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Forgetting Marbury's Lesson: Qualified Immunity's Original Purpose

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FORGETTING *MARBURY*'S LESSON: QUALIFIED IMMUNITY'S ORIGINAL PURPOSE

Tobias Kuehne*

Substantial parts of the history of qualified immunity remain unwritten. While qualified immunity is hotly debated among scholars and practitioners, we know little about qualified immunity's origins, and the institutional pressures that shaped its historical path. This Article provides that missing history. It begins by observing the striking parallels between *Pierson v. Ray*—qualified immunity's origin case—and *Marbury v. Madison*. Both were suits against government officials to vindicate individual rights granted by a congressional statute, and both cases arose while the Court was under intense political pressure. In each case, the Supreme Court struck a surprising middle ground: It insisted that those individual rights should be broadly available but reserved judicial discretion on when to provide a remedy. In both cases, the Court thus declined to apply a broad statutory grant of authority and interposed a new, judicially created authority—judicial review in *Marbury*, and qualified immunity in *Pierson*. And in both cases, the Supreme Court turned political pressures to its advantage.

But while *Marbury* is recognized as a success story, qualified immunity is not. In the first decade after *Pierson*, the Court still tried to use qualified immunity to position the judiciary as a mediator between citizens and government officials in § 1983 and *Bivens* actions. This effort, led by Justice Byron White, culminated in *Harlow v. Fitzgerald*, which articulated the modern qualified immunity standard. But ever since *Harlow*, the Supreme Court has abandoned the *Marburian* middle position of balancing rights and remedies. Spearheaded by Chief Justice William Rehnquist, the Court began to limit the availability of both judicial remedies and individual rights in qualified immunity actions.

Marbury's success story—and qualified immunity's failure—thus gives guidance on how a politically beleaguered Court should mediate between citizen plaintiffs and officer defendants: recognize the broad availability of individual while granting a partial victory to the Court's critics, and carve out a new domain of authority that enhances the judiciary's independence and legitimacy in the process. This Article traces qualified immunity's historical departure from its *Marburian* wisdom, points to a litigation strategy that could restore it, and derives some deeper lessons about the Court's institutional limitations.

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INTRODUCTION

The history of qualified immunity remains to be fully written. In the vast academic literature on the subject, its origins and development are usually glossed over, if they are mentioned at all.[1] As calls for qualified immunity's overhaul mount, and the Supreme Court refuses to reconsider the doctrine,[2] it is imperative that we understand how we got to where we are today. This Article provides the missing history of qualified immunity.

A. Qualified Immunity Doctrine Today

Qualified immunity creates a high bar for plaintiffs who seek money damages from government officials for federal rights violations under 42 U.S.C. § 1983[3] or *Bivens v. Six Unknown Named Agents*.[4] Under *Harlow v. Fitzgerald*, "government

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[1] For some brief discussions of qualified immunity's history, see William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 50–61 (2018); John C. Jeffries, *The Liability Rule for Constitutional Torts*, 99 VA. L. REV. 207, 250–52 (2013); Richard H. Fallon, Jr., *Bidding Farewell to Constitutional Torts*, 107 CALIF. L. REV. 933, 941–50 (2019). More recently, Scott A. Keller has shed light on the common-law origins of qualified and absolute immunity in the last quarter of the nineteenth century. *See Qualified and Absolute Immunity at Common Law*, 73 STAN. L. REV. 1337 (2021). This Article focuses on the more recent history of qualified immunity from 1967 onward.

[2] In June of 2020, the Supreme Court denied certiorari in several qualified-immunity cases, some of which petitioned for a recalibration of the doctrine. Jay Schweikert, *The Supreme Court's Dereliction of Duty on Qualified Immunity*, CATO AT LIBERTY (June 15, 2020, 11:27 AM), https://www.cato.org/blog/supreme-courts-dereliction-duty-qualified-immunity [https://perma.cc/8V7W-EYC4].

[3] State officials are sued under § 1983. The statute in its current form reads:

> 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 . . . .

42 U.S.C. § 1983.

[4] 403 U.S. 388 (1971). Federal officials are sued under *Bivens*, albeit only for a limited number of constitutional violations. In *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017), the Court has recently emphasized that, in light of its *Bivens* jurisprudence in the last few decades, extending causes of action against federal officials to new contexts has become a "disfavored judicial activity." *Id.* at 1857 (internal quotation marks and citation omitted).

officials performing discretionary functions" receive immunity for those violations if their "conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[5] The doctrine uses a functional approach: If the government official's challenged acts were executive in nature, she may invoke qualified immunity; if the challenged acts are legislative, judicial, or quasi-judicial in nature, she receives absolute immunity for those acts.[6]

Since the Court handed down *Harlow* in 1982, it has emphasized that rights must be defined with a high degree of specificity to be considered "clearly established."[7] Case law has to give "fair notice"[8] so that individual officers are able to "determine how the relevant legal doctrine . . . will apply to the factual situation[s they] confront[]" in their daily line of work.[9] While the standard "do[es] not require a case directly on point," the Court insists that "existing precedent must have placed the statutory or constitutional question beyond debate."[10] Because qualified immunity was intended to "protect[] 'all but the plainly incompetent or those who knowingly violate the law,'"[11] the Court has called qualified immunity's standard "exacting."[12]

The Court's stringency stems from qualified immunity's underlying purpose to minimize the social costs arising from § 1983 litigations. Those costs include that competent individuals may be deterred from serving in the government, and that those who do serve are chilled in their ability to meet their obligations vigorously. Section 1983 litigation also costs the government time, energy, and money.[13] To

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[5] 457 U.S. 800, 818 (1982).

[6] *See, e.g.*, Imbler v. Pachtman, 424 U.S. 409 (1976) (granting absolute immunity for acts performed in a judicial function); Burns v. Reed, 500 U.S. 478, 484–87 (1991) (laying out the analytical framework); Butz v. Economou, 438 U.S. 478, 504–16 (1978) (same); *see also* Buckley v. Fitzsimmons, 509 U.S. 259, 273 (1993) (observing that qualified immunity "represents the norm" (quoting Malley v. Briggs, 475 U.S. 335, 340 (1986))).

[7] *See, e.g.*, Anderson v. Creighton, 483 U.S. 635, 640 (1987) (holding that "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right"); *see also* City of Escondido v. Emmons, 139 S. Ct. 500, 503 (2019) ("Under our cases, the clearly established right must be defined with specificity. 'This Court has repeatedly told courts . . . not to define clearly established law at a high level of generality.'" (quoting Kisela v. Hughes, 138 S. Ct. 1148, 1152 (2018))); Kit Kinports, *The Supreme Court's Quiet Expansion of Qualified Immunity*, 100 MINN. L. REV. HEADNOTES 62 (2016) (discussing the Court's progressive tightening of the standard).

