegations in the plaintiff’s pleading and accept the allegations hypothetically for a pleading affirmative defense. See Beyda, *supra* note 60, at 2703–04. Nevertheless, the Federal Rules of Civil Procedure do not change the nature of an affirmative defense—a “yes, but . . .” defense from a defendant. *Id.* at 2704.

70. See *Blonder-Tongue Lab’ys, Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 350 (1971) (finding that “[r]es judicata and collateral estoppel are affirmative defenses that must be pleaded” to give the opposing party a chance to argue).

B. *Burden of Proof: A Century-Long Debate*

The burden of proof is another concept with a rich common law history.⁷¹ The burden of proof deals with the allocation of parties' obligations to demonstrate the existence of facts and that those facts lead to a desired legal consequence.⁷² It has two dimensions: the burden of production and the burden of persuasion.⁷³ The burden of production is often referred to as a duty to produce sufficient evidence or permit the trier of fact to find for the obligated party on the issue in question, and the burden of persuasion is the burden of persuading a trier of fact that the law and the disputed facts together compel a particular conclusion.⁷⁴

Colella and Bain observed that the allocation of the two dimensions of obligations "plagued the law of evidence for some time now," but scholars barely produced any theoretical consensus.⁷⁵ The struggle of analyzing the two dimensions is that they are pretty similar in practice and often beared by the same party, as the party under the obligation of persuading a fact-finder almost always bears the obligation to produce sufficient evidence.⁷⁶ Thus, Dworkin concluded more than half a century ago that this debate does not have much functional meaning other than academic discussions.⁷⁷

71. See Colella & Bain, *supra* note 19, at 2885.

72. See Roger B. Dworkin, *Easy Cases, Bad Law, and Burdens of Proof*, 25 VAND. L. REV. 1151, 1153 (1972) ("[S]ome party must carry the burden of producing evidence or lose at the hands of the judge, and some party must carry the burden of persuasion or lose at the hands of the jury.").

73. See *id.* at 1154 ("Because the two burdens are carried in the same way, both in theory and in fact, the advocate is apt to treat them identically."); see also Duvall, *supra* note 21, at 137–38 (comparing the burden of proof with the burden of production).

74. See Dworkin, *supra* note 72, at 1154 ("The same amount of evidence may carry both burdens, or more may be required to persuade the jury than to avoid an adverse peremptory ruling from the judge.").

75. See Colella & Bain, *supra* note 19, at 2886 ("Nor do we seek to add yet another formulation of what the burden of proof is or should be . . .").

76. See Dworkin, *supra* note 72, at 1153–54 ("[T]he standard applied in deciding whether a party has carried his burden of producing evidence is determined by the standard to be applied in deciding whether he has carried his burden of persuasion."); Duvall, *supra* note 21, at 137 (reiterating the functional similarity between the two dimensions).

77. See Dworkin, *supra* note 72, 1154 ("Most importantly, the two burdens are designed to do the same thing—to determine the outcome of

Dworkin was right. Courts and practitioners seldom obsess with the subtle distinction between the burden of production and persuasion.⁷⁸ They understand a party's role in a case quite well without deepening into the century-long academic debate.⁷⁹ The burden of proof is broadly understood as the burden of persuasion: a party's burden to persuade the court that the facts and law together shall lead to a particular legal consequence.⁸⁰ Thus, it is common knowledge that a plaintiff shall bear the burden to prove each element of the cause of action, as the plaintiff is the party seeking the ultimate legal consequence: a remedy from the defendant.⁸¹ The defendant shall bear the burden of proving an affirmative defense, as the defendant is the party raising new material and advocating for a different legal consequence—even if the plaintiff can prove all the elements of the cause of action, the plaintiff is still barred from recovery.⁸²

C. *How the Mess Started: From a Clear Supreme Court Ruling to a 5-5-2 Circuit Split*

The root of the confusion regarding parties' burden of proof in qualified immunity can be traced back to two conflicting Supreme Court decisions: *Gomez v. Toledo* and *Harlow v. Fitzgerald*.⁸³ The Supreme Court's refusal to address this

litigation in the event of a failure of proof. Studying the two parts of the burden of proof together thus has some utility, as long as one remembers the analytical distinction between them.”)

78. See Colella & Bain, *supra* note 19, at 2886 (recognizing the courts attempts to resolve the burden-allocation “conundrum have largely focused on splicing the burden of proof into two distinct categories”).

79. See *id.* (“This . . . does not attempt to wade through the minefield of theoretical constructs that have been the subject of academic commentary.”).

80. See Duvall, *supra* note 21, at 137–38 (“Some believe the distinction is harmful, or similarly, that the two burdens are actually the same.”).

81. See Colella & Bain, *supra* note 19, at 2886 (“On a conceptual level, courts and everyday practitioners know very well what the burden of proof means and how it should be allocated in a particular legal and factual context.”). An example of this would be that “plaintiffs bear the burden of proving their causes of action and defendants bear the burden of proving affirmative defenses.” *Id.*

82. See *id.*

83. Compare *Gomez v. Toledo*, 446 U.S. 635, 640 (1980) (finding qualified immunity to be an affirmative defense, thus implying the burden of proof rests

conflict directly leads to two layers of confusion: who shall bear the burden to raise the qualified immunity and who shall bear the burden to prove the qualified immunity.

1. *Gomez* and *Harlow*: A Clear Ruling and a Seed of Confusion

In *Gomez v. Toledo*, a plaintiff brought a § 1983 action against the defendant, a superintendent of the police department, alleging that the defendant violated procedural due process by terminating him from employment with the police.⁸⁴ The federal district court granted the defendant's Rule 12(b)(6) motion, holding that the plaintiff failed to state a valid claim.⁸⁵ Observing that the defendant was entitled to qualified immunity, the district court ruled that the plaintiff was required to plead, as part of his claim for relief, that, in committing the actions alleged, the defendant was motivated by bad faith.⁸⁶ The absence of any such allegation, it held, required dismissal of the case.⁸⁷ The First Circuit affirmed the district court's ruling.⁸⁸

The Supreme Court reversed.⁸⁹ The Court held that qualified immunity is an affirmative defense.⁹⁰ Citing Federal Rule of Civil Procedure 8(c), it held that "the burden of pleading

with the defendant), and Duvall, *supra* note 21, at 155 n.124 (stating the *Gomez* majority opinion's use of the term "affirmative defense" could be understood to imply that the burden of proof rests with the defendant), with *Harlow v. Fitzgerald*, 457 U.S. 800, 815, n.24 (1982) (stating that "*Gomez* did not decide which party bore the burden of proof" in a qualified immunity affirmative defense).

84. *See Gomez*, 446 U.S. at 638–39 ("[Section 1983] reflects a congressional judgment that a 'damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees.'" (citation omitted)).

85. *See id.* at 637.

86. *See id.* (finding that the allegations lacked any factual basis to conclude that the "anxiety, embarrassment, and injury to [plaintiff's] reputation" was motivated by defendant's bad faith).

87. *Id.*

88. *See id.* at 638.

89. *See id.* at 640–41 ("Our conclusion as to the allocation of the burden of the pleading is supported by the nature of the qualified immunity defense.").

90. *See id.* at 640.

it rests with the defendant.”⁹¹ It also ruled that the lower court’s ruling contradicted § 1983’s text:

By the plain terms of § 1983, two—and only two—allegations are required in order to state a cause of action under that statute. First, the plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law. Petitioner has made both of the required allegations.⁹²

In other words, since qualified immunity is not an element in § 1983, the lower court erred in dismissing the plaintiff’s case for failure to plead facts to negate qualified immunity.

This short case was not complex. Confirming qualified immunity’s status as an affirmative defense was expected, as it is clearly not a traverse. Naturally, the defendant shall be the party to raise it and bear the burden of proof, just like any other affirmative defense. However, in a one-sentence concurrence, Rehnquist refuted this line of thought.⁹³ He pointed out that this case only clarified the *burden of pleading*, instead of the burden of persuasion.⁹⁴

Rehnquist’s concurrence contradicts the majority opinion because, at that time, the concept that a defendant shall bear the burden of proof for an affirmative defense was undisputed.⁹⁵ Nevertheless, his short concurrence was eventually adopted by the Supreme Court. Two years after *Gomez*, the Supreme Court, in *Harlow*, expressly stated that “*Gomez* did not decide which party bore the burden of proof on the issue of good faith.”⁹⁶

Harlow is the case that planted the seed of the burden of proof confusion.⁹⁷ The *Harlow* Court clarified that the standard concerning a government official’s knowledge about a federal

91. *Id.*

92. *Id.*

93. *Id.* at 642 (Rehnquist, J., concurring).

94. *See id.*

95. *See id.* (“[R]eading it as he does to leave open the issue of the burden of persuasion, as opposed to the burden of pleading, with respect to a defense of qualified immunity.”).

96. *Harlow v. Fitzgerald*, 457 U.S. 800, 815 n.24 (1982).

97. *See* Chen, *The Burdens of Qualified Immunity*, *supra* note 20, at 71 (“The confusion began in *Harlow v. Fitzgerald*, when the Court set out procedural guidelines for administering the defense.”).

right should be an objective one—that an official should not be held responsible for her action unless any reasonable official would have known that such action would violate a federal right.⁹⁸ The Court then rendered a procedural instruction to lower courts concerning the application of this reasonableness text—but this instruction was filled with mixed signals.⁹⁹ The Court first instructed that, in light of avoiding the disruption of daily governmental function, courts should make efforts to resolve qualified immunity issues at the summary judgment phase.¹⁰⁰ But then, it instructed that discovery should not commence until a court decides whether the alleged federal right was well established, and the Court even indicated that if the federal right was found to not be clearly established, the government official would prevail.¹⁰¹ This language suggested that the Court expected lower courts to rule on qualified immunity based on a plaintiff's pleading and to resolve this issue at the dismissal phase.¹⁰²

Since litigants are subject to different evidentiary standards at the summary judgment and dismissal phase, the *Harlow* Court failed to clarify the burden of proof concerning qualified immunity.¹⁰³ On the contrary, the Court's elusive language exacerbated this confusion: Has *Harlow* overruled

98. See *Harlow*, 457 U.S. at 817–18 (“If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to ‘know’ that the law forbade conduct not previously identified as unlawful.”).

99. See Chen, *The Burdens of Qualified Immunity*, *supra* note 20, at 71 (characterizing how the lower courts have placed qualified immunity under three different categories).

100. See *Harlow*, 457 U.S. at 818 (“Reliance on the objective reasonableness of an official’s conduct, as measured by reference to clearly established law, should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment.”).

101. See *id.* at 817–19 (“[B]are allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery.”).

102. See Chen, *The Burdens of Qualified Immunity*, *supra* note 20, at 71 (“The ruling reflects the Court’s understanding that trial courts could evaluate the merits of a qualified immunity defense on the pleadings, rather than after development of the factual record.”).

103. See *id.* (“[T]he Court conveyed a conflicting message by indicating that the preferred procedural device for adjudicating qualified immunity was summary judgment.”).

Gomez, thus stripping the affirmative defense label from qualified immunity? If so, then what is qualified immunity?

2. A 5-5-2 Tally

The Supreme Court has never issued any ruling that clarifies this confusion.¹⁰⁴ The confusion regarding qualified immunity's burden of proof quickly developed into a sharp circuit split.¹⁰⁵

Kenneth Duvall conducted a full circuit survey and found that this confusion led to a 5-5-2 tally.¹⁰⁶ Specifically, he found that five circuits—the Fifth, Sixth, Seventh, Tenth, and Eleventh—placed the *burden of persuasion*¹⁰⁷ in the qualified immunity inquiry on plaintiffs.¹⁰⁸ Another five circuits—the First, Second, Third, Ninth, and D.C.—did the reverse and put the burden of proof on defendants.¹⁰⁹ The Fourth and the Eighth Circuits, creatively, took a more complex approach. They bifurcated qualified immunity's two prongs and assigned the burden of proof of each prong to the plaintiff and the defendant, respectively.¹¹⁰

This complicated circuit split hardly came as a surprise. “Affirmative defense” was not the only label the Supreme Court put on qualified immunity. Chen observed, “The Court’s

104. See *id.* (reiterating the confusion relates to the hybrid nature of a “qualified” immunity).

105. See Kit Kinports, *Qualified Immunity in Section 1983 Cases: The Unanswered Questions*, 23 GA. L. REV. 597, 635–36 (1989) (recognizing how circuit decisions are conflicting, even within the same opinion).

106. See Duvall, *supra* note 21, at 143–45.

107. Duvall specifically used the phrase *burden of persuasion* in his survey. *Id.* However, he recognized that “the burden of production apparently has not been an issue in the qualified immunity context” and “[w]hile these circuits may not break down the allocation of the burden of proof either by the two burdens in play (persuasion and production) or by the two steps involved in the immunity inquiry, it is reasonable to assume that both burdens are on the plaintiff for *both* steps.” *Id.* at 143, 144.

108. See *id.* at 144–45.

109. See *id.* at 145 (reiterating that “it seems reasonable to assume that both burdens are on the defendant for both steps”).

110. See *id.* (“[T]he two circuits allocate the two steps differently, with the Fourth Circuit placing the burden of establishing that the law was clearly established on the defendant and that the defendant did not violate a constitutional right on the plaintiff, and the Eighth Circuit doing just the opposite.”).

immunity decisions have variously characterized qualified immunity as a liability immunity, a trial immunity, and a pretrial litigation immunity (or immunity from suit).¹¹¹ Each label is a well-established litigation device with its allocation of the burden of proof.¹¹² Since the Supreme Court has never clarified which label is ultimately fit for qualified immunity, lower courts have a vast space to create their own rules.