[8] *Kisela*, 138 S. Ct. at 1152 (quoting Brosseau v. Haugen, 543 U.S. 194, 198 (2004)); *see also* Hope v. Pelzer, 536 U.S. 730, 739 (2002).

[9] *Kisela*, 138 S. Ct. at 1152 (quoting Mullenix v. Luna, 136 S. Ct. 305, 308 (2015) (per curiam)); *see also* City of San Francisco v. Sheehan, 135 S. Ct. 1765, 1774 (2015) (quoting Plumhoff v. Rickard, 572 U.S. 765, 778–79 (2014)).

[10] White v. Pauly, 137 S. Ct. 548, 551 (2017) (quoting *Mullenix*, 136 S. Ct. at 308); *see also* Reichle v. Howards, 566 U.S. 658, 664 (2012) (quoting language to same effect).

[11] *White*, 137 S. Ct. at 551 (quoting *Mullenix*, 136 S. Ct. at 308); *see also Sheehan*, 135 S. Ct. at 1774 (quoting same language from Ashcroft v. al-Kidd, 563 U.S. 731, 743 (2011)).

[12] *Sheehan*, 135 S. Ct. at 1774.

[13] *See, e.g.*, Pearson v. Callahan, 555 U.S. 223, 231, 237 (2009) (quoting Mitchel v.

avoid those costs, qualified immunity doctrine seeks to dispose of insubstantial lawsuits before trial, usually at the summary judgment stage.[14]

But while the Supreme Court has insisted that "clearly established" statutory or constitutional rights be defined with granularity, it has consistently avoided—and signaled to federal appeals courts to avoid—specifying those rights since *Pearson v. Callahan*'s overruling of *Saucier v. Katz*.[15] While *Saucier* had required federal courts to determine whether a constitutional violation had been alleged before reaching the question of whether the law was clearly established,[16] *Pearson* gave them "sound discretion [to] decid[e]" the underlying merits or skip ahead to the qualified-immunity analysis of whether the right was clearly established at the time of the challenged conduct.[17] Moreover, the Court has restricted the sources from which clearly established law can be drawn.[18]

This has led to a catch-22. On the one hand, the law must be highly specific to overcome the qualified immunity defense and hold individual officers accountable. On the other, the Court has balked at creating such specific law because it is often easier to resolve a case on the demanding clearly established prong and, when granting qualified immunity, would risk spelling out federal rights in dictum.[19] This has left "standards of official conduct permanently in limbo," and given officers considerable leeway to "persist[ ] in the challenged practice[s]."[20]

B. Qualified Immunity Scholarship Today

Qualified immunity has generated a slew of interest among academics, journalists,[21] and interest groups across the political spectrum. Many scholars have criticized

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Forsyth, 472 U.S. 511, 526 (1985)); Saucier v. Katz, 533 U.S. 194, 200 (2001); Harlow v. Fitzgerald, 457 U.S. 800, 817 (1982).

[14] *See Pearson*, 555 U.S. at 231–32 (quoting Anderson v. Creighton, 483 U.S. 635, 640 n.2 (1987); Hunter v. Bryant, 502 U.S. 224, 227 (1991) (per curiam)); *see also Harlow*, 457 U.S. at 818; *Saucier*, 533 U.S. at 201. For an important discussion of how qualified immunity fails these policy goals, see Joanna Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2 (2017).

[15] *See infra* Part IV.

[16] *Saucier*, 533 U.S. at 201.

[17] *Pearson*, 555 U.S. at 236.

[18] *See, e.g.*, Carroll v. Carman, 574 U.S. 13, 17 (2014) (leaving undecided whether a single "controlling circuit precedent could constitute clearly established federal law."); Lane v. Franks, 573 U.S. 228, 246 (2014) (rejecting case law on point from other circuits if it conflicts with precedent in the circuit in which plaintiff sued); Ashcroft v. al-Kidd, 563 U.S. 731, 742 (2011) (rejecting that "clearly established law [could] "lurk[ ] in the broad history and purposes of the Fourth Amendment" (internal quotations omitted)); *see also* Kinports, *supra* note 7, at 66.

[19] Karen M. Blum, *Qualified Immunity: Time to Change the Message*, 93 NOTRE DAME L. REV. 1887, 1905 (2018). For specifics, see *infra*, Sections III.B.2–3. *See also* Baude, *supra* note 1, at 84–86 (discussing the Court's extensive use of summary reversals based on the clearly established prong).

[20] Camreta v. Greene, 563 U.S. 692, 706 (2011) (internal citation omitted).

[21] For discussions before and after the extrajudicial killing of George Floyd, see Eric

qualified immunity on doctrinal or policy grounds. Among the doctrinal critics, William Baude has questioned qualified immunity's legal basis, arguing that Congress never authorized qualified immunity, that its roots in the common law are suspect, that it has become unmoored from *any* common-law standard it once purported to embody, and that it does not withstand scrutiny as a civil equivalent to criminal law's rule of lenity.[22] Alan Chen has similarly objected that qualified immunity violates § 1983's original intent.[23] He has also criticized the Court for "embedding a central paradox" in the doctrine by framing qualified immunity as a pure question of law, while ignoring the inescapably fact-bound nature of its application.[24] Kit Kinports has focused on the Court's "pattern of covertly broadening [qualified immunity], describing it in increasingly generous terms, and inexplicably adding qualifiers to precedent that then take on a life of their own."[25] And Katherine Mims Crocker has analyzed and rejected various justifications for qualified immunity that are grounded in separation-of-powers and federalism principles.[26]

Scholars have also criticized qualified immunity on policy grounds. Joanna Schwartz's empirical work has shown that qualified immunity falls short of its own goals. Because police officers are widely indemnified, qualified immunity does not temper overdeterrence.[27] It fails to both weed out insubstantial suits at the motion-to-dismiss and summary-judgment stage[28] and incentivize plaintiffs' lawyers to decline insubstantial suits.[29] Instead, it increases the risk, costs, and complexity of constitutional

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Schnurer, *Congress Is Going to Have to Repeal Qualified Immunity*, THE ATLANTIC (June 17, 2020), https://www.theatlantic.com/ideas/archive/2020/06/congress-going-have-repeal-qualified-immunity/613123 [https://perma.cc/M8HU-5YVL]; Andrew Chung et al., *For Cops Who Kill, Special Supreme Court Protection*, REUTERS INVESTIGATES (May 8, 2020, 12:00 PM, GMT), https://www.reuters.com/investigates/special-report/usa-police-immunity-scotus [https://perma.cc/7A25-Z927]; Mark Joseph Stern, *The Supreme Court Broke Qualified Immunity. Now It Has the Chance to Fix It.*, SLATE (May 27, 2020, 5:54 PM), https://slate.com/news-and-politics/2020/05/george-floyd-supreme-court-police-qualified-immunity.html [https://perma.cc/PTF9-BYX9].

[22] *See generally* Baude, *supra* note 1.

[23] Alan K. Chen, *The Facts About Qualified Immunity*, 55 EMORY L.J. 229, 273–75 (2006).

[24] *Id.* at 230; *see also* Alan K. Chen, *The Intractability of Qualified Immunity*, 93 NOTRE DAME L. REV. 1937 (2018) (highlighting the implications flowing from that paradox). *Accord* Blum, *supra* note 19, at 1917–32.

[25] Kinports, *supra* note 7, at 64. For an earlier critique of the Court's activism in qualified immunity, *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).

[26] Katherine Mims Crocker, *Qualified Immunity and Constitutional Structure*, 117 MICH. L. REV. 1405 (2019).

[27] Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 885–90 (2014); *see also* Barbara E. Armacost, *Qualified Immunity: Ignorance Excused*, 51 VAND. L. REV. 583, 583–87 (1998).

[28] Schwartz, *supra* note 14, at 10–11.

[29] Joanna C. Schwartz, *Qualified Immunity's Selection Effects*, 114 NW. L. REV. 1101, 1103–06 (2020).

and federal statutory litigation.[30] In so doing, it fails to protect officers from the financial burdens and distractions of litigation.[31]

Beyond pointing to qualified immunity's failures on its own terms, critics have also argued that the doctrine stifles the development of constitutional rights,[32] permits government officials to violate rights,[33] and is part of a broader rollback of constitutional rights by the Supreme Court.[34] Based on these powerful critiques, some scholars have called for the abolition of the doctrine[35] and begun to envision post-qualified-immunity legal regimes.[36]

Still, some scholars have argued in support of qualified immunity. Notwithstanding critics' claims to the contrary, John Jeffries maintains that underenforcing money damages claims for constitutional violations encourages courts to develop constitutional law or prevent the rollback of rights.[37] Richard Fallon—who penned the *Harlow* decision as Justice Lewis Powell's law clerk—has also insisted that "the *Harlow* formula . . . is basically sound,"[38] pointing out that abolishing qualified immunity would have unforeseen ripple effects on substantive rights, standing requirements, rules of pleading, and standards of proof.[39] Aaron Nielson and Christopher

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[30] *Id.*

[31] Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1803–14 (2018).

[32] Blum, *supra* note 19, at 1893–905; Stephen R. Reinhardt, *The Demise of* Habeas Corpus *and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 MICH. L. REV. 1219, 1244–50 (2015); Schwartz, *supra* note 31, at 1814–20. *But see* Colin Rolfs, *Qualified Immunity After* Pearson v. Callahan, 59 UCLA L. REV. 468, 474 (2011) (presenting evidence that district courts after *Pearson* have continued to make constitutional rulings in qualified immunity cases).

[33] Reinhardt, *supra* note 32, at 1244–53; *see also* David M. Shapiro & Charles Hogle, *The Horror Chamber: Unqualified Impunity in Prison*, 93 NOTRE DAME L. REV. 2021, 2024–35 (2018).

[34] *See* JAMES E. PFANDER, CONSTITUTIONAL TORTS AND THE WAR ON TERROR 149 (2017); Reinhardt, *supra* note 32, at 1245; Nancy Leong, *Making Rights*, 92 B.U. L. REV. 405, 406 (2012); Nancy Leong, *Improving Rights*, 100 VA. L. REV. 377, 379 (2014); Pamela Karlan, *Shoe-Horning, Shell Games, and Enforcing Constitutional Rights in the Twenty-First Century*, 78 UMKC L. REV. 875, 882–88 (2010); Rudovsky, *supra* note 25, at 25–26.

[35] Blum, *supra* note 19, at 1892, 1932–36 (proposing reviving municipal liability under a respondeat superior theory, rendering § 1983 suits against officers in their individual capacity irrelevant and bypassing qualified immunity issues); Schwartz, *supra* note 31, at 1800.

[36] *See generally* Joanna C. Schwartz, *After Qualified Immunity*, 120 COLUM. L. REV. 309 (2020).

[37] John C. Jeffries, *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 89–90 (1999) (arguing that underenforcement allows courts to innovate and spell out the law); *see also* Jeffries, *supra* note 1, at 246–49 (renewing the claim). *But see supra* notes 31–33 and accompanying text.

[38] Fallon, *supra* note 1, at 989.

[39] Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—and Their*

Walker have cautioned against discarding the defense by emphasizing the importance of statutory stare decisis[40] and federalism.[41]

Those defensive accounts tend to be more contextual than qualified immunity's critiques on doctrinal and policy grounds, but they stop short of a crucial question: Why has the Supreme Court chosen to retrench the doctrine time and time again, in spite of mounting criticism and the doctrine's apparent failures? What are its institutional interests in holding on to qualified immunity?

C. This Article's Contribution: An Institutional History and the Lessons of Marbury

To understand how qualified immunity ended up in its current impasse and find a way forward, it is necessary to examine the doctrine's history. This Article provides that missing history by looking at the modern doctrine's origins,[42] the institutional pressures and judicial philosophies that shaped its development, and the unforeseen events that precipitated its demise. The analysis begins by observing the striking parallels between *Pierson v. Ray*[43]—qualified immunity's origin case—and *Marbury v. Madison*.[44] In *Marbury*, the Court heard an individual's claim against a government officer and concluded that the officer had violated one of the individual's rights; however, the Court refused to award a remedy, holding that Congress's grant of original jurisdiction to hear the case was unconstitutional.[45] By stressing the importance of individual rights while "rationing" the remedies to vindicate them,[46] the Court managed to extricate itself from the political crossfires. Refusing the power that Congress had granted it, the Court enshrined a *new* authority—judicial review—and with it bolstered the judicial branch's independence and institutional legitimacy.[47]

This is what I call the *Marburian* move—a strategy of splitting the difference between individual rights and government accountability, while removing the Court from the political fray and enhancing the judiciary's power, independence, and legitimacy.

Connections to Substantive Rights, 92 VA. L. REV. 633, 639 (2006); Richard H. Fallon, Jr., *Asking the Right Questions About Officer Immunity*, 80 FORDHAM L. REV. 479, 480 (2011).

[40] *See* Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 NOTRE DAME L. REV. 1853, 1854 (2018).

[41] *See* Aaron L. Nielson & Christopher J. Walker, *Qualified Immunity and Federalism*, 109 GEO. L.J. 229, 299 (2020).

[42] The doctrine, of course, ultimately traces back to much older common-law concepts. *See generally, e.g.*, Baude, *supra* note 1; Keller, *supra* note 1. This Article chooses Pierson v. Ray as its origin point because there, for the first time, the Court recognized a qualified immunity for executive officers charged with civil rights violations under § 1983. 386 U.S. 547 (1967).

[43] 386 U.S. 547 (1967).