While the 5-5-2 tally is convoluted, Duvall observed some thin consensus among the circuits. He found that “the burden of pleading at least seems always to be on the defendant and the burden of production apparently has not been an issue in the qualified immunity context, presumably because courts have not sought to separate the burdens of proof in this situation.”¹¹³

Duvall’s observation, which was made eleven years ago, makes sense. Regardless of the various labels the Supreme Court has put on qualified immunity, there is no good argument to justify burdening plaintiffs to plead a defense or an immunity for defendants. A plaintiff should not be burdened to make the prima facie case *and* to simultaneously negate a defendant’s argument. This is common sense.

But common sense often goes at odds with qualified immunity. In the past decade, another circuit split emerged, and this split directly challenges this common sense: it is about whether a plaintiff must plead sufficient facts to anticipate and negate qualified immunity.

II. FROM AN AFFIRMATIVE DEFENSE TO AN ELEMENT

In the past decade, confusion regarding qualified immunity’s burden of proof continued to plague all jurisdictions. Eventually, the only thin consensus—that defendants should be expected to plead their immunity—has gone, and another circuit split has emerged. This split was triggered by a Supreme Court case in 2011: *Ashcroft v. al-Kidd*. Eventually, several jurisdictions have put the entire burden of qualified immunity—the burden to plead and the burden to prove—to

111. Chen, *The Burdens of Qualified Immunity*, *supra* note 20, at 71.

112. See *id.* (explaining the “confused understanding about the proper legal standards” under such labels).

113. Duvall, *supra* note 21, at 143.

plaintiffs and made qualified immunity an element of plaintiffs' civil rights cause of actions, often in the form of § 1983.

A. *Ashcroft v. al-Kidd: Let the Water Be Muddier*

Al-Kidd is a post-9/11 *Bivens* case. The plaintiff alleged that the F.B.I. intended to detain him on terrorism suspicion but lacked the probable cause to make the arrest.¹¹⁴ Thus, the F.B.I. arrested him under the pretext of the material-witness statute, and secured an arrest warrant by proffering to the magistrate that the plaintiff possessed crucial information for another case.¹¹⁵ The plaintiff sued the F.B.I. for violating the Fourth Amendment.¹¹⁶ The government moved for dismissal based on qualified immunity; the district court denied, and the Ninth Circuit affirmed.¹¹⁷

The Supreme Court reversed.¹¹⁸ Citing *Harlow*, Justice Scalia stated, “Qualified immunity shields federal and state officials from money damages *unless a plaintiff pleads facts showing* (1) that the official violated a statutory or constitutional right, and (2) that the right was ‘clearly established’ at the time of the challenged conduct.”¹¹⁹ Scalia found that the plaintiff failed to assert sufficient facts to defeat qualified immunity.¹²⁰ Specifically, he found that the plaintiff failed to “assert that his arrest would have been unconstitutional absent the alleged pretextual use of the warrant”; thus, he failed to establish a violation of the Fourth Amendment.¹²¹ Scalia also found that the plaintiff’s alleged right under the Fourth Amendment—to be free from pretextual

114. *See* *Ashcroft v. al-Kidd*, 563 U.S. 731, 734 (2011) (“It is alleged that federal officials had no intention of calling most of these individuals as witnesses, and that they were detained, at Ashcroft’s direction, because federal officials suspected them of supporting terrorism but lacked sufficient evidence to charge them with a crime.”).

115. *See id.*

116. *See id.*

117. *See id.*

118. *See id.* at 744 (remanding the case “for further proceedings consistent with this opinion”).

119. *Id.* at 735 (emphasis added).

120. *Id.* at 740–44.

121. *Id.* at 740.

detention—had not been addressed by any judicial opinion.¹²² Thus, this alleged right was not clearly established.¹²³

Scalia treated qualified immunity as a pure pleading issue and put the burden entirely on the plaintiff. This ruling directly contradicts *Gomez*, which ruled that the defendant shall bear the burden of pleading for qualified immunity.¹²⁴ However, *Gomez* was not mentioned in the majority opinion or the concurrences. Four justices—Ginsburg, Sotomayor, Breyer, and Kennedy—filed concurrences expressing concerns over Scalia’s narrow view on the Fourth Amendment.¹²⁵ The change in the burden of pleading escaped from scholars’ attention as well. The attention was understandably pivoted to the part where Scalia raised the bar for the second prong of qualified immunity, requiring the federal right to be clearly established not only to a reasonable officer, but *every* reasonable officer.¹²⁶

Many lower courts, however, did not miss this change in *al-Kidd*, and they followed Scalia’s lead and started to ignore *Gomez*.¹²⁷ The water has become much muddier.

This Article conducted a full-circuit survey, investigating *al-Kidd*’s impact on federal appellate courts’ § 1983 dockets concerning qualified immunity.¹²⁸ It found that a new 6-5-1 circuit split has emerged. Six federal circuits—the Fifth, Sixth, Eighth, Tenth, Eleventh, and D.C.—have issued published opinions requiring the plaintiff to assert sufficient facts at the *pleading* phase of a § 1983 case in anticipation of, and in order

122. See *id.* at 743 (“The Court of Appeals seems to have cherry-picked the aspects of our opinions that gave colorable support to the proposition that the unconstitutionality of the action here was clearly established.”).

123. See *id.*

124. See *Gomez v. Toledo*, 446 U.S. 635, 640 (1980) (“Since qualified immunity is a defense, the burden of pleading it rests with the defendant.”).

125. See *Ashcroft v. al-Kidd*, 563 U.S. 731, 744 (2011) (Kennedy, J., concurring) (“The Court’s holding is limited to the arguments presented by the parties and leaves unresolved whether the Government’s use of the material-witness statute in this case was lawful.”).

126. See, e.g., Karen Blum & Erwin Chemerinsky, *Qualified Immunity Developments: Not Much Hope Left for Plaintiffs*, 29 *TOURO L. REV.* 633, 656 (2013) (“The *Harlow* standard for thirty years focused on whether it was clearly established law that ‘a’ reasonable officer should know; now it must be law that ‘every’ reasonable officer should know.”).

127. See cases cited *supra* notes 26–36.

128. See *supra* notes 26–36 and accompanying text.

to overcome, the defendant's future qualified immunity argument—the failure to do so has caused 12(b)(6) dismissals.¹²⁹

Al-Kidd's impact on the Second, Third, Fourth, Seventh and Ninth Circuits is limited. *Al-Kidd* has not become authority for these courts to dismiss a plaintiffs' § 1983 suit for failure to anticipate and overcome qualified immunity at the pleading stage.¹³⁰ In these jurisdictions, defendants must first raise the qualified immunity argument.

Al-Kidd's impact on the First Circuit is currently unclear, as few published opinions have addressed this issue. Thus, it is a 6-5-1 circuit split.

B. *The Elementary Approach: From a Defense to an Element*

While six circuits have issued published opinions that follow the *al-Kidd* pleading requirement, the strength of the opinions differ. Specifically, the Fifth, Sixth, Eighth, and D.C. Circuits' positions are firmer, as they apply this pleading standard with the most consistency.¹³¹ The Tenth¹³² and Eleventh Circuits¹³³ have applied the *al-Kidd* standard in

129. See cases cited *supra* notes 26–31.

130. See cases cited *supra* notes 33–36.

131. See cases cited *supra* notes 26–28, 31.

132. In a death penalty case in 2016, the Tenth Circuit dismissed a plaintiff's § 1983 claim based on qualified immunity and held that “in resolving a motion to dismiss based on qualified immunity, a court must consider whether the facts that a plaintiff has alleged make out a violation of a constitutional right, and whether the right at issue was clearly established at the time of defendant's alleged misconduct.” *Est. of Lockett v. Fallin*, 841 F.3d 1098, 1107 (10th Cir. 2016). However, in 2019, the Tenth Circuit held: “When a defendant *raises* the qualified-immunity defense, the onus is on the plaintiff to demonstrate (1) that the official violated a statutory or constitutional right, and (2) that the right was clearly established at the time of the challenged conduct.” *Cummings v. Dean*, 913 F.3d 1227, 1239 (10th Cir. 2019) (emphasis added) (internal quotations omitted). Although the court granted qualified immunity to the government official in this case, its language indicates that the court might expect the defendant to at least raise it as an affirmative defense first.

133. The Eleventh Circuit has a unique burden-shifting structure on qualified immunity. A defendant governmental official “must first prove that he was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred. Once the defendant establishes that he was acting within his discretionary authority, the burden shifts to the plaintiff to show that qualified immunity is not appropriate.” *Penley v. Eslinger*, 605 F.3d 843, 849 (11th Cir. 2010). Thus, the burden to raise qualified immunity is still

published opinions, but the application is less consistent than the other four circuit courts in this group.

Nevertheless, this split is new, not just for its recentness. The 5-5-2 tally's impact was mainly on the summary judgment phase, as the allocation of the burden of proof between parties is the essential part of this phase.¹³⁴ A court will review the facts from the discovery phase, eliminate materially disputed parts, and determine whether the plaintiff or the defendant has successfully carried the burden.¹³⁵ The new 6-5-1 tally, however, impacts a case at the initial phase—the pleading phase, a phase a plaintiff is solely responsible for.¹³⁶ In this phase, a court's focus is not whether any party has carried the burden of proof but whether a plaintiff has plausibly pleaded a prima facie case.¹³⁷ Thus, likening qualified immunity at the pleading phase inevitably makes it a part of a plaintiff's cause of action. In civil rights litigation, this cause of action often comes in the form of § 1983.

This Article provides several case studies from the Fifth, Sixth, Eighth, and D.C. Circuits to demonstrate how courts follow *al-Kidd*'s pleading requirement and treat qualified immunity as an element of § 1983.

1. The Fifth Circuit: *Backe v. LeBlanc* and *Carswell v. Camp*

*Backe v. LeBlanc*¹³⁸ is a police brutality case. Plaintiffs sued several police officers and the municipality under § 1983,

on a plaintiff. The Eleventh Circuit in 2019 clarified that the pleading burden is on a plaintiff: “To overcome qualified immunity, a plaintiff must plead[] facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was clearly established at the time of the challenged conduct.” *Echols v. Lawton*, 913 F.3d, 1313, 1319 (11th Cir. 2019) (internal quotations omitted).

134. See Chen, *The Burdens of Qualified Immunity*, *supra* note 20, at 9 (“[T]he application of the summary judgment doctrine is entirely contingent upon the allocation of the burden of persuasion on the issue being litigated.”).

135. See, e.g., *Penley*, 605 F.3d at 849 (applying the multi-step, burden-shifting analysis when a government official can prove that he or she was acting within their discretionary authority).

136. See, e.g., *Cummings*, 913 F.3d at 1239 (looking into whether the plaintiff has carried the burden during the pleading phase when a qualified immunity defense is raised).

137. See, e.g., *id.*

138. 691 F.3d 645 (2012).

arguing that police officers used excessive force while detaining them, and that the municipality had a custom of tolerating policy brutality.¹³⁹ Defendants filed a motion to dismiss based on qualified immunity.¹⁴⁰ The district court denied the motion, holding that discovery was needed to resolve factual issues so that the court could rule on the qualified immunity issue.¹⁴¹ Defendants appealed, arguing that the district court abused its discretion in ordering discovery, and that the court should have ruled in their favor due to the plaintiffs’ “failure to articulate facts which plausibly overcome their qualified immunity defenses.”¹⁴²

The Fifth Circuit agreed with the defendants. The Fifth Circuit ruled that a district court may not defer its ruling on qualified immunity based on its need for discovery.¹⁴³ Instead, a district court must first answer whether “the plaintiff’s pleadings assert facts which, if true, would overcome the defense of qualified immunity.”¹⁴⁴ The Fifth Circuit further instructed that a plaintiff “must plead specific facts that *both* allow the court to draw the reasonable inference that the defendant is liable for the harm he has alleged and that defeat a qualified immunity defense with *equal specificity*.”¹⁴⁵ Otherwise, a court shall rule against a plaintiff and declare that the plaintiff failed to state a valid claim.

Under the Fifth Circuit’s rule, a plaintiff not only needs to plead facts that could overcome qualified immunity, but such facts must bear *equal specificity* compared to the facts associated with the main cause of action.¹⁴⁶ In other words, in civil rights litigation, pleading sufficient facts to build a plausible § 1983 claim—that a person under the color of state law violated a plaintiff’s federal right—no longer satisfies the

139. *See id.* at 647 (alleging “this history amounted to a City policy or custom” that defendants authorized, and which made them individually liable for failing to train the responding officers on the appropriate use of force).

140. *See id.* (arguing that “Appellees failed to plead specifically a City policy causing a deprivation of constitutional rights”).

141. *See id.*

142. *Id.*

143. *Id.* at 648.

144. *Id.*

145. *Id.* (emphasis added).

146. *Id.*

test laid out in *Iqbal* and *Bell Atlantic Corp. v. Twombly*.¹⁴⁷ A plaintiff must plead additional facts that the federal right in question is so clearly established, to the level of “beyond any debate,” as instructed in *al-Kidd*, that every officer was on notice of such right. Thus, functionally, a plaintiff must treat qualified immunity as a part of § 1983.