[44] 5 U.S. (1 Cranch) 137 (1803).

[45] *Id.* at 174–80.

[46] *See generally* Aziz Z. Huq, *Judicial Independence and the Rationing of Constitutional Remedies*, 65 DUKE L.J. 1 (2015); *see also* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1515 n.352 (1987) (discussing a "margin of underenforcement").

[47] ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 27–28 (6th ed., 2016).

I argue that qualified immunity was born out of a *Marburian* move, but that, over time, the doctrine departed from *Marbury*'s wisdom. This *Marburian* lens will allow us to understand the history of qualified immunity from an institutional perspective. Through incremental doctrinal innovations that reacted to inside and outside pressures, the Court fashioned qualified immunity in order to avoid political crossfire and enhance its judicial power, independence, and legitimacy. But over time, the Court foreclosed those doctrinal possibilities, maneuvered itself *into* the political crossfire, and began to jeopardize the independence and legitimacy it had created for itself.[48]

This Article's analysis of qualified immunity from an institutional and historical perspective has several upshots. First, it explains how qualified immunity ended up in its current confused state and why academic critiques have gone unheard. Second, it opens a vista onto a litigation strategy that may reform qualified immunity. Third, an institutional and historical analysis offers some insights on the nature of judicial power and the judiciary's role in our system of government.

This Article proceeds in five Parts. Part I situates *Pierson v. Ray*,[49] the origin case of qualified immunity, in its historical and doctrinal context. The discussion will spell out the close parallels between *Pierson* and *Marbury* and develop the analytical framework of the *Marburian* move. Part II traces how the modern qualified immunity standard emerged from *Scheuer v. Rhodes*[50] to *Harlow v. Fitzgerald*.[51] Under Justice Byron White's stewardship, two developments occurred: first, the qualified immunity standard became a purely objective legal inquiry; second, the standard was made the same for all executive officers, regardless of their rank (apart from the President of the United States). During that period, the doctrine closely followed *Marbury*'s wisdom by striking a balance between recognizing broadly available individual rights and selectively granting remedies to keep the Court above the political fray. Part III follows the Court's struggle to adhere to a *Marburian* balance in the period between *Harlow* (1982) and *Saucier v. Katz* (2001), and its slow departure from that balance. While some decisions continued to perform *Marburian* moves, Chief Justice Rehnquist began to undermine the *Marburian* ledger on the rights side. At the same time, Justice Scalia (and others) began to chip away on the remedies side by introducing a particularity requirement for the "clearly established" standard—a standard that would become more and more demanding over time. *Saucier* represents the last gasp in holding the *Marburian* middle ground. But, as Part IV of this Article describes, the devolution of qualified immunity into indecision and, effectively, endorsing much government misconduct became nearly inevitable after the changes that Chief Justice Rehnquist and Justice Scalia injected into the doctrine. Part V concludes with a litigation strategy to move away from the current qualified immunity standard.

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[48] *See infra* Parts III–IV.
[49] 386 U.S. 547 (1967).
[50] 416 U.S. 232 (1974).
[51] 457 U.S. 800 (1982).

I. *PIERSON V. RAY* AND THE *MARBURIAN* MOVE

A. Pierson*'s Oddly Conservative Holding*

But for some peculiar circumstances, the origin case of qualified immunity's fraught and winding history might have never come before the Supreme Court. Petitioner Robert Laughlin Pierson, an Episcopal minister and son-in-law to then–New York State Governor Nelson A. Rockefeller, had been on a "prayer pilgrimage" in the Deep South in September of 1961.[52] At the height of the Freedom Rider Movement, Pierson and twenty-seven other priests who were part of the Episcopal Society for Cultural and Racial Unity, were expressing their support for the Freedom Riders by traveling as an integrated group of Black and White ministers from New Orleans to Detroit.[53] On their way through Jackson, Mississippi, fifteen of them (three Black, twelve White) decided to sit in the "Whites-Only" waiting room to break Mississippi's segregation laws, be arrested, and serve as "witness[es to] focus attention on sham justice in support of segregation."[54] When they arrived at the waiting room, local police captain J.L. Ray and two officers promptly arrested them under § 2087.5.1 of the Mississippi Code for congregating "with intent to provoke a breach of the peace."[55] Local judge Jim Spencer, an Episcopalian himself, handed down the maximum sentence: a $200 fine and four months in jail, along with the reprimand that it was "the duty of all men who are professors of the Gospel to pay respectful obedience to the civil authority."[56] Following a telegram to Attorney General Robert Kennedy and a wave of outrage across the faithful community,[57] the convictions were overturned on appeal for lack of evidence.[58]

This could have been the end of the matter. Most participants in the broader Freedom Rider movement lacked the funds to affirmatively litigate their rights in court.[59] Not so Robert Pierson and his co-petitioners. Alleging wrongful arrest and false imprisonment in violation of their First Amendment Rights to free expression, they filed a civil damages suit under 42 U.S.C. § 1983 against Judge Spencer, Captain Ray, and the arresting officers. After a jury found for the defendants, the Fifth

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[52] RAYMOND ARSENAULT, FREEDOM RIDERS: 1961 AND THE STRUGGLE FOR RACIAL JUSTICE 433 (2006).

[53] *Id.*

[54] Reply Brief for Petitioner at 4, *Pierson*, 386 U.S. 547 (1967) (Nos. 79, 94).

[55] MISS. 1942 CODE § 2087.5.1(1), *invalidated by* Thomas v. Mississippi, 380 U.S. 524 (1965).

[56] ARSENAULT, *supra* note 52, at 434.

[57] *Id.* at 433–34.

[58] Brief for Petitioner at 5, *Pierson*, 386 U.S. 547 (1967) (Nos. 79, 94) [hereinafter *Pierson Petitioner's Brief*].

[59] ARSENAULT, *supra* note 52, at 439.

Circuit held that the Supreme Court's recent holding in *Monroe v. Pape*[60] precluded any executive officer from claiming immunity.[61] It also held, however, that no cause of action could be brought under § 1983 against Pierson because the priests' actions indicated that they had consented to the arrest.[62]

Pierson appealed to the Supreme Court, which reached the same result, but on different grounds. Correcting the Fifth Circuit's reading of *Monroe*, Chief Justice Warren held for a unanimous Court that § 1983 did not abrogate a police officer's common-law defense of good faith and probable cause to the common-law claim of false arrest and imprisonment.[63]

It seems odd that the Warren Court, a champion of civil rights and restraining local law enforcement practices,[64] would so resoundingly reverse a lower court applying the High Court's recently minted *Monroe* to vindicate the 1871 Civil Rights Act, a statute that had expressly been intended to curb lawlessness by local government officials in the Reconstruction South.[65] Why recognize a partial immunity for police officers in a case in which a Mississippi state court had dismissed the charges against civil rights activists,[66] where the segregationist state law enforced against Pierson and his companions had been invalidated by the time *Pierson* reached the Court,[67] and where there was evidence that local police had frequently arrested civil rights activists in efforts to enforce segregation?[68] The reasons will become clear when stepping back and considering the drift of the case law at the time, the Warren Court's broader agenda, and its institutional constraints, and the political pressures the it was facing.

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[60] 365 U.S. 167, 184 (1961) (holding that § 1983's "under color of [state law]" provision reaches conduct by a state police officer's "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law" (citation omitted)).

[61] Pierson v. Ray, 352 F.2d 213 (5th Cir. 1965).

[62] *Id.*

[63] *Pierson*, 386 U.S. at 555. The opinion was 8–1, but even the lone dissenter, Justice Douglas, only took issue with the separate holding on judicial immunity. *Id.* at 558–67 (Douglas, J., dissenting).

[64] *See* ED CRAY, CHIEF JUSTICE: A BIOGRAPHY OF EARL WARREN 289–300, 379–411, 432–42, 455–68 (1997); *see generally* MORTON HORWITZ, THE WARREN COURT AND THE PURSUIT OF JUSTICE (1998) (praising the Warren Court's progressivism).

[65] *See* Alfred Avins, *The Ku Klux Klan Act of 1871: Some Reflected Light on State Action and the Fourteenth Amendment*, 11 ST. LOUIS L.J. 331 (1967) (laying out the Congressional debate). For a compelling *judicial* account of § 1983's purpose to combat lawless conduct by the Ku Klux Klan, shielded by local judges, see Briscoe v. LaHue, 460 U.S. 325, 356–64 (1983) (Marshall, J., dissenting). By the time of the Freedom Rides, the Klan's influence in the South was alive and well. ARSENAULT, *supra* note 52, at 425.

[66] *Pierson Petitioner's Brief*, *supra* note 58, at *5.

[67] Thomas v. Mississippi, 380 U.S. 524 (1965) (citing Boynton v. Virginia, 364 U.S. 454 (1960)).

[68] ARSENAULT, *supra* note 52, at 433; *Pierson Petitioner's Brief*, *supra* note 58, at *9.

B. Pierson*'s Historical Context*

When the Supreme Court handed down *Pierson v. Ray* in 1967, it had to resolve two issues. First, it considered whether judges' absolute common-law immunity from damage suits for their judicial acts had survived the passage of § 1983. Second, it considered whether law enforcement officers' defenses of good faith and probable cause in a common-law tort for false arrest and imprisonment had survived.[69]

The Court quickly disposed of the first question: judicial immunity had been a bedrock principle since *Bradley v. Fisher*,[70] which had been decided shortly after the passage of the 1871 Civil Rights Act. If there was any doubt whether § 1983 had intended to abolish that immunity, the Court dispelled it by drawing on its broad holding in *Tenney v. Brandhove*,[71] that the 1871 Congress had not meant to abolish *any* common-law immunities.[72]

This set the stage for the question of police officer immunity: whichever defense or immunity existed for false arrest at common law would still be available. Chief Justice Warren found that, "[u]nder the prevailing view in this country," that defense consisted in a showing of probable cause that a law had been violated and the enforcing officer's good faith in the law's validity.[73] *Monroe v. Pape* had implied nothing to the contrary, and the defense was available even where, as here, the law which the officer enforced had been found unconstitutional in the interim.[74] In essence, *Pierson* instituted the principle "[a] policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does."[75]

Nor did the Supreme Court push the frontier of the law as it stood in 1967. At the time of *Pierson*, five circuit courts had already held that police officers sued under § 1983 for false arrest can invoke the good-faith and probable-cause defenses.[76] The

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[69] The Court also considered the subsidiary questions whether such a defense is available when the state law in question was later found unconstitutional and whether the officers could invoke *another* common-law defense: petitioners' (alleged) consent to arrest. Pierson v. Ray, 386 U.S. 547, 547 (1967).

[70] 80 U.S. (1 Wall) 335 (1871).

[71] 341 U.S. 367 (1951).

[72] *Pierson*, 386 U.S. at 554 (citing *Tenney*, 341 U.S. 367 (1871)). *But see generally* Avins, *supra* note 65.

[73] *Pierson*, 386 U.S. at 555.

[74] *Id.* at 555–56.

[75] *Id.* at 555.

[76] *See* Joyce v. Ferrazzi, 323 F.2d 931, 932–33 (1st Cir. 1963) (finding no § 1983 liability because "not every police error of law or fact arises to the dignity of a deprivation of a federally secured right, privilege or immunity"); Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949) ("There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors."), *cert. denied*, 339 U.S. 949 (1950);

only circuit that had contrary case law on the books had reversed itself in light of *Tenney v. Brandhove* and extensive federal case law in the lower courts.[77] Another circuit had granted police officers the good-faith and probable-cause defense in § 1983 suits for misapplying a traffic statute,[78] while yet another had granted local police officers absolute immunity by holding that they could not be sued under § 1983 at all.[79] The Fifth Circuit in *Pierson* was thus an outlier when it ruled that *Monroe v. Pape* foreclosed immunities for police officers sued under § 1983.[80] *Pierson* made only a passing reference to the broad circuit consensus, suggesting that it did not think of its decision as an innovation.[81] Qualified immunity thus emerged as a blessing of a stable inter-circuit consensus that seemed all but inevitable in the wake of *Bradley*'s and *Tenney*'s broad holdings.[82]

Mueller v. Powell, 203 F.2d 797, 800 (8th Cir. 1953) (finding that officers are liable, but stating that to escape § 1983 liability, "the officer must not act arbitrarily, but must exercise his discretion in a legal manner, using all reasonable means to prevent mistakes. In other words, he must . . . act[ ] in good faith . . . ." (quoting Russo v. Miller, 3 S.W.2d 266, 269 (Mo. Ct. App. 1928))); Pritchard v. Downie, 326 F.2d 323, 325 (8th Cir. 1964) (exempting officers from § 1983 liability because probable cause for arrest existed); Beauregard v. Wingard, 362 F.2d 901, 903 (9th Cir. 1966) ("[W]here probable cause . . . exist[s] civil rights are not violated by an arrest even though innocence may subsequently be established."); Marland v. Heyse, 315 F.2d 312, 314 (10th Cir. 1963) (holding that, in a § 1983 suit, it was for the jury to decide whether an arresting officer "was so arbitrary, unreasonable and without probable cause as to subject the plaintiff to a deprivation of rights guaranteed by the Constitution of the United States").

[77] Bauers v. Heisel, 361 F.2d 581, 585–88 (3d Cir. 1966) (holding, in light of *Tenney* and vast inter-circuit consensus, that § 1983 was not intended to derogate common-law immunities), *rev'g* Picking v. Pa. R. Co., 151 F.2d 240 (3d Cir. 1945) (denying immunity under § 1983), *cert. denied*, 386 U.S. 1021 (1967).