The Fifth Circuit restated this approach in several cases, including the 2022 case *Carswell v. Camp*.¹⁴⁸ In this case, a plaintiff sued several prison officers under § 1983, and alleged that they failed to treat her son’s heart condition in the prison, causing her son’s death.¹⁴⁹ Individual defendants filed a motion to dismiss based on qualified immunity.¹⁵⁰ The district court ruled against the defendants, stating that any defendant wanting to assert qualified immunity “must file an answer,” rather than a motion to dismiss.¹⁵¹ In the meantime, the court stayed discovery against the defendants concerning qualified immunity.¹⁵²

The Fifth Circuit reversed by holding that a district court *must* rule on qualified immunity based on the plaintiff’s pleading per the defendants’ motion.¹⁵³ Most significantly, the Fifth Circuit declared, “the Supreme Court has now made clear that a plaintiff asserting constitutional claims against an officer claiming [qualified immunity] must survive the motion to dismiss without any discovery.”¹⁵⁴

In fact, the Supreme Court has never expressly so ruled.¹⁵⁵ Nevertheless, the Fifth Circuit made this bold assertion based

147. 550 U.S. 544 (2007).

148. 54 F.4th 307 (5th Cir. 2022).

149. *See id.* at 309.

150. *See id.*

151. *Id.*

152. *See id.* at 310.

153. *See id.* at 311 (“We hold the district court abused its discretion by deferring its ruling on qualified immunity and subjecting the immunity-asserting defendants to discovery in the meantime.”).

154. *Id.*

155. *See Ashcroft v. Iqbal*, 556 U.S. 662, 672 (2009) (allowing qualified immunity to apply in a case is “conceptually distinct” from the plaintiff’s claim).

on its broad reading of *Iqbal*.¹⁵⁶ Indeed, the Supreme Court in *Iqbal* mentioned that qualified immunity should operate as a tool for government officials to be free from the burden of discovery.¹⁵⁷ However, the *Iqbal* Court did not go so far as to require lower courts to examine whether a plaintiff's pleading could overcome qualified immunity. *Iqbal's* legacy, together with *Twombly*, was to tighten the pleading requirement regarding a plaintiff's cause of action, not a defendant's defense.¹⁵⁸ In *Iqbal*, the Court ruled against plaintiffs for failing to state a *Bivens* claim because the pleaded facts did not make a plausible case that individual defendants purposefully violated the plaintiffs' First and Fifth Amendment rights.¹⁵⁹ The Court did not rule against the plaintiffs for failing to plead facts to overcome qualified immunity.¹⁶⁰

The Fifth Circuit's ruling in *Carswell* is significant, demonstrating how far this court has gone with qualified immunity. The lower court simply asked the defendant to explicitly raise an affirmative defense in an answer, which complies with Rule 8(c): "*In responding to a pleading*, a party must affirmatively state any avoidance or affirmative defense."¹⁶¹ The district court did not make any judgment on the merit of qualified immunity; it did not even open discovery.¹⁶² Nevertheless, the Fifth Circuit was not having it. The Fifth Circuit made it clear that qualified immunity is a plaintiff's burden from the beginning, and the defendant did not even have to assert it.¹⁶³ A plaintiff must plead sufficient facts to build a

156. See *Carswell*, 54 F.4th at 311–12 (finding that the Supreme Court in *Iqbal* "concluded the respondent was 'not entitled to discovery, cabined or otherwise.'" (quoting *Iqbal*, 556 U.S. at 686)).

157. See *Iqbal*, 556 U.S. at 685–86 (describing the "basic thrust" of the qualified immunity doctrine as the "avoidance of disruptive discovery").

158. See *id.* at 687 ("And Rule 8 does not empower the [plaintiff] to plead the bare elements of his cause of action, affix the label 'general allegation,' and expect his complaint to survive a motion to dismiss.>").

159. See *id.* at 681–84 ("But even if the complaint's well-pleaded facts give rise to a plausible inference that respondent's arrest was the result of unconstitutional discrimination, that inference alone would not entitle respondent to relief.>").

160. See *id.*

161. FED. R. CIV. P. 8(c) (emphasis added).

162. See *Carswell v. Camp*, 54 F.4th 307, 309 (5th Cir. 2022).

163. See *id.* at 311–12.

plausible case concerning the main cause of action and simultaneously overcome a future qualified immunity defense.¹⁶⁴ Thus, in the Fifth Circuit, qualified immunity is not an affirmative defense. Qualified immunity is an element of the plaintiff's § 1983 case.

2. The Sixth Circuit: *Johnson v. Moseley*

*Johnson v. Moseley*¹⁶⁵ is a malicious prosecution case.¹⁶⁶ The plaintiff alleged that police officers pressed prosecutors to pursue charges against him despite clearly flawed evidence, violating his Fourth Amendment rights.¹⁶⁷ Individual officers moved to dismiss, arguing that the plaintiff's § 1983 claim is barred by qualified immunity because the plaintiff's complaint did not include factual allegations of specific conduct plausibly making out a violation of clearly established federal law.¹⁶⁸ Essentially, the defendants argued that the plaintiff failed to plead sufficient facts to overcome qualified immunity. The district court ruled against the defendants based on the possibility that discovery might disclose specific facts substantiating the claim.¹⁶⁹

The Sixth Circuit reversed.¹⁷⁰ The Sixth Circuit first held that, at the pleading stage, a plaintiff must plead sufficient facts to plausibly make out a claim that the defendant's conduct violated a constitutional right that was clearly established law at the time, such that a reasonable officer would have known

164. *See id.* (“[W]here the pleadings are insufficient to overcome QI, the district court *must* grant the motion to dismiss without the benefit of pre-dismissal discovery.”).

165. 790 F.3d 649 (6th Cir. 2015).

166. *See id.* at 651.

167. *See id.* at 652 (“The federal claim for malicious prosecution against the officers is based on allegations that [the alleged victim’s] medical records contained information inconsistent with details in her domestic violence accusations.”).

168. *See id.* at 651.

169. *See id.* at 656.

170. *See id.* at 651 (“Because we find that the district court’s denial of relief was based on an overly charitable reading of plaintiff’s complaint, we reverse.”).

that his conduct violated that right.¹⁷¹ This position directly contradicts *Gomez*, but the Sixth Circuit found support from another Supreme Court case, *Mitchell v. Forsyth*.¹⁷²

Mitchell indeed has language that seemingly supports the Sixth Circuit.¹⁷³ However, *Mitchell* is a summary judgment case,¹⁷⁴ and *Mitchell* is also a case in which the Court failed to form a true majority. It is a 4-3 opinion with three concurrences.¹⁷⁵ *Mitchell* is not a case on point.

The Sixth Circuit's in-depth analysis of the plaintiff's complaint showcases how it merged qualified immunity into § 1983's statutory realm. It found that to establish a malicious prosecution case, a plaintiff must plead facts that can satisfy four elements.¹⁷⁶ The Sixth Circuit found that only one element was in dispute: whether the defendants influenced or participated in the decision to prosecute.¹⁷⁷ It held that the lower court erred in finding that the plaintiff pleaded sufficient facts satisfying this element because the district came to this conclusion from a generalized sense.¹⁷⁸ Citing several qualified immunity cases, the Sixth Circuit ruled that the district court should inquire whether the plaintiff pleaded facts making out a violation of a constitutional right clearly established in a particularized sense, "in light of the specific context of the case, not as a broad general proposition."¹⁷⁹ Following this rationale, the lower court should have dismissed this case for failing to establish a cause of action. While the plaintiff might have pleaded facts showing the defendant officers participated in the

171. See *id.* at 653 (explaining that, in light of *Twombly/Iqbal*, the plausibility standard "asks for more than just a sheer possibility that a defendant has acted unlawfully").

172. 472 U.S. 511 (1985).

173. See *id.* at 526 ("Unless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery.").

174. See *id.* at 512–14.

175. See *generally id.*

176. See *Johnson v. Moseley*, 790 F.3d 649, 654 (6th Cir. 2015).

177. See *id.*

178. See *id.*

179. *Id.* (quoting *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004), *Saucier v. Katz*, 533 U.S. 194, 201 (2001)).

prosecution, it was not enough.¹⁸⁰ A plaintiff must plead facts that resonate with some factual contexts from prior cases, such as that the defendants continued to participate after the arrest, made false testimony, etc.¹⁸¹ Since the plaintiff failed to do so, the violation was not clearly established.¹⁸²

The Sixth Circuit, here, merged an element of a civil rights cause of action with qualified immunity without any explanation. It quietly elevated the test from whether a defendant “influenced or participated in a prosecution” to whether the defendant “continue[d] the prosecution after he or she had knowledge of facts that would have led any reasonable officer to conclude that probable cause had ceased to exist and that continuing the prosecution would be in violation of plaintiff’s clearly established constitutional rights.”¹⁸³ The scope of this element has become much narrower, which makes the plaintiff’s burden of pleading much higher. Despite its denial, the Sixth Circuit here is essentially enforcing a heightened pleading requirement against the plaintiff, running afoul of *Gomez* and *Crawford–El v. Britton*.¹⁸⁴

3. The Eighth Circuit: *Payne v. Britten* and *Faulk v. City of St. Louis*

*Payne v. Britten*¹⁸⁵ is a prisoners’ rights case. It showcases how the Eighth Circuit treats qualified immunity as a pleading problem for the plaintiff alone. An inmate filed various civil rights claims *pro se*, including § 1983, against prison officials

180. *See id.* at 655 (explaining that “a defendant’s participation must be marked by some kind of blameworthiness, something beyond mere negligence or innocent mistake”).

181. *See id.* (“[T]ruthful participation in the prosecution decision is not actionable.”).

182. *Id.* at 655–57.

183. *Id.* at 654.

184. 523 U.S. 574 (1998); *see id.* at 595

In the past, we have consistently declined similar invitations to revise established rules that are separate from the qualified immunity defense. We refused to change the Federal Rules governing pleading by requiring the plaintiff to anticipate the immunity defense or requiring pleadings of heightened specificity in cases alleging municipal liability. (citing *Gomez v. Toledo*, 446 U.S. 635, 639–40 (1980)).

185. 749 F.3d 697 (8th Cir. 2014).

who censored and confiscated his mail, alleging violations of his First and Fourteenth Amendment rights.¹⁸⁶ Defendants moved for dismissal, asserting qualified immunity, and argued that the mail was pedophilia-related.¹⁸⁷ The district court held that it must consider matters outside the pleadings to resolve this matter.¹⁸⁸ Thus, it converted the defendant's motion from a motion to dismiss to a motion for summary judgment, and ordered the defendants to submit evidence to support their qualified immunity argument.¹⁸⁹ Based on the defendants' evidence, the district court partially ruled against the plaintiff, holding that the defendants may continue to monitor his mail.¹⁹⁰ However, the district court denied the defendants' motion concerning the continued confiscation of future mail.¹⁹¹ The defendants appealed.¹⁹²

The Eighth Circuit reversed.¹⁹³ It held that the district court abused its discretion in converting the dismissal motion to a motion for summary judgment and asking the defendants to provide evidence to support the defense they asserted.¹⁹⁴ Instead, at the pleading phase, "Courts may ask only whether the facts as alleged plausibly state a claim and whether that claim asserts a violation of a clearly established right."¹⁹⁵ Thus, it was impermissible for the district court to burden the defendants with providing any evidence regarding qualified immunity, even though the defendants asserted this defense.¹⁹⁶ However, the court conceded that the qualified immunity issue here was "ultimately and eventually," a factual one, as only the

186. *Id.* at 699.

187. *Id.* at 699–700.

188. *Id.* at 700.

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.* at 702.

194. *Id.*

195. *Id.*

196. *See id.* at 701 (“[A]lthough we are compelled to remand, we are sympathetic with the district court in this case and understand clearly why the district court followed the seemingly reasonable, but impermissible, path that it chose.”).

content of the withheld mail, which were under the defendants' control, would determine the merits of this defense.¹⁹⁷

The Eighth Circuit's ruling does not make much sense if we treat qualified immunity as an affirmative defense. Indeed, at the pleading stage, a trial court is generally restrained from ordering discovery, as it should assume all facts alleged by the plaintiff as true.¹⁹⁸ However, this restraint was clearly designed to protect plaintiffs, not defendants. When a defendant asserts an affirmative defense in a motion to dismiss, nothing stands in a trial court's way to request the defendant to provide evidence. Actually, Rule 12(d) specifically mandates that when a trial court finds matters outside the pleadings presented in a Rule 12(b)(6) motion to dismiss, the motion *must* be treated as one for summary judgment, and all parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.¹⁹⁹ Thus, the district court in this case was simply following the rule. It converted the defendant's motion to dismiss to a motion for summary judgment after it found that the defendant asserted an affirmative defense that would require a review of the content of the withheld mail, which was outside the scope of the plaintiff's pleading.

But the Eighth Circuit expected more. It expected the district court to make an exception for qualified immunity and accept the *defendant's* factual allegations as true without any discovery, even when such an approach would contradict Rule 12(d) and would lead to a dismissal of a plaintiff's claim based on a factual matter that has never been resolved. In the meantime, the Eighth Circuit expected the plaintiff to plead specific facts to overcome the defendant's qualified immunity, which, as it recognized, was ultimately a factual issue. The court did not elaborate on how a plaintiff could get the specific facts without any discovery when such facts were under the defendants' control.