[78] Hurlburt v. Graham, 323 F.2d 723, 725 (6th Cir. 1963) (exempting from § 1983 liability police officers who allegedly gave inaccurate testimony in a traffic accident case that applied the wrong statute); *see also* Gabbard v. Rose, 359 F.2d 182, 185 (6th Cir. 1966) ("No one has a constitutional right to be free from a law officer's honest misunderstanding of law or facts in making [an] arrest." (quoting Agnew v. City of Compton, 239 F.2d 226, 231 (9th Cir. 1956))); Downie v. Powers, 193 F.2d 760, 764 (10th Cir. 1951) (ruling that "[d]iligent and conscientious effort is all that is required" of law enforcement officials tasked with keeping the peace).

[79] Smith v. Dougherty, 286 F.2d 777 (7th Cir. 1961), *cert. denied*, 368 U.S. 903 (1961).

[80] William Baude has critiqued qualified immunity for not being grounded in the common law. Baude, *supra* note 1, at 50–61. While this may be correct, it must be noted that the federal courts at the time of *Pierson* thought otherwise.

[81] *See* Pierson v. Ray, 386 U.S. 547, 555 n.9 (1967).

[82] *See id.* at 553–55 (first citing Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1871); and then citing Tenney v. Brandhove, 341 U.S. 367 (1951)); *see also* Sheldon Nahmod, *Section 1983 Is Born: The Interlocking Supreme Court Stories of* Tenney *and* Monroe, 17 LEWIS & CLARK L. REV. 1019 (2013) (discussing Justices Frankfurter and Douglas's disagreement over the meaning and scope of § 1983 and their varying concern for federalism and individual rights, respectively).

The political backdrop of the time sheds further light on this development. Although the Court's opinion in *Pierson* opinion barely mentions the civil rights context in which the case arose, the Court, in 1967, was keenly aware of the political delicacy of a private individual's suit to hold Southern state law enforcement officers accountable for enforcing a segregationist law.[83] Mark Tushnet, among many others, has observed that "the Warren Court [was] an actor in 1960s politics."[84] It certainly felt the political and social pressure that had been mounting ever since its civil rights decisions in *Brown v. Board of Education*,[85] *Heart of Atlanta Motel, Inc. v. United States*,[86] and *Katzenbach v. McClung*,[87] as well as its criminal procedure holdings in *Massiah v. United States*,[88] *Escobedo v. Illinois*,[89] and *Miranda v. Arizona*.[90] *Pierson* was argued on January 11, 1967,[91] just two months after the Democratic party and Lyndon Johnson's Great Society coalition had suffered a stinging loss in the 1966 midterm elections,[92] despite its recent shift from the war on poverty to the war on crime.[93] "[A]s the Great Society coalition decayed, so did the coherence of the

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[83] *See, e.g.*, Brief for Respondents in Cause No. 79 and Petitioners in Cause No. 94, at 5, *Pierson*, 386 U.S. 547 (Nos. 79, 94) [hereinafter *Pierson Respondent's Brief*]; Oral Argument at 56:10, *Pierson*, 386 U.S. 547 (No. 79), https://www .oyez.org/cases/1966/79 ("I'd like to get to the immunity of the police officers because if there is anyone that I feel . . . here that needs representation . . . it is the policeman . . . in these troubled times.").

[84] Mark Tushnet, *The Warren Court as History: An Interpretation*, *in* THE WARREN COURT IN HISTORICAL AND POLITICAL PERSPECTIVE 1, 2 (Mark Tushnet ed., 1993); *see also* LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS (2000).

[85] 347 U.S. 483 (1954) (holding school segregation under the "separate but equal" doctrine unconstitutional).

[86] 379 U.S. 241 (1964) (upholding the constitutionality of Title II of the 1964 Civil Rights under the Commerce Clause).

[87] 379 U.S. 294 (1964) (holding that the Commerce Clause empowers Congress to prohibit racial discrimination in restaurants).

[88] 377 U.S. 201 (1964) (holding testimonial statements deliberately elicited from a criminal defendant by police after the right to counsel attaches constitutionally inadmissible at trial).

[89] 378 U.S. 478 (1964) (overturning the conviction of a criminal defendant who had been interrogated without counsel despite repeated requests to see his lawyer).

[90] 384 U.S. 436 (1966) (holding that the Fifth Amendment requires warnings securing the right against self-incrimination before the beginning of a custodial interrogation). For a discussion of public outcries in response to those cases, see CRAY, *supra* note 64, at 460–61, and POWE, *supra* note 84, at 399.

[91] 386 U.S. 547, 547 (1967).

[92] *See* BENJAMIN J. GUTHRIE UNDER DIRECTION OF W. PAT JENNINGS, CLERK OF THE HOUSE OF REPRESENTATIVES, STATISTICS OF THE CONGRESSIONAL ELECTION OF NOVEMBER 8, 1966 (1967), http://clerk.house.gov/member_info/electionInfo/1966election.pdf [https://perma.cc/2Q7L-6L2C]; *see also* POWE, *supra* note 84, at 400.

[93] *See generally* ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA (2016).

Warren Court."[94] Justin Driver has poignantly documented this unraveling in his discussion of the Court's surprisingly conservative (opinions even by the standards of the time)throughout Chief Justice Warren's tenure.[95] In Ed Cray's words, "the Warren Court was not insensitive to the needs of law enforcement, particularly the safety of police on the streets."[96] The Court had become especially hesitant to impose further restrictions on the police after the public backlash to *Miranda* in 1966.[97] Two years later, Justice Douglas in his dissent to *Terry v. Ohio* squarely pointed to "hydraulic pressures . . . [that] bear heavily on" the Court to water down constitutional guarantees and give the police the upper hand.[98] Times were changing. Soon, the Warren Court would hear the Nixon campaign's clarion calls of "law and order" and "Impeach Earl Warren!"[99]

The birth of qualified immunity therefore seems unsurprising considering its legal, political, and institutional contexts. After the Warren Court's broad expansion of individual rights, *Pierson* sought to ease the pressure on the Court by "creating a margin of underenforcement" of those rights under § 1983.[100] It handed an olive branch to state law enforcement by giving it room to maneuver, while curtailing *Monroe v. Pape* and the reach of a Congressional statute that had given the federal courts vast enforcement powers. And in the midst of a standoff between the people and state governments, the Court had installed itself as an arbiter: Section 1983 would not automatically trigger liability if a constitutional right had been violated—the Court had interposed a fault scheme by which courts had room to decide whether officers were shielded.[101] The Court had refrained from exercising its power to impose strict liability—and revived the power to preside over those very same disputes. It is this strategic maneuver that I term the *Marburian* move. A brief analysis of *Marbury v. Madison* will bring this analytical framework into view.