*Faulk v. City of St. Louis*²⁰⁰ is a recent case that further demonstrates the Eighth Circuit's clear pro-defendant approach

197. *Id.* at 702; *see id.* at 701 (“Here, that issue clearly involves a simple fact question: what is in the withheld mail (much of which is mail that only the officials have seen)?”).

198. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

199. *See* FED. R. CIV. P. 12(d).

200. 30 F.4th 739 (8th Cir. 2022).

to qualified immunity. *Faulk* is one of many § 1983 cases concerning the police's handling of the protest following the acquittal of former St. Louis police officer Jason Stockley in the killing of Anthony Lamar Smith.²⁰¹ Faulk, a journalist, alleged that while he was reporting on the protest, he was unlawfully assaulted, pepper sprayed, and detained by the police without any probable cause.²⁰² He sued the municipality and individual officers involved in his arrest under § 1983, alleging First and Fourth Amendment violations.²⁰³ One of the individual officers moved for dismissal based on qualified immunity.²⁰⁴ The district court denied the motion, citing the need for discovery.²⁰⁵

The Eighth Circuit reversed.²⁰⁶ Citing *Ashcroft v. al-Kidd*, the Eighth Circuit first restated that a plaintiff must plead facts that may overcome qualified immunity in the pleading.²⁰⁷ The Eighth Circuit then held that the plaintiff failed to plead a valid Fourth Amendment violation against the moving defendant.²⁰⁸ It found that the plaintiff simply alleged that the defendant was a member of the team that stopped and arrested him, and that the defendant was the officer who confiscated his vehicle during the arrest.²⁰⁹ To the Eighth Circuit, it was not enough.²¹⁰ It held that the plaintiff failed to allege additional facts to show the defendant's "personal involvement" during the arrest.²¹¹ Thus, the relevant claims were dismissed.²¹²

The Eighth Circuit did not elaborate why the defendant's specific action—actively confiscating the plaintiff's vehicle

201. *Id.* at 742.

202. *Id.* at 742–43.

203. *Id.*

204. *Id.*

205. *Id.* at 746.

206. *Id.* at 746–47.

207. *See id.* at 744 (“Qualified immunity protects an official ‘unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was clearly established at the time of the challenged conduct.’” (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011))).

208. *Id.* at 744–46.

209. *Id.* at 745.

210. *Id.* at 744–46.

211. *Id.* at 744.

212. *Id.* at 751.

during an alleged unlawful arrest—was insufficient to show personal involvement.²¹³ The Eighth Circuit did not cite any First or Fourth Amendment case and explain the level of personal involvement needed to build a § 1983 claim. The Eighth Circuit seemed to indicate that a defendant needs to have physical contact with the plaintiff to enable a § 1983 case, which is a position the Supreme Court has never endorsed.²¹⁴ Additionally, the Eighth Circuit found that dismissal of the claims against the moving defendant was *appropriate* in this case, in part because the plaintiff successfully added other defendants in later proceedings.²¹⁵ The Eighth Circuit did not explain how the plaintiff's success in adding other defendants justified dismissing the claims against this specific defendant.

Also, it is worth noting that none of the key reasons here—lack of personal involvement or the success in adding other defendants—clearly relates to qualified immunity. The court did not get to the core of qualified immunity. Here, qualified immunity simply served as a vessel to further the court's narrow view on the Fourth Amendment and its policy considerations in civil rights litigation.

4. The D.C. Circuit: *Taylor v. Reilly* and *Jones v. Kirchner*

In *Taylor v. Reilly*,²¹⁶ an inmate filed a § 1983 claim against four parole officers, alleging that their denial of his parole request violated the Ex Post Facto Clause of the Constitution,²¹⁷ because they retroactively applied a new set of parole regulations that would create a significant risk of longer incarceration.²¹⁸ Defendants moved to dismiss, arguing qualified immunity, among other grounds.²¹⁹ The district court dismissed the case, and the plaintiff appealed.²²⁰

213. See *id.* at 746 (reasoning that an officer who was working in the vicinity that night might take custody of a bicycle to protect a citizen's property, which would not lend itself to a showing of misconduct at all).

214. See *id.*

215. See *id.*

216. 685 F.3d 1110 (D.C. Cir. 2012).

217. U.S. CONST. art. I, § 9, cl. 3; *id.* § 10, cl. 1.

218. *Taylor*, 685 F.3d at 1111–12.

219. *Id.* at 1113.

220. See *id.* (“In upholding the defense of qualified immunity, the court found: ‘It was not clearly established in 2005—nor is it today—that the

The D.C. Circuit affirmed. Citing *al-Kidd*, it first held that “we begin (and end) with an examination of whether the right the plaintiff asserts was ‘clearly established’ at the time of his 2001 and 2005 parole hearings.”²²¹ In other words, the court examined whether the plaintiff pleaded sufficient facts to overcome qualified immunity.

The D.C. Circuit held that, while the plaintiff successfully pleaded facts to allege a federal right recognized by the Supreme Court, it was not enough.²²² The court recognized that retroactively applying a new regulation could create a significant risk of longer incarceration in many situations.²²³ However, determining whether the new regulation would eventually lead to significant risk is complex.²²⁴ To draw a conclusion on this issue, a person would need to carefully compare the two sets of regulations with each other, and also consider the specific facts of the inmate’s case.²²⁵ The court pointed out that the plaintiff did not cite any case in which a court burdened a parole officer to make a detailed comparison so that the officer would avoid violating the Ex Post Facto Clause.²²⁶ Thus, even assuming there was a violation, it was not a violation that any reasonable official would have understood.²²⁷

Both the D.C. Circuit and the district court found that specific facts regarding the inmate’s background were needed to resolve the qualified immunity issue.²²⁸ However, the need for additional facts did not lead to discovery; instead, it led to the dismissal of the plaintiff’s claim. The D.C. Circuit elaborated that they expected the plaintiff to “demonstrate, by evidence

Commission’s retroactive application of its guidelines violated the *ex post facto* clause’ because ‘such a determination depends on the facts of the particular case.’” (citation omitted).

221. *Id.* at 1113.

222. *Id.* at 1114–16.

223. *Id.* at 1114.

224. *See id.*

225. *See id.* at 1114–16.

226. *See id.* at 1116.

227. *See id.*

228. *See id.* (explaining that the nature of the prisoner’s offenses, the prisoner’s background, and the prisoner’s conduct subsequent to conviction are all examined in comparing the two regulations).

drawn from the rule's practical implementation by the agency charged with exercising discretion, that its retroactive application will result in a longer period of incarceration than under the earlier rule."²²⁹ Like the Eighth Circuit in *Payne*, the D.C. Circuit here expected the plaintiff to plead specific facts to overcome qualified immunity, but denied the plaintiff's access to the particular facts simultaneously.

The D.C. Circuit cited the Supreme Court's *Garner v. Jones*²³⁰ decision to support its position.²³¹ However, *Garner* is a summary judgment case.²³² Parties at the summary judgment phase are expected to present specific evidence to fulfill their burden of proof on the merit of their arguments.²³³ At the pleading stage, however, Rule 8(a) only requires notice pleading—a short and plain statement of the claim showing that the pleader is entitled to relief.²³⁴ Thus, the D.C. Circuit applied a much higher evidentiary standard against the plaintiff, simply because this case concerned qualified immunity.

The D.C. Circuit took a step further in *Jones v. Kirchner*,²³⁵ showing that even a factually clear federal right violation is insufficient to help a plaintiff survive qualified immunity. In *Jones*, an arrestee filed § 1983 and *Bivens* claims against several F.B.I. agents and the D.C. police officers for Fourth Amendment violations.²³⁶ On a search warrant, a federal magistrate judge specifically ruled that law enforcement may only conduct a daytime search between 6 AM and 10 PM.²³⁷ However, the F.B.I. and the D.C. police executed the warrant at 4:45 AM, without announcing or knocking, and arrested the plaintiff.²³⁸ The

229. *Id.* at 1114.

230. 529 U.S. 244 (2000).

231. *See* Taylor v. Reilly, 685 F.3d 1110, 1114 (D.C. Cir. 2012) (“‘The question,’ the Court held in *Garner*, ‘is whether the [new law] creates a significant risk of prolonging [the prisoner’s] incarceration.’”).

232. *See Garner*, 529 U.S. at 244–45.

233. *See* Chen, *The Burdens of Qualified Immunity*, *supra* note 20, at 9.

234. FED. R. CIV. P. 8(a)(2).

235. 835 F.3d 74 (D.C. Cir. 2016).

236. *Id.* at 77–78.

237. *Id.* at 78.

238. *Id.*

district court dismissed this case per defendants' motion for multiple reasons, including qualified immunity.²³⁹

The D.C. Circuit agreed with the district court on qualified immunity.²⁴⁰ On the timing of the search, it first held that executing a search in violation of the terms of a warrant is *per se* unconstitutional.²⁴¹ The court specifically held that noncompliance with a warrant directly runs afoul of the Fourth Amendment, which demands strict compliance within the bounds set by the warrant.²⁴² Thus, violating the terms of a warrant equals violating the Fourth Amendment.

Unfortunately, qualified immunity determines that it was not enough. The D.C. Circuit held that there has not been a case from the relevant jurisdiction that specifically deals with this issue.²⁴³ Thus, this right was not so clearly established that it could put every officer on notice.²⁴⁴ Therefore, the Fourth Amendment claim on the timing of the warrant execution was dismissed.²⁴⁵

This case is quite convoluted, despite the facts being clear. There was no dispute as to what was written on the warrant, and no dispute that the defendants violated the warrant's terms. The D.C. Circuit held that the defendant's action was unconstitutional. But none of this mattered in the qualified immunity analysis. Since there was no case law on point, the defendants, who showed no respect for the law or the magistrate, got away. Via qualified immunity, the D.C. Circuit exempted defendants from any liability despite the blatant

239. *Id.* at 79.

240. *Id.* at 86.

241. *See id.* at 84–85 (“If the Defendants executed the warrant when the magistrate said they could not, then they exceeded the authorization of the warrant and, accordingly, violated the Fourth Amendment.”).

242. *See id.* at 86 (“Simply ignoring the timing limitation was not among the choices lawfully available to the officers in this case.”).

243. *See id.* (“It was not clearly established in Maryland in 2005 that the Fourth Amendment prohibits the nighttime execution of a daytime-only warrant.”).

244. *See id.* (“If our learned colleagues on the Fourth Circuit believed as recently as 2009 that the nighttime execution of a daytime-only warrant is not a constitutional violation, then the police officers who work in that jurisdiction cannot be faulted for failing to appreciate in 2005 that their conduct was unconstitutional.”).

245. *Id.*

violation of the law. The plaintiff got nothing. In this case, the unconstitutional label was indeed just a label, as it did not confer any remedy to the plaintiff. *Marbury v. Madison*'s²⁴⁶ teaching—that for every right there must be a remedy²⁴⁷—was completely ignored.

III. THE FLAWS OF THE ELEMENTARY APPROACH

In this Part, this Article criticizes the elementary approach from two perspectives. First, this approach distorts the rule-of-law values of the Federal Rules of Civil Procedure. Second, this approach contradicts § 1983's statutory language and purpose.

A. *The Rule-of-Law Values of the Federal Rules of Civil Procedure*

In 2011, John Greabe called for the elementary approach and argued that the Supreme Court should treat qualified immunity as an element of § 1983 and *Bivens* claims, and expressly allocate the pleading burden to the plaintiffs.²⁴⁸ He believed such an approach would strike an ideal balance between the Federal Rules of Civil Procedure's notice pleading requirement and the Supreme Court's disfavor of individual-capacity civil rights litigation.²⁴⁹ Specifically, he

246. 5 U.S. 137 (1803).

247. *See id.* at 163 (“The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.”).

248. *See Greabe, supra* note 61, at 6 (“[T]he Court could . . . reformulate the *Bivens* doctrine and reinterpret § 1983 to require plaintiffs pressing individual-capacity claims to plead facts establishing a violation of clearly established law *as a necessary element of such claims.*”).

249. Greabe argued that the elementary approach is better because:

First, such a reform would permit the Court to do away with the confusing, and often lawless, qualified immunity doctrine, while leaving undisturbed the liability boundaries that presently exist under constitutional tort law. Second, it would reinforce rule-of-law values by legitimizing under basic pleading law Rule 12(b)(6) dismissals of individual-capacity claims that fail to contain a factual narrative giving rise to a plausible inference that the defendant has violated clearly established law. Third, the reform could be implemented in a manner that addresses legitimate concerns about “law freezing”—i.e., courts dismissing claims under

argued that officially allocating the pleading burden on the plaintiff would allow the Supreme Court to bypass the troublesome qualified immunity, reserve the rule-of-law values of the Federal Rules of Civil Procedure, help courts render better constitutional law rulings, and perhaps even bring more constitutional rights to individuals in the long run.²⁵⁰

As discussed in the last section, in the past twelve years, many Courts of Appeals have allocated the pleading burden of qualified immunity to the plaintiff.²⁵¹ Thus, there is no better way to test the functionality of the elementary approach than to analyze those courts' rulings and their impact. While this Article agrees with Greabe in principle, that the judiciary should explore meaningful ways to reconcile the Federal Rules of Civil Procedure with qualified immunity—it argues that the elementary approach is simply not the answer. A closer look at the cases in the last section shows that the elementary approach did the exact opposite: it further distorted the rule-of-law value of the Federal Rules of Civil Procedure; it did not help courts elaborate constitutional issues in their opinions; and it certainly did not provide the much-needed protection of individual constitutional rights.

The rule-of-law values of the Federal Rules of Civil Procedure depend on their presumptive validity—that all federal rules should be followed unless the Supreme Court held that a particular one is unconstitutional.²⁵² Since the Supreme

the qualified immunity doctrine without saying what the Constitution requires and thus failing to establish the law going forward—that has led many commentators (including me) to argue that “unnecessary” rulings on constitutional meaning should sometimes be handed down in cases which properly terminate on qualified immunity grounds. Fourth, the reform might, in the long run, be protective of individual constitutional rights; if implemented with care, it could lead to courts making law-settling constitutional rulings with the assistance of government counsel and in contexts where there are fewer reasons to suppose that courts might be inclined to construe constitutional rights too narrowly because of phenomena unrelated to the merits of the imbedded constitutional question.

Id. at 6–7.

250. *See id.*

251. *See supra* Part II.B.

252. *See Greabe, supra* note 61, at 21 (citing *Exxon Corp. v. Burglin*, 42 F.3d 948, 951 (5th Cir. 1995)). The burden of establishing the invalidity of a

Court's 1965 *Hanna v. Plumer*²⁵³ decision, few courts have questioned the prima facie value of the Federal Rules of Civil Procedure, and courts repeatedly ruled that the Federal Rules of Civil Procedure shall be followed on all matters.²⁵⁴ The Supreme Court has not held any provision of the Federal Rules of Civil Procedure unconstitutional ever since.²⁵⁵ Thus, Rule 8(c), the provision burdening defendants to plead an affirmative defense, should be followed. The elementary approach violates Rule 8(c) because it burdens a plaintiff to plead the inapplicability of an affirmative defense. The only way to justify this approach is to strip the affirmative defense label provided by *Gomez*.

Greabe accurately identified the *Gomez* problem.²⁵⁶ He cleared this hurdle by arguing that *Gomez* is no longer good law.²⁵⁷ He found that the part where the Supreme Court granted the affirmative defense status to qualified immunity overlaps with the part where the Court adopted a subjective reasonable standard, which *Harlow* overruled two years later.²⁵⁸ In his view, the policy reason identified in *Gomez* for treating qualified immunity as an affirmative defense is undermined by *Harlow*.²⁵⁹ Thus, "considerations of horizontal stare decisis do not militate in favor of having the Court continue to follow *Gomez*."²⁶⁰

federal rule is heavy because "all federal rules of court enjoy presumptive validity." *Exxon Corp.*, 42 F.3d at 951. "Indeed, to date the Supreme Court has never squarely held a provision of the civil rules to be invalid on its face or as applied." *Id.* at 950 (internal quotation omitted). This principle was first established by *Hanna v. Plumer*, 380 U.S. 460 (1965), in which the Supreme Court "provided the Rules with a presumptive validity if not quite an automatic seal of approval." 19 WRIGHT & MILLER, *supra* note 64, § 4508.

253. 380 U.S. 460 (1965).

254. *Id.* at 473.

255. See *Exxon Corp.*, 42 F.3d at 950 ("Indeed, to date the Supreme Court has never squarely held a provision of the civil rules to be invalid on its face or as applied." (citation omitted)).

256. Greabe, *supra* note 61, at 24–25.

257. See *id.* at 26 ("[T]he *Gomez* ruling constitutes a 'remnant of abandoned doctrine . . .'" (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 855 (1992))).

258. *Id.* at 25.

259. *Id.* at 25–26.

260. *Id.* at 24.

Greabe's analysis has significant doctrinal value. However, functionally, his analysis has not been adopted by any court. The Supreme Court had many opportunities to address and clarify *Gomez's* precedential value, but it refused.²⁶¹ Without a clear signal from the Supreme Court, lower courts have no space to question *Gomez's* stare decisis value, as the Supreme Court repeatedly held that it is "[the Supreme] Court's prerogative alone to overrule one of its precedents."²⁶² Indeed, this Article has not found a single federal court of appeals opinion making any effort to address the *Gomez* dilemma before allocating the pleading burden on plaintiffs. They simply ignore it, and exempt qualified immunity from Rule 8(c) without answering the core question: whether qualified immunity is still an affirmative defense, and why it operates outside the rule.

The exemption-without-justification nature of the elementary approach further distorts the rule-of-law values of the Federal Rules of Civil Procedure because it allows courts to deviate from a rule based on vague policy concerns.

In *Siegert v. Gilley*,²⁶³ Justice Kennedy concurred that courts should be allowed to apply a heightened pleading standard on plaintiffs in qualified immunity issues.²⁶⁴ Although this approach runs afoul of Rule 8 and Rule 9, Kennedy believed that this approach was "a necessary and appropriate accommodation" to the core purpose of qualified immunity that government officials should be able to avoid litigation burdens.²⁶⁵ Whether the government is entitled to avoid litigation burdens is a policy matter;²⁶⁶ thus, Kennedy

261. See *supra* note 43 and accompanying text.

262. *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997); see *Agostini v. Felton*, 521 U.S. 203, 237 (1997) ("[I]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").

263. 500 U.S. 226 (1991).

264. *Id.* at 235 (Kennedy, J., concurring in the judgment).

265. *Id.* at 235–36.

266. See, e.g., Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1801–03 (2018). Schwartz, along with many other scholars, persuasively argued that qualified immunity has no common law root as the Supreme Court alleged. See *id.* Instead, the Court's support of qualified immunity is based on policy concerns, such as financial liability, the danger of being sued, etc. See *id.* at 1803.

essentially advocated that policy concerns may trump the Federal Rules of Civil Procedure. His concurrence did not gain any votes from the other Justices—not even Scalia or Rehnquist—likely due to its blatant disregard for the rule-of-law values of the Federal Rules of Civil Procedure.²⁶⁷

The six Courts of Appeals that adopted the elementary approach revived Kennedy's lone concurrence. They demonstrate that courts have no problem allocating pleading burdens in violation of clear procedural rules as long as the case involves qualified immunity. Many cases in the last section required the plaintiff to assert specific facts at the pleading stage—in violation of the notice pleading requirement of Rule 8—even when such facts were possessed solely by the defendant. Essentially, those courts adopted a heightened pleading standard on plaintiffs for qualified immunity, as Kennedy advocated. As Judge Higginbotham pointed out, this approach is *problematic*, because it ignores the presumed validity of the Federal Rules of Civil Procedure, and it also renders *Gomez* an invalid law without the Supreme Court's manifestation.²⁶⁸

B. *The Elementary Approach and the Text of § 1983*

Regarding statutory interpretation, the Supreme Court favors textualism. As Justice Kagan put it, “We’re all textualists now.”²⁶⁹ There are two types of textualism: the old textualism, which exclusively focuses on the plain meaning of the statutory text; and the new textualism, which interprets the meaning of the statutory text under specific contexts.²⁷⁰ The elementary

267. Cf. *Schultea v. Wood*, 47 F.3d 1427, 1433 (5th Cir. 1995) (“The contention that a federal procedural rule conflicts with a substantive right is problematic. . . . In any event, finding a civil rule inapplicable does not solve the problem. We would have to supply a new rule in its place.”).

268. See *id.* As *Siegert* made plain, *Gomez* is alive and well. See *Siegert*, 500 U.S. at 231 (majority opinion) (“Qualified immunity is a defense that must be pleaded by a defendant official.” (citing *Gomez v. Toledo*, 446 U.S. 635 (1980))).

269. Harvard Law School, *The 2015 Scalia Lecture: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE, at 8:28 (Nov. 25, 2015), <https://perma.cc/AU2G-S8GF>.

270. See Margaret H. Lemos, *The Politics of Statutory Interpretation*, 89 NOTRE DAME L. REV. 849, 858 (2014) (reviewing ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012)) (stating

approach cannot be reconciled with § 1983's text under either the old or new textualism.²⁷¹

1. The Old Textualism v. The Elementary Approach

The plain meaning of § 1983 leaves no space for the elementary approach to add any new element to the statute. Section 1983 provides that,

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.²⁷²

As the Supreme Court confirmed, there are only two elements in this statute: 1) “a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States,” and 2) the plaintiff “must show that the alleged deprivation was committed by a person acting under color of state law.”²⁷³ Nothing in the statute's text can allude to the conclusion that a third element exists—that the federal right at issue needs to be so clearly established that it is known to any reasonable government officer, as qualified immunity requires.

that old textualism exclusively focused on the plain meaning of the text, while, for new textualism, “[c]ontext is key, and that includes statutory purpose”).

271. This Article focuses on the dynamic between qualified immunity and 42 U.S.C. § 1983, the most frequently used civil rights cause of action. It does not extend its analysis to other common law or statutory causes of actions.

272. 42 U.S.C. § 1983.

273. *West v. Atkins*, 487 U.S. 42, 48 (1988); *see also* *Parratt v. Taylor*, 451 U.S. 527, 535 (1981) (affirming that the § 1983 analysis is a two-element inquiry), *overruled in part on other grounds*, *Daniels v. Williams*, 474 U.S. 327, 330–31 (1986).

Furthermore, the text of § 1983 specifically deters the elementary approach that merges qualified immunity into § 1983's elements. The statute provides that a person acting under the color of state law shall be liable for the deprivation of "any rights, privileges, or immunities secured by the Constitution and laws."²⁷⁴ The word "any," as an adjective, means "one or some indiscriminately of whatever kind"; "one, some, or all indiscriminately of whatever quantity"; or "unmeasured or unlimited in amount, number, or extent."²⁷⁵ In other words, "any" means "all," and no literature is disputing this definition. Additionally, the Supreme Court has long held that every word within a statute is there for a purpose and should be given its due significance.²⁷⁶ The word "any" appears six times in this one section: "any statute"; "any state"; "any citizen"; "any right"; "any action"; "any Act." Congress did not choose this word randomly.²⁷⁷

Applying the plain meaning of "*any*," the statutory meaning of federal rights under § 1983 shall include all federal "rights, privileges, or immunities under the Constitution" and federal law without any limitation in scope.²⁷⁸ Thus, the elementary approach simply cannot be reconciled with the plain text in § 1983. The elementary approach denies the general enforceability of all federal rights; it carves out a small portion of federal rights—those that are considered clearly established—and will only allow enforcement of those rights, as demonstrated in the following image. In other words, the application of the elementary approach would render the term "any right" to mean "only those that are clearly established," which contradicts with the plain meaning of the word "any."

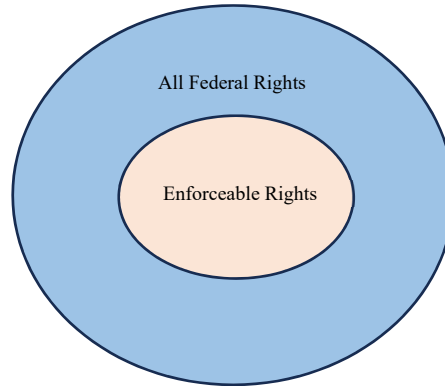
274. *Id.* (emphasis added).

275. *Any*, MERRIAM-WEBSTER ONLINE, <https://perma.cc/4LR5-JWHB> (last visited Jan. 9, 2024).

276. *See* United States v. Menasche, 348 U.S. 528, 538–39 (1955) ("It is our duty to give effect, if possible, to every clause and word of a statute, rather than to emasculate an entire section, as the Government's interpretation requires." (internal quotations omitted)).

277. 42 U.S.C. § 1983.

278. *Id.*



Also, allowing “any” to mean anything different from its plain meaning would make the entire statute unharmonized. Since “any” appears six times in this section, giving this word a different meaning would confuse its meaning on other occasions. If “any right” means only “those that are clearly established,” then what does “any statute” mean? What about “any state” or “any citizen”? This approach would make it impossible to interpret this statute in a way that harmonizes all of its parts, which is mandated by the Supreme Court.²⁷⁹

2. The New Textualism v. The Elementary Approach

The result would be the same under the new textualism, which considers the context around the text, including the statutory purpose.²⁸⁰

a. *The Context of the Statute*

As Scalia and Garner explained, context “embraces . . . a word’s historical associations acquired from recurrent patterns of past usage, and . . . a word’s immediate syntactic setting—that is, the words that surround it in a specific

279. See *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 217–18 (2001) (“[S]tatutory construction ‘is a holistic endeavor’ and that the meaning of a provision is ‘clarified by the remainder of the statutory scheme when only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.’” (citation omitted)).

280. See Lemos, *supra* note 270, at 858.

utterance.”²⁸¹ The word *any* appears six times in § 1983, and nothing in the six uses suggests that *any* means *only those that are clearly established*. Reading § 1983 as a whole, its statutory language—“[e]very person”; “any statute”; “any State”; “any citizen”; “any right”—strongly suggests a broader, more inclusive way of interpretation, consistent with the statutory purpose.

A holistic review of the entire Civil Rights Act of 1871—the federal statute that created § 1983—also reveals that the elementary approach does not fit in the overall context of this act, because its narrow view on federal rights contradicts a seldomly mentioned section of this act—Section 7. Section 7 provides that,

[N]othing herein contained shall be construed to supersede or repeal any former act or law except so far as the same may be repugnant thereto; and offences heretofore committed against the tenor of any former act shall be prosecuted, and any proceeding already commenced for the prosecution therefore shall be continued and completed, the same as if this act had not been passed, except so far as the provisions of this act may go to sustain and validate such proceedings.²⁸²

Section 7 contains the guiding principle for statutory interpretation regarding the entire Civil Rights Act of 1871. It forbids any attempt to narrowly construe its text in a way that may render any previously recognized federal right unenforceable.