C. Pierson*'s* Marburian *Move*

Robert McCloskey treats *Marbury v. Madison* as a paradigm case, "a masterwork of indirection, a brilliant example of . . . advanc[ing] in one direction while

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[94] Tushnet, *supra* note 84, at 19.

[95] Justin Driver, *The Constitutional Conservatism of the Warren Court*, 100 CALIF. L. REV. 1101 (2012).

[96] CRAY, *supra* note 64, at 466.

[97] *See* POWE, *supra* note 84, at 394, 399, 405–08.

[98] Terry v. Ohio, 392 U.S. 1, 39 (1968) (Douglas, J., dissenting); *see also* POWE, *supra* note 84, at 407.

[99] *See* POWE, *supra* note 84, at 391, 407–08 ("*Miranda* was the highpoint of the Warren Court's criminal procedure revolution and set the Court on a collision course with the 1968 presidential election."); MICHAEL J. GRAETZ & LINDA GREENHOUSE, THE BURGER COURT AND THE RISE OF THE JUDICIAL RIGHT 2–4 (2016); *see also* Tushnet, *supra* note 84, at 20.

[100] Amar, *supra* note 46, at 1515 n.352.

[101] *See* Pierson v. Ray, 386 U.S. 547, 557 (1967).

[the] opponents are looking in another," and "of rejecting and assuming power in a single breath."[102] The facts and holdings of *Marbury* are well-known to every law student.[103] In 1801, William Marbury was denied his commission as justice of the peace after the newly elected President Thomas Jefferson instructed his Secretary of State, James Madison, to hold on to all commissions that had not yet been dispatched.[104] Demanding that his commission be honored, Marbury brought a mandamus action directly in the Supreme Court. At the time, the Court was facing heavy political pressure after the outgoing Federalist President John Adams had appointed John Marshall as Chief Justice, created six new appellate courts, and filled them with sixteen pro-Federalist judges, appointed at the eleventh hour.[105] The Court therefore needed to tread lightly.

Marbury, in a unanimous decision penned by Chief Justice Marshall, held that, under "a government of laws, and not of men," Marbury had a legal right to his position, and that mandamus was indeed the proper remedy.[106] In the same breath, however, the Court withheld that remedy by holding that the statutory provision authorizing the Court to order mandamus—Section 13 of the 1789 Judiciary Act—was unconstitutional.[107] In teeing up its holding in this way, the Court achieved several goals at once. It insisted on the principle of government accountability under the law, and that, generally, government officials are not exempt from nondiscretionary legal duties. Yet, in handing the executive a victory in this particular case, the Court avoided an interbranch confrontation at a time of political weakness. By the same token, it established the principle of judicial supremacy—designating itself the decider of last resort in disputes over the constitutionality of the nation's laws.[108]

Marbury's genius lay in handing a small victory to an antagonistic executive and "high-mindedly refus[ing]" a statutory grant of jurisdiction from an allied Congress,[109] all the while creating an independent power of its own. The Court did so by insisting on the broad availability of individual rights, but being elusive on the remedy. The *Marburian* move averted a political standoff, created a legal innovation, and strengthened the Court as an institution.

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[102] MCCLOSKEY, *supra* note 47, at 25, 26.

[103] For more detailed accounts, see WILLIAM E. NELSON, *MARBURY V. MADISON*: THE ORIGINS AND LEGACY OF JUDICIAL REVIEW 54–70 (2000), and WILLIAM H. REHNQUIST, THE SUPREME COURT 21–34 (Random House 2001) (1987). Perhaps the authoritative account of *Marbury* can be found in William W. Van Alstyne, *A Critical Guide to* Marbury v. Madison, 1969 DUKE L.J. 1 (1969). On the issue of verifying and pinning down which facts are the important ones, see Sanford Levinson & Jack M. Balkin, *What Are the Facts of* Marbury v. Madison*?*, 20 CONST. COMMENT. 255 (2003).

[104] Van Alstyne, *supra* note 103, at 4.

[105] *Id.* at 3–4.

[106] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163, 173 (1803).

[107] *Id.* at 173–80.

[108] *Id.* at 177–78, 180.

[109] MCCLOSKEY, *supra* note 47, at 26.

Pierson v. Ray closely mirrors the *Marburian* move. It handed a small victory to law enforcement, declined to exercise the broad statutory grant of the 1871 Civil Rights Act to enforce federal rights against lawless state actors, and gave courts the last word on whether police officers should be held liable for violating an individual's federal rights.[110] Here, too, the Court backed down in a time of political pressure. The *Marburian* framework will serve as a framework to guide this Article's historical analysis of qualified immunity. It will uncover how the Court's qualified immunity decisions initially followed *Marbury*'s wisdom—and how they came to abandon that wisdom as time went on.

II. FOLLOWING *MARBURY*'S WISDOM: CRAFTING THE NEW QUALIFIED-IMMUNITY STANDARD

This Part will trace how the Supreme Court fashioned the modern qualified-immunity standard. In *Scheuer v. Rhodes*,[111] the Court expanded *Pierson*'s fairly narrow holding into the broad proposition that executive officers should receive *some* form of immunity for their official acts.[112] As the load of federal civil rights cases began to grow, *Scheuer* raised many questions about the contours and applicability of the new standard. The Court, under the stewardship of Justice Byron White, addressed these questions by shaping the standard in two major ways: making it wholly objective and making it uniform for every official performing executive acts.

A. Scheuer v. Rhodes*: Broadening the Defense and Raising New Questions*

1. An Atmosphere "Rife with Political Passion"

Seven years after *Pierson*, the Supreme Court again confronted the question of officer immunity in a civil damages suit—this time in *Scheuer v. Rhodes*. *Scheuer* arose from the circumstances surrounding the infamous Kent State University shooting on May 4, 1970. At the time, the war in Vietnam had taken center stage.[113] When Nixon announced on April 28 that the United States had expanded the war into

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[110] An unbridled application of *Monroe v. Pape* to give effect to § 1983's strict liability scheme would not have given the judiciary as much room to maneuver as it did under the fault scheme of probable cause and good faith. The difference between *Marbury* and *Pierson* is of course that the Court held a congressional act unconstitutional in the former, and only created a defense to one in the latter. But this is a difference in degree, not in kind, especially given the later developments that progressively hollowed out § 1983. The other—for our purposes, inconsequential—difference is the statutory remedy involved (mandamus versus money damages).

[111] 416 U.S. 232, 241–44, 247–48 (1974).

[112] *Id.* at 241–42, 247–48.

[113] BRUCE J. SCHULMAN, THE SEVENTIES: THE GREAT SHIFT IN AMERICAN CULTURE, SOCIETY, AND POLITICS 13–14 (2001).