The elementary approach operates in the exact opposite way. Under this approach, many federal rights are no longer enforceable simply because a court concludes that they are not clearly established. For example, in *Jones v. Kirchner*, the D.C. Circuit’s application of the elementary approach renders a clear-cut Fourth Amendment right—the right to be free from an illegal arrest in violation of a warrant—unenforceable, simply because the court couldn’t find an identical case addressing this issue.²⁸³ In *Payne v. Britten*, the Eighth Circuit made another

281. *Id.* at 857 (quoting ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 33 (2011)).

282. Pub. L. No. 42-22, § 7, 17 Stat. 13, 15 (1871).

283. See *supra* notes 236–245 and accompanying text.

clear-cut First Amendment right—the right to be free from governmental censorship on the content of personal mails—unenforceable, because the elementary approach dictates that the plaintiff asserting this right must provide undisputed evidence to overcome the government’s qualified immunity, even when the government was the party that possessed the evidence.²⁸⁴ Thus, the elementary approach clearly violates § 7’s principle that “offences heretofore committed against the tenor of any former act shall be prosecuted.”²⁸⁵

b. Statutory Purpose

The elementary approach also deviates from the statutory purpose of the Civil Rights Act of 1871, which is to broaden the access of federal courts to individuals whose rights are violated while their state governments refuse to render any remedy.

Congress enacted the Civil Rights Act of 1871 merely a year after ratifying the three Reconstruction Amendments: The Thirteenth, the Fourteenth, and the Fifteenth Amendments.²⁸⁶ Congress saw the need to pass legislation dedicated explicitly to enforcing federal rights because the Reconstruction Amendments met rampant pushback from the South, including state governments and individual white supremacists.²⁸⁷ White supremacists, led by the Ku Klux Klan, violently attacked African-American communities when they attempted to exercise newly recognized federal rights.²⁸⁸ Many state governments and judiciaries were often unwilling to enforce the laws against

284. See *supra* notes 185–197 and accompanying text.

285. Civil Rights Act of 1871, Pub. L. No. 42-22, § 7, 17 Stat. 13, 15.

286. See *Civil Rights and Reconstruction*, HIST. SOC’Y N.Y. CTS., <https://perma.cc/L22R-YJZL> (last visited Jan. 21, 2024).

287. *Mitchum v. Foster*, 407 U.S. 225, 240 (1972) (“It is clear from the legislative debates surrounding passage of § 1983’s predecessor that the Act was intended to enforce the provisions of the Fourteenth Amendment ‘against State action, . . . whether that action be executive, legislative, or judicial.’” (citation omitted)).

288. See *Grant, Reconstruction and the KKK*, PBS AM. EXPERIENCE, <https://perma.cc/CW4H-F2AX> (last visited Jan. 9, 2024) (detailing the violent activity of the KKK in the late 1860s).

white supremacists and sometimes directly abetted their crimes.²⁸⁹ As Congressman Perry observed,

Sheriffs, having eyes to see, see not; judges, having ears to hear, hear not; witnesses conceal the truth or falsify it; grand and petit juries act as if they might be accomplices. All the apparatus and machinery of civil government, all the processes of justice, skulk away as if government and justice were crimes and feared detection. Among the most dangerous things an injured party can do is to appeal to justice.²⁹⁰

Thus, Congress enacted the Civil Rights Act of 1871 to offer a judicial sanctuary for individuals. Through § 1983, Congress created “a uniquely federal remedy against incursions upon rights secured by the Constitution and laws of the Nation.”²⁹¹ An individual could bypass the biased state system and seek remedies directly from a federal court against anybody—either a private individual or a governmental official—for federal rights violations as long as the violator acted under the color of state law.²⁹² Since then, federal courts played “a paramount role in protecting constitutional rights.”²⁹³ As the Supreme Court stated, “The very purpose of § 1983 was to interpose the federal courts between the States and the people, as *guardians of the people’s federal rights*—to protect the people from unconstitutional action under color of state law.”²⁹⁴

The Supreme Court recognized this statutory purpose and frequently used the legislative history as the foundation to liberally interpret the application of § 1983. In *Monell v. Department of Social Services of the City of New York*,²⁹⁵ the Court extended § 1983’s reach and allowed damages against municipalities because Congress “intended to give a broad

289. See *Mitchum*, 407 U.S. at 240 (“Proponents of the legislation noted that state courts were being used to harass and injure individuals, either because the state courts were powerless to stop deprivations or were in league with those who were bent upon abrogation of federally protected rights.”).

290. *Id.* at 241 (quoting CONG. GLOBE, 42d Cong., 1st Sess. 374–76 (1871) (statement of Rep. Aaron Perry)).

291. *Felder v. Casey*, 487 U.S. 131, 139 (1988).

292. See 42 U.S.C. § 1983.

293. *Patsy v. Bd. of Regents of the State of Fla.*, 457 U.S. 496, 503 (1982).

294. *Mitchum*, 407 U.S. at 242 (emphasis added).

295. 436 U.S. 658 (1978).

remedy for violations of federally protected civil rights”²⁹⁶ In *Patsy v. Board of Regents of the State of Florida*,²⁹⁷ the Court reversed the lower courts’ rulings that required a plaintiff to exhaust state remedies before bringing a § 1983 claim, holding that the legislative history shows that Congress intended to provide “*immediate access to the federal courts*” for individuals whose constitutional rights were at risk of deprivation.²⁹⁸ In *Golden State Transit Corp. v. City of Los Angeles*,²⁹⁹ the Court held that all federal rights are presumed to be enforceable via § 1983 unless a defendant can demonstrate that Congress has expressly withdrawn the remedy from this statute.³⁰⁰ In short, the Court has been fully aware that Congress’s overall goal in enacting § 1983 was to make it easier for a plaintiff to assert a federal right in a federal court, not to make it harder.

The elementary approach goes against the congressional intent because it has made it much harder to assert a § 1983 claim, and it also allows state actors to define the scope of federal rights, which is the opposite of the forty-second Congress’s intent that the federal court must act as the judicial sanctum for people to enforce a federal right. A plaintiff is subjected to a heightened pleading requirement because, now, she must not only plead a federal right but also specific facts showing that this right is clearly established and recognized by *any officer beyond any dispute*. By design, this approach significantly limits plaintiffs’ access to federal courts by narrowly redefining federal rights. Whether a federal right is enforceable is determined by the objective knowledge of a violator, often a state law enforcement officer. Thus, this approach has a subtle states’ rights tone, which will be elaborated fully in the following Part.

In sum, the elementary approach violates textualism. However, textualism was nowhere to be found in *al-Kidd* or any case that followed the elementary approach. None of those cases

296. *Id.* at 685.

297. 457 U.S. 496 (1982).

298. *Id.* at 504 (emphasis added).

299. 493 U.S. 103 (1989).

300. *See id.* at 106–07 (“[E]ven when the plaintiff has asserted a federal right, the defendant may show that Congress specifically foreclosed a remedy under § 1983 by providing a comprehensive enforcement mechanis[m] for protection of a federal right.”).

engage in a statutory interpretation analysis and investigate whether there was room to insert a third element—qualified immunity—into the text of § 1983. But this is barely surprising. As Margaret Lemos found, textualism does not always produce conservative results.³⁰¹ The exercise of textualism is political *per se*, as conservative judges frequently deviate from textualism whenever they see its application would not guarantee a conservative result.

IV. PIERCING THE PROCEDURAL VEIL: FROM GUARDIANS OF CIVIL RIGHTS TO GUARDIANS OF STATES' RIGHTS

The burden of pleading often serves as a veil for courts to shield the exercise of judicial activism. Many scholars have dedicated scholarships to illustrate how the Supreme Court's *Iqbal/Twombly* rulings fundamentally changed the dynamic in federal civil litigation.³⁰² Under the plausibility test, a plaintiff can no longer rely on Rule 8's notice pleading requirement; rather, the new plausibility test significantly increased a plaintiff's pleading burden, demanding that the alleged facts must be "plausible" enough to persuade a judge on the claim's viability.³⁰³ As a result, the dismissal rate, especially for cases involving civil rights, started to surge in federal courts.³⁰⁴

301. See Lemos, *supra* note 270, at 868 (finding it impossible to "anticipate the policy consequences of adopting" a methodology that "consistently constrict[s] (or expand[s]) the scope" of statutes).

302. See, e.g., Sinnar, *supra* note 47, at 430 (arguing that the effect of *Iqbal* may be to normalize expansive uses of racial and religious criteria by law enforcement and to desensitize legal audiences to the effects of such policies on minority communities); Alexander A. Reinert, *Measuring the Impact of Plausibility Pleading*, 101 VA. L. REV. 2117, 2121 (2015) ("[D]ismissal rates have increased significantly post-*Iqbal* . . ."); David Freeman Engstrom, *The Twiqbal Puzzle and Empirical Study of Civil Procedure*, 65 STAN. L. REV. 1203, 1207–08 (2013) ("[T]he number of causes of action pled per case has declined significantly post-*Twombly*."). But see Jonah B. Gelbach, *Material Facts in the Debate Over Twombly and Iqbal*, 68 STAN. L. REV. 369, 369–70 (2016) ("[I]t is not possible to determine whether '*Twiqbal's*' supporters or critics are more accurate in their assessments of the efficacy of the new plausibility pleading regime . . .").

303. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

304. See Raymond H. Brescia, *The Iqbal Effect: The Impact of New Pleading Standards in Employment and Housing Discrimination Litigation*, 100 KY. L.J. 235, 239–40 (2012) (finding that the dismissal rate on employment discrimination cases in federal courts increased by 11 percent

The elementary approach can be viewed as another example of courts pushing a pro-defendant agenda with disguised procedural discretions—following the *Iqbal/Twombly* theme. However, this Article argues that this new approach means much more. Rudovsky long observed that the Supreme Court, through its qualified immunity jurisprudence, “has engaged in an aggressive reconstruction of the scope of § 1983.”³⁰⁵ This Article further argues that the judicial activism behind the qualified immunity rulings is the Supreme Court’s fundamental disagreement with the Reconstruction Congress’s view on federal courts. The Court today believes that federal courts need to move on from the guardians of civil rights role and implement a new role: guardians of states’ rights. This ideology demonstrated its force during the Rehnquist Court, and its shape became much more defined during the Roberts Court.³⁰⁶ Lower courts that adopted the elementary approach simply responded to the Supreme Court’s new direction.

A. *Qualified Immunity and the Rehnquist Court*

The Rehnquist Court was a Court of Law-and-Order,³⁰⁷ demonstrated by its harsh stance on criminal defendants. This Court significantly limited the application of the Exclusionary Rule,³⁰⁸ increased the procedural bar for state prisoners to challenge their convictions in federal court via Habeas

after the issuance of *Iqbal*); Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 AM. U. L. REV. 553, 556 (2010) (showing that, after the issuance of *Iqbal*, the dismissal rates of constitutional civil rights cases increased by 10 percent).

305. Rudovsky, *supra* note 6, at 25.

306. See *infra* Part IV.A.

307. Law-and-Order politics refers to a type of political initiative that promises a harsh stance on crimes. It can be traced back to Alabama Governor George Wallace, who invoked law-and-order to arouse a racist, anti-integration sentiment. Although it had an undeniable racial tone from beginning, it was well-received by voters. See Lonnie T. Brown, Jr., *Different Lyrics, Same Song: Watts, Ferguson, and the Stagnating Effect of the Politics of Law and Order*, 52 HARV. C.R.-C.L. L. REV. 305, 335 (2017). Thus, President Johnson adopted Law-and-Order politics, and President Nixon used it as his major campaign theme. See *id.* at 337 (stating that President Johnson “could not resist the political temptation to publicly trumpet his administration’s similar intolerance for lawless activities of any kind”).

308. See *United States v. Leon*, 468 U.S. 897, 926 (1984).

Corpus;³⁰⁹ recognized many exceptions that would free an officer from reading the *Miranda* rights;³¹⁰ and upheld the constitutionality of executing offenders who were minors at the time of their crimes.³¹¹ The Rehnquist Court also used qualified immunity as a vehicle to enhance its Law-and-Order stance, starting with its generous interpretation of *Harlow*.

The contemporary jurisprudence of qualified immunity started with *Harlow*, a case from the late years of the Burger Court.³¹² *Harlow* expressly overruled the subjective, good-faith standard and changed it to an objective knowledge test.³¹³ The Court firmly believed that its duty was to shield government actors from “insubstantial claims”; therefore, it held that a government actor should be shielded by qualified immunity as long “as their conduct does not violate clearly established” law of which a reasonable person would have known.³¹⁴ From a practice perspective, this new test would effectively deter a qualified immunity case from going to trial. Parties can establish objective knowledge after discovery, and sometimes

309. See *Wainwright v. Sykes*, 433 U.S. 72, 91 (1977) (finding that absent the Respondent’s showing of cause for the failure to make a timely objection, federal habeas corpus review is barred); *McCleskey v. Zant*, 499 U.S. 467, 503 (1991) (finding that failing to bring a claim in an earlier habeas petition was an abuse of the writ).

310. See, e.g., *Oregon v. Elstad*, 470 U.S. 298, 318 (1985) (“We hold today that a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warnings.”); *New York v. Quarles*, 467 U.S. 649, 659 (1984) (establishing a “public safety” exception to *Miranda* rights); *Davis v. United States*, 512 U.S. 452, 459 (1994) (“[I]f a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect might be invoking the right to counsel, our precedents do not require the cessation of questioning.”).

311. See *Stanford v. Kentucky*, 492 U.S. 361, 380 (1989) (“We discern neither a historical nor a modern societal consensus forbidding the imposition of capital punishment on any person who murders at 16 or 17 years of age.”), abrogated by *Roper v. Simmons*, 543 U.S. 551 (2005).

312. See *Rudovsky*, *supra* note 6, at 42 (“In *Harlow v. Fitzgerald*, the Court reconsidered and radically reformulated the immunity doctrine.”).

313. See *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982) (defining the limits of qualified immunity in “objective terms”).

314. *Id.* at 818; see *id.* at 808 (emphasizing the expectation that “insubstantial suits need not proceed to trial”).

even prior to discovery, depending on a court's view on the scope of objective knowledge.³¹⁵

But *Harlow* did not clearly define the scope of objective knowledge of clearly established law. Five years after its issuance, the Rehnquist Court quickly started to generously define this scope in favor of law enforcement. The Rehnquist Court implemented its pro-law-enforcement ideology in two ways. First, it extended *Harlow's* objective test, which was initially created for high-level, decision-making government officials, to law enforcement officers of all levels.³¹⁶ Second, it created two layers of protection for law enforcement officers: whether an officer is deemed to have been on notice of a clearly established right—and is therefore liable—was no longer solely dependent upon whether the Supreme Court, or any other court, had held the right was clearly established. Instead, an officer can avoid liability if they prove that they reasonably believed their conduct was lawful, even if it was not.³¹⁷

For example, in *Anderson v. Creighton*,³¹⁸ a group of federal and state law enforcement officers searched a plaintiff's house without a warrant.³¹⁹ Nothing in this case indicated that probable cause or any exigent circumstance existed, meaning this warrantless search was likely unconstitutional in light of a clear line of Fourth Amendment rulings from the Supreme Court. However, the Supreme Court reversed the Eighth Circuit, and held that the officers involved were entitled to qualified immunity.³²⁰ Writing for the majority, Scalia

315. See *id.* at 818–19 (“Reliance on the objective reasonableness of an official’s conduct, as measured by reference to clearly established law, should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment.”).

316. See *Anderson v. Creighton*, 483 U.S. 635, 654 (1987) (Stevens, J., dissenting) (“Today this Court nevertheless makes the fundamental error of simply assuming that *Harlow* immunity is just as appropriate for federal law enforcement officers such as petitioner as it is for high government officials.”).

317. See *id.* at 658–60.

318. 483 U.S. 635 (1987).

319. *Id.* at 637.

320. See *id.* at 641 (“The relevant question in this case, for example, is the objective (albeit fact-specific) question whether a reasonable officer could have believed Anderson’s warrantless search to be lawful, in light of clearly established law and the information the searching officers possessed. Anderson’s subjective beliefs about the search are irrelevant.”).

concluded that, under *Harlow*'s objective test, the fact that an alleged action has been clearly held unconstitutional does not lead to the conclusion that this law was clearly established to the officer.³²¹ A court must consider the specific circumstances of the case and decide whether the officer would have understood that his action was unlawful.³²²

Scalia did not identify any specific circumstance in this case that would make a law enforcement officer believe that a warrantless search could be legal without any existing exigencies. He did not explain why *Harlow*'s objective knowledge test would require a court to assess an officer's subjective knowledge, such as specific information possessed by the F.B.I. agents in this case, in order to draw a conclusion on whether the law was clearly established.³²³ Scalia's rationale was more based on his sympathy with law enforcement—that it would be unreasonable to expect officers to fully understand the law:

We have frequently observed . . . the difficulty of determining whether particular searches or seizures comport with the Fourth Amendment Law enforcement officers whose judgments in making these difficult determinations are objectively legally reasonable should no more be held personally liable in damages than should officials making analogous determinations in other areas of law.³²⁴

In his fierce dissenting opinion, Justice Stevens sharply pointed out that the two-layer protection the Court proscribed simply did not exist in *Harlow*.³²⁵ The functionality of Scalia's

321. *See id.* ("It simply does not follow immediately from the conclusion that it was firmly established that warrantless searches not supported by probable cause and exigent circumstances violate the Fourth Amendment that Anderson's search was objectively legally unreasonable.").

322. *See id.* ("[T]he determination whether it was objectively legally reasonable to conclude that a given search was supported by probable cause or exigent circumstances will often require examination of the information possessed by the searching officials.").

323. *See id.*

324. *See id.* at 644 (citation omitted).

325. *See id.* at 659 (Stevens, J., dissenting)

Although the question does not appear to have been argued in, or decided by, the Court of Appeals, this Court has decided to apply a double standard of reasonableness in damages actions against

test is a myth, as it is characterized as “objective knowledge,” but it is also case-by-case specific.³²⁶ But one thing remains clear: the Rehnquist Court was unapologetically pro-law-enforcement.³²⁷ The Court concluded that *Harlow* guaranteed a solid immunity for law enforcement officers,³²⁸ which the Court must deliver at all costs. Between a citizen’s clearly established Fourth Amendment rights and law enforcement’s qualified immunity shield, the Court firmly stood with the latter.³²⁹

A subtle but deeper perspective of *Anderson* has been understudied: the skepticism over federal jurisdiction on civil rights.

The Warren Court, in *Monroe v. Pape*,³³⁰ confirmed that the Reconstruction Congress intended to provide a federal civil rights action through § 1983 for plaintiffs to sue a person acting under the color of state law—regardless of whether the state provides an available cause of action, the person acted with

federal agents who are alleged to have violated an innocent citizen’s Fourth Amendment rights. By double standard I mean a standard that affords a law enforcement official two layers of insulation from liability or other adverse consequence, such as suppression of evidence.

326. See *id.* at 641 (majority opinion) (“[W]hether it was objectively legally reasonable to conclude that a given search was supported by probable cause or exigent circumstances will often require examination of the information possessed by the searching officials. But . . . this does not reintroduce . . . the inquiry into officials’ subjective intent that *Harlow* sought to minimize.”); see also Teressa E. Ravenell, *Hammering in Screws: Why the Court Should Look Beyond Summary Judgment When Resolving Section 1983 Qualified Immunity Disputes*, 52 VILL. L. REV. 135, 147–49 (2007) (arguing that *Anderson v. Creighton* essentially enables courts to consider facts outside a plaintiff’s complaint, leading to a heightened pleading standard for qualified immunity).

327. See *Anderson*, 483 U.S. at 664 (Stevens, J., dissenting) (“The Court’s double-counting approach reflects understandable sympathy for the plight of the officer and an overriding interest in unfettered law enforcement.”).

328. See *Anderson v. Creighton*, 483 U.S. 635, 639 (1987) (majority opinion) (“*Harlow* would be transformed from a guarantee of immunity into a rule of pleading.”).

329. See *id.* at 659, 664 (Stevens, J., dissenting) (arguing that the majority “seems prepared and even anxious in this case to remove any requirement that the officer must obey the Fourth Amendment when entering a private home” and that their approach “ascribes a far lesser importance to the privacy interest of innocent citizens than did the Framers of the Fourth Amendment”).

330. 365 U.S. 167 (1978).

specific intent, or the person acted with or without state law authorization.³³¹ However, with more conservatives occupying the bench following the Warren Court, the Supreme Court soon started to curtail § 1983's reach.³³² Qualified immunity is one of the battlefields where this curtailment materialized.

The Rehnquist Court's strategy was consistent: it utilized the objective knowledge test to limit the scope of the underlying substantive constitutional right so narrowly that it is hardly enforceable, making § 1983's federal jurisdiction irrelevant. As Kuehne observed, attacking the underlying constitutional right was Rehnquist's "long game," which showcased his ultimate skepticism of federal judicial review of individual rights.³³³ *Anderson* is a good example. The most significant legacy of this case is not the inherently flawed objective knowledge test; instead, it is the result that a clearly established Fourth Amendment right—to be free from a warrantless home search without exigencies—has suddenly become vague.³³⁴ This type of skepticism opens a wide space for lower courts to further question the scope of the Fourth Amendment's protection of a person's dwelling, demonstrated by the D.C. Circuit's *Jones v. Kirchner* decision, allowing law enforcement to search a person's house in a manner that directly violates the terms of a

331. See *id.* at 187 ("We conclude that the meaning given 'under color of law in the Classic case and in the Screws and Williams cases was the correct one; and we adhere to it.").

332. See Rudovsky, *supra* note 6, at 30 (arguing that the Supreme Court curtailed the access to federal courts by "creating a structure capable of isolating those cases that presented only state common law tort claims"). For example, the Court first held that, to hold a municipal officer liable under § 1983, a plaintiff needs to establish more than an employer/employee relationship, which defied *Monroe*'s ruling that an officer should be held liable if she was acting under color of state law. In *Parratt v. Taylor*, 451 U.S. 527, 543–44 (1981), the Court held that there was no deprivation of due process of law because the state provided such process in the form of a post-taking remedy for the deprivation.

333. Tobias Kuehne, *Forgetting Marbury's Lesson: Qualified Immunity's Original Purpose*, 30 WM. & MARY BILL RTS. J. 963, 996 (2022).

334. See *Anderson*, 483 U.S. at 664 (Stevens, J., dissenting) ("[U]ntil now the Court has not found intolerable the use of a probable-cause standard to protect the police officer . . . simply because his reasonable conduct is subsequently shown to have been mistaken. Today, however, the Court counts the law enforcement interest twice and the individual's privacy interest only once.").

warrant.³³⁵ Similarly, the objective test analysis in *Saucier v. Katz*³³⁶ and *Brosseau v. Haugen*³³⁷ is only a veil, and behind this veil was the Court's attack on *Graham v. Connor*,³³⁸ a case that established a person's right to be free from excessive police force without imposing serious harm.³³⁹ In *Backe v. LeBlanc*, the Fifth Circuit, indeed, picked up this signal from the higher Court, and dismissed a plaintiff's excessive force claim without engaging in any analysis on whether the threat of serious harm existed.³⁴⁰ In fact, the Fifth Circuit did not even mention *Graham v. Connor* anywhere in their opinion.

This anti-civil rights, anti-federal intervention sentiment permeated the Rehnquist Court, and was then amplified by an even more conservative Court: the Roberts Court.

B. *Qualified Immunity and the Roberts Court*

During the Roberts Court, the bench became even more conservative than the Rehnquist Court, and some scholars argue that the Roberts Court today is as conservative as the Supreme Court in the 1930s.³⁴¹ The ultra-conservativeness of

335. See *Jones v. Kirchner*, 835 F.3d 74, 84 (D.C. Cir. 2016) (“The district court erred in holding there was no constitutional violation. Jones does not allege the timing of the search was unlawful merely because it took place at night; he alleges it was unlawful because it violated an express limitation on the face of the warrant.”).

336. 533 U.S. 194 (2001).

337. 543 U.S. 194 (2004).

338. 490 U.S. 386 (1989).

339. In both cases, the Court found that an officer was entitled to qualified immunity for using deadly force under the specific circumstances of the case, as the Court found that its previous rulings regarding this matter, namely *Tennessee v. Garner*, 471 U.S. 1 (1985) and *Graham v. Connor*, 490 U.S. 386 (1989), were not specific enough to put the officer on notice of the plaintiff's Fourth Amendment right.

340. See *Backe v. LeBlanc*, 691 F.3d 645, 648 (5th Cir. 2012)

[W]e both have jurisdiction to review and must vacate the district court's order here. The court stated that it was “premature to address the defendant's assertions of qualified immunity before discovery has taken place,” but as the Supreme Court has noted, that is *precisely* the point of qualified immunity: to protect public officials from expensive, intrusive discovery until and unless the requisite showing overcoming immunity is made.

341. See Nina Totenberg, *The Supreme Court Is the Most Conservative in 90 Years*, NPR (July 5, 2022), <https://perma.cc/D66L-N6JR> (“The data tell the

the Court impacts its jurisprudence on criminal justice issues, including qualified immunity. Also during this period, a series of post-9/11, War-on-Terror cases came up to the Supreme Court, many of which involved qualified immunity.³⁴² The political climate pushed the Court to enhance its pro-law-enforcement policy, but, this time, with bipartisan support.

The bipartisan support for law enforcement's entitlement to qualified immunity is an important phenomenon of the Roberts Court. *Al-Kidd* was an 8-0 opinion with Justice Kagan's recusal.³⁴³ In *Wood v. Moss*,³⁴⁴ Justice Ginsburg delivered a unanimous opinion, holding that Secret Service agents were entitled to qualified immunity when they pushed protesters further away from President George W. Bush while keeping his supporters close by.³⁴⁵ While admitting that Secret Service

story. The court produced more conservative decisions this term than at any time since 1931 In an astounding 62% of the decisions, conservatives prevailed, and more importantly, often prevailed in dramatic ways.”).

342. In *Iqbal*, a case that arose from the F.B.I.'s large-scale arrests of Muslim immigrants after the 9/11 attack, the Roberts Court significantly heightened the pleading standard in federal courts and upended the liberal pleading regime that allowed a pleading to survive dismissal if it provided fair notice of the basis of the case to a defendant. See *Ashcroft v. Iqbal*, 556 U.S. 662, 686–87 (2009). Shirin Sinnar observed that the Court's particular narrative of the defendant, Javaid Iqbal, a Pakistani Immigrant, provided the foundational legitimacy of racial and religious profiling that may shape society today. See Sinnar, *supra* note 47, at 384. Additionally, the *Iqbal* Court specifically held that a *Bivens* action, one of the few actions that would allow a plaintiff to assert damages claim against a federal agent, is a “disfavored” cause of action. See *Iqbal*, 556 U.S. at 675.

This view was then enhanced by another post-9/11 case, *Ziglar v. Abbasi*, 582 U.S. 120 (2017), which essentially closed the door for a plaintiff to assert damages claims for a federal agent's misconduct. See *generally id.* In *al-Kidd*, a case involving the arrest of a U.S. citizen who the F.B.I. believed possessed critical information regarding a terrorist attack, the Roberts Court held that a federal right being clearly established is no longer sufficient. See *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011). Rather, when qualified immunity is involved, the right needs to be so clear beyond any dispute, to any law enforcement officers. See *id.* at 741.

343. See *generally al-Kidd*, 563 U.S. 731.

344. 572 U.S. 744 (2014).

345. See *id.* at 748–49

The United States Court of Appeals for the Ninth Circuit . . . found dispositive of the agents' motion to dismiss “the considerable disparity in the distance each group was allowed to stand from the

agents' actions might constitute viewpoint-based discrimination, Ginsburg refused to engage in strict scrutiny, but focused on the importance of safeguarding the President, even though the security risk could be easily mitigated by less restrictive means.³⁴⁶ In *Plumhoff v. Rickard*,³⁴⁷ the Roberts Court unanimously held that officers who fired fifteen shots, killing a driver and passenger after a high-speed chase, were entitled to qualified immunity, despite the fact that the initial probable cause to pull over the car was simply due to an inoperable headlight.³⁴⁸ In *Rehberg v. Paulk*,³⁴⁹ the Court again reached a 9-0 consensus, holding that a government official who served as a complaining witness and presented perjured testimony to a grand jury was immune from any § 1983 claim.³⁵⁰ Thus, it is clear that qualified immunity has developed an ideology-resistant nature during the Roberts Court.

These cases were just the tip of the iceberg. Zina Makar observed that the Roberts Court summarily issued over a dozen *per curiam* opinions through its shadow docket on qualified immunity, almost always favoring law enforcement.³⁵¹ William

Presiden[t].” Because no “clearly established law” so controlled the agents’ response to the motorcade’s detour, we reverse the Ninth Circuit’s judgment. (citation omitted).

346. See *id.* at 748 (“The First Amendment, our precedent makes plain, disfavors viewpoint-based discrimination. But safeguarding the President is also of overwhelming importance in our constitutional system.”).

347. 572 U.S. 765 (2014).

348. See *id.* at 768

The courts below denied qualified immunity for police officers who shot the driver of a fleeing vehicle to put an end to a dangerous car chase. We reverse and hold that the officers did not violate the Fourth Amendment. In the alternative, we conclude that the officers were entitled to qualified immunity because they violated no clearly established law.

349. 566 U.S. 356 (2012).

350. See *id.* at 375 (“[W]e hold that a grand jury witness is entitled to the same immunity as a trial witness.”).

351. See Zina Makar, *Per Curiam Signals in the Supreme Court’s Shadow Docket*, 98 WASH. L. REV. 427, 433–34 (2023). Makar spotted the following cases involving qualified immunity during the Roberts Court: *Ryburn v. Huff*, 565 U.S. 469 (2012); *Stanton v. Sims*, 571 U.S. 3 (2013); *Tolan v. Cotton*, 572 U.S. 650 (2014); *Carroll v. Carman*, 574 U.S. 13 (2014); *Taylor v. Barkes*, 575 U.S. 822 (2015); *Mullenix v. Luna*, 577 U.S. 7 (2015); *White v. Pauly*, 580 U.S. 73 (2017); *Kisela v. Hughes*, 138 S. Ct. 1148 (2018); *City of Escondido v.*

Baude conducted an exhaustive search of the Supreme Court cases involving qualified immunity from 1982 to 2017.³⁵² The Roberts Court had eighteen cases during this period, and it sided with law enforcement seventeen times, with the only exception being *Hernandez v. Mesa*,³⁵³ in which the Court reversed the lower court on other grounds without deciding on the immunity issue.³⁵⁴ The Rehnquist Court (September 1986–September 2005) handled eight qualified immunity cases, and denied immunity to law enforcement twice.³⁵⁵ The Roberts Court is a more staunch advocate for law enforcement than the Rehnquist Court was.

The Roberts Court's pro-law-enforcement trait should not be analyzed solely under the criminal justice context. Rather, this Article argues that the root of the Roberts Court's pro-law-enforcement stance came from its fundamental disagreement with the Reconstruction Congress's proactive vision of federal courts as the forum to deter states' abuse of power. The Roberts Court today believes that the federal courts' civil-rights-guardian era has passed, and it is time to help states restore their rights. In *Shelby County v. Holder*,³⁵⁶ the Court struck down a key provision of the Voting Rights Act of 1965,³⁵⁷ which mandated federal review of a state's voting procedure, stating that, "The conditions that originally justified these measures no longer characterize voting in the covered jurisdictions."³⁵⁸ In *National Federation of Independent Business v. Sebelius*,³⁵⁹ the majority upheld the legality of the

Emmons, 139 S. Ct. 500 (2019); *Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4 (2021); *City of Tahlequah v. Bond*, 142 S. Ct. 9 (2021).

352. See Baude, *supra* note 51, at 88–90.

353. 582 U.S. 548 (2017).

354. See *id.* at 555.

355. See Baude, *supra* note 51, at 88–90. The two cases that Baude found that the Rehnquist Court denied qualified immunity to law enforcement officers are *Groh v. Ramirez*, 540 U.S. 551 (2004) and *Hope v. Pelzer*, 536 U.S. 730 (2002).

356. 570 U.S. 529 (2013).

357. Pub L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 52 U.S.C).

358. *Shelby County*, 570 U.S. at 535.

359. 567 U.S. 519 (2012).

Affordable Care Act³⁶⁰ under Congress's taxing power; Justice Roberts, writing for the majority, used this opportunity to insert a much more restrictive view of federal power under the Commerce Clause and a corresponding respect for states' autonomy.³⁶¹ Regarding reproductive rights, the Court overruled *Roe v. Wade*³⁶² in the name of states' rights, stating that "the authority to regulate abortion must be returned to the people and their elected representatives."³⁶³ So, as Roberts said in *Shelby County*, "[T]hings have changed dramatically."³⁶⁴ The Reconstruction Congress's view is simply outdated for the Roberts Court's taste. Federal courts today should not be a judicial sanctuary for those whose civil rights are violated. People must remedy their rights elsewhere, and whether that place actually exists does not concern the Supreme Court.

The Roberts Court's states' rights contour provides a crucial theoretical foundation for its qualified immunity jurisprudence: federal rights must be interpreted narrowly to honor states' autonomy. In many qualified immunity cases, state law enforcement officers are the defendants. In those cases, the application of the objective knowledge test has a subtle states' rights tone in it, because whether a federal right is clearly established does not depend on whether the Supreme Court has clearly defined the law; instead, it depends on whether a state actor is aware of this right. For example, in *Mullenix v. Luna*,³⁶⁵ a state trooper fired six rounds at a car traveling eighty-five miles-per-hour, causing the driver's death.³⁶⁶ His action directly violated his supervisor's order, which was to "stand by," and no circumstance indicated that a threat of serious physical harm

360. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 42 U.S.C.).

361. See *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 554 ("While Congress's authority under the Commerce Clause has of course expanded with the growth of the national economy, our cases have "always recognized that the power to regulate commerce, though broad indeed, has limits." The Government's theory would erode those limits" (citations omitted)).

362. 410 U.S. 113 (1973).

363. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 292 (2022).

364. *Shelby County*, 570 U.S. at 547.

365. 577 U.S. 7 (2015).

366. *Id.* at 8–10.

existed.³⁶⁷ The Court held that qualified immunity applied. It began by recognizing that a plaintiff does not need to identify a case directly on point to show the law at issue is clearly established.³⁶⁸ However, “[i]t is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts.”³⁶⁹ Thus, whether the law regarding excessive use of force was clearly established depended on whether there was a body of case law that “squarely govern[ed]” the specific facts in the case, so that any state trooper in the same situation would have known that it was wrong to fire six rounds at a car when the supervisor specifically objected.³⁷⁰ Under this strict test, the Court concluded that none of the cases cited by the lower court provided sufficient specificity to put the state trooper on notice.³⁷¹ Thus, no clearly established right was violated.

The Roberts Court applied the *Mullenix* rationale consistently,³⁷² and eventually rendered the right to be free from excessive police force—a Fourth Amendment right established in *Tennessee v. Garner*³⁷³ and *Graham v. Connor* in the 1980s—so diminished that state law enforcement can easily ignore it. The principle established by *Garner* and *Graham*—that excessive force is only permissible where the

367. *Id.* at 9.

368. *See id.* at 12 (“We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate.” (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011))).

369. *Id.*

370. *Id.* at 13.

371. *See id.* at 15 (“[N]one of our precedents ‘squarely governs’ the facts here.”).

372. *See Kisela v. Hughes*, 584 U.S. 100, 103–04 (2018) (“Here, the Court need not, and does not, decide whether Kisela violated the Fourth Amendment when he used deadly force against Hughes. For even assuming a Fourth Amendment violation occurred—a proposition that is not at all evident—on these facts Kisela was at least entitled to qualified immunity.”); *see also* *District of Columbia v. Wesby*, 583 U.S. 48, 65 (2018) (“Even assuming the officers lacked actual probable cause to arrest the partygoers, the officers are entitled to qualified immunity because they reasonably but mistakenly concluded that probable cause was present.” (internal quotations omitted)); *see also* *White v. Pauly*, 580 U.S. 73, 76–77 (2017) (“Because this case concerns the defense of qualified immunity . . . the Court considers only the facts that were knowable to the defendant officers.”).

373. 471 U.S. 1 (1985).

officer has probable cause to believe that the suspect poses a threat of serious physical harm—is considered too general to provide meaningful guidance to state law enforcement.³⁷⁴ Additionally, the Roberts Court repeatedly emphasizes the difficulty for a law enforcement officer to understand the law in light of daily operations.³⁷⁵ Ironically, the law enforcement’s alleged inability to understand federal law becomes its biggest weapon to defy the law: an officer is not considered on notice of any federal law unless a plaintiff can point to a body of case law that has practically identical facts to the specific case involving this officer. In other words, a state actor’s knowledge, or ability to comprehend, dictates the scope of a federal right. This is where the Roberts Court’s support of states’ rights and its qualified immunity jurisprudence converge: they both promote skepticism over previously established federal rights, actively seek new ways to diminish them, and allow states to decide when and how federal law can be enforced.

This is precisely the situation the Reconstruction Congress was confronted with. The newly created federal right received mountains of pushback in the South, as the state governments expressly or implicitly refused to enforce those rights. The Reconstruction Congress’s response was to create the Civil Rights Act of 1871, broadening access to federal courts for individuals who were in disadvantaged positions. But the Roberts Court has moved on from the Reconstruction era. Instead, this is the time for the Court to reconsider those previously established civil rights and decide whether the Court, or Congress, was too generous to the vulnerable in a fashion that might endanger states’ autonomy. The states’ rights tone in qualified immunity cases is consistent with the Roberts Court’s recent civil rights rulings regarding voting rights, interstate commerce, and reproductive rights, in which the Court expressly demonstrated its commitment to honoring states’

374. See *Garner*, 471 U.S. at 7; *Graham v. Connor*, 490 U.S. 386, 396–97 (1989); see also *Mullinex*, 577 U.S. at 14 (“Far from clarifying the issue, excessive force cases involving car chases reveal the hazy legal backdrop against which Mullenix acted.”).

375. See *Mullinex v. Luna*, 577 U.S. 7, 12 (2015) (“[I]t is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts.” (citing *Saucier v. Katz*, 533 U.S. 194, 205 (2001))).

rights—even when such devotion would render equal protection and due process of law unenforceable.

CONCLUSION

Many scholars have observed that there was not much hope for plaintiffs in qualified immunity cases.³⁷⁶ This Article agrees with them. Qualified immunity is a court-created policy, with bipartisan support from the Supreme Court. Thus, it is insensible to expect the judiciary to make changes on qualified immunity.

This Article argues that the focus in fighting against qualified immunity should be on movement lawyering. Civil rights litigants and activists should invest more resources in advocating for state legislatures to denounce qualified immunity through state law, which several states have already done.

There will be many hurdles in movement lawyering against qualified immunity. Its force will likely be limited to blue states, and there is also uncertainty as to whether a state's denouncement of qualified immunity would affect federal courts at all. Thus, movement lawyering against qualified immunity deserves a full body of literature that comprehensively illustrates this strategy. Nevertheless, movement lawyering is still the best option when compared to the hopeless situation of the judiciary. The bottom line is that we simply cannot leave the qualified immunity monster out any longer and expect its master—the judiciary—to come to the rescue. It is time for people to take over the action plan and put the monster back in its cage.

376. See, e.g., Karen Blum et al., *Qualified Immunity Developments: Not Much Hope Left for Plaintiffs*, 29 *TOURO L. REV.* 633, 633 (2013)

[T]his Article discusses the continued effects of the Supreme Court's reformulation of the qualified immunity analysis that allows lower courts to skip deciding the merits of the constitutional issue and jump to the question of whether the law was clearly established. Finally, this Article discusses recent decisions making it more difficult for Section 1983 plaintiffs to establish that the federal law was clearly established.