Cambodia, student protests broke out across the country.[114] The protests came at an inopportune moment for Ohio Governor James A. Rhodes, who had been running as a law-and-order candidate in a hotly contested Republican Senatorial primary at the time.[115] When protestors burned down an ROTC house on May 2,[116] he publicly vowed to "eradicate the problem"[117] and gave National Guards Adjutant General Sylvester Del Corso the authority to move the troops onto Kent State's campus.[118] In the hours that followed, eight students were injured and four were shot dead.[119]

The victims' families brought a wrongful death suit against the Governor and various Guardsmen under § 1983. The district court dismissed the complaints before the defendants had even filed their answers, holding that the suit was effectively against the State of Ohio and thus barred by the Eleventh Amendment.[120] In affirming the district court, the Sixth Circuit added that the Governor and Guardsmen were entitled to absolute executive immunity, accepting the lower court's judicial notice that the protestors had created a state of insurrection.[121] In an atmosphere "rife with political passion"[122] as government and citizens both accused each other of lawlessness, the Supreme Court was called upon as the final arbiter between the state authorities and the people.

2. *Scheuer*'s *Marburian* Move

The *Scheuer* Court performed another deft *Marburian* move by allowing the victims to have their day in court, while avoiding the case's political pitfalls. At the outset, *Scheuer v. Rhodes* rejected the state sovereign immunity argument. Extending the application of *Ex parte Young*[123] from injunctive actions to damages actions, the Court held that the Eleventh Amendment did not bar suits against officials in their individual capacity, reasoning that state officers who violate the Constitution were "stripped of [their] official or representative character and [are] subjected . . . to the

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[114] *Id.* at 43–44.

[115] Petitioner's Brief at 59, *Scheuer*, 416 U.S. 232 (1974) (No. 72-1318) [hereinafter *Scheuer Brief*].

[116] Brief of the Nat'l Council of the Churches of Christ in the U.S.A. et al. as Amici Curiae at 6, *Scheuer*, 416 U.S. 232 (1974) (Nos. 72-1318, 72-914) [hereinafter *Scheuer Church Brief*].

[117] *Scheuer Church Brief*, *supra* note 116, at 6.

[118] *Scheuer Church Brief*, *supra* note 116, at 5–6.

[119] John Kifner, *4 Kent State Students Killed by Troops*, N.Y. TIMES (May 5, 1970) at A1.

[120] *Scheuer Petitioner's Brief*, *supra* note 115, at *8–10.

[121] Krause v. Rhodes, 471 F.2d 430, 437–38, 440 (6th Cir. 1972), *rev'd sub nom. Scheuer*, 416 U.S. 232; *see also Scheuer Petitioner's Brief*, *supra* note 115, at 19.

[122] *Scheuer Petitioner's Brief*, *supra* note 115, at *59.

[123] 209 U.S. 123 (1908).

consequences of [their] individual conduct."[124] Next, however, Chief Justice Burger, writing for a unanimous Court,[125] granted a partial victory to the State defendants. While executive officials' immunity was not be absolute, it had to be proportionate to "the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time."[126] Courts could consider whether there were "reasonable grounds for the belief formed at the time . . . in light of all the circumstances" and whether the officer had a "good-faith belief"[127] that his conduct was lawful.

With this unspecific standard, the Court managed to vindicate individual rights by overturning two lower courts that had been swept up in the underlying political controversy. And in *Marburian* fashion, it enhanced the authority of the courts. Federal courts became the forum in which to defuse and depoliticize contentious clashes between the people and state authorities.[128] By splitting the difference between the two sides, the Court again curtailed § 1983's jurisdictional grant, increased the judiciary's power and independence, and avoided getting caught in a political crossfire. Indeed, the *New York Times* lauded *Scheuer* for "uphold[ing] the [decedents' families'] right . . . to a trial on the merits of charges that their civil rights had been violated in the campus demonstrations."[129] Meanwhile, the decedent Scheuer's mother was "very pleased that we're finally getting something done."[130] And the defendant Adjutant General Del Corso remarked that he was "not worried, but [also] not elated" by the Court's decision.[131]

3. New Questions and a *Marburian* Mover

From an institutional standoff, the Court had emerged with enhanced judicial power. But now that the courthouse doors had been opened, the Court's new, undefined immunity standard raised three new questions. First, should courts emphasize the objective component of reasonable grounds, or the subjective component of the

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[124] *Scheuer*, 416 U.S. at 237 (quoting *Ex parte Young*, 209 U.S. at 159–60).

[125] *Id.* at 233. Justice Douglas had recused himself, though. Warren Weaver, Jr., *Parents of Kent Victims Can Sue, High Court Says*, N.Y. TIMES (Apr. 18, 1974) at 1.

[126] *Scheuer*, 416 U.S. at 247.

[127] *Id.* at 247–48.

[128] Compare the *Scheuer* Court's cryptic reference to the events as "the same period of alleged civil disorder on the campus of Kent State University in Ohio during May 1970, which was before us, in another context, in *Gilligan v. Morgan*," *id.* at 234 (citation omitted) with the lower courts' judicial notice that there was "a mob in insurrection." Krause v. Rhodes, 471 F.2d 430, 435 (6th Cir. 1972), *rev'd sub nom. Scheuer*, 416 U.S. 232.

[129] Weaver, *supra* note 125.

[130] *Id.* at 30 (internal quotations omitted).

[131] *Id.* (internal quotations omitted).

officer's good-faith intent?[132] Second, how would the immunity standard "vary[] [by] the scope of discretion and responsibilities of the office"?[133] And third, how should courts reliably distinguish executive officials from legislative or judicial officers when their functions overlapped?[134] The Court would also have to grapple with how the immunity standard would fit into the larger legal landscape. The most pressing questions here were: Should the immunity standard respond to the increased load of § 1983 cases that came in the wake of the Court's expansion of constitutional and statutory rights?[135] Should qualified immunity take federalism concerns into account by striking a proper balance between federal judicial power and state government actors?[136] And should the immunity regimes for federal officials sued under *Bivens* and state officials sued under § 1983 be the same or distinct?[137]

The Court would hammer out answers to all of these questions in the next eight years, which culminated in the twin cases *Nixon v. Fitzgerald*[138] and *Harlow v. Fitzgerald*.[139] The main driving force behind that development was Justice White.[140] As the Court's "extremely influential" center Justice in the 1970s and early 1980s, "his effect on the Court's agenda as well as its direction had never been greater."[141] Keenly aware of the Court's institutional concerns,[142] Justice White spearheaded two major developments in the qualified immunity doctrine: turning the standard into a purely objective one, and ensuring that the standard would be uniform across all officials performing executive acts.[143] The cases that advanced those two developments hewed closely to the wisdom of *Marbury*.

B. Towards an Objective Standard: The "Promise of § 1983"

1. *Wood v. Strickland*: Splitting the Prongs

Wood v. Strickland was "an altogether extraordinary case [in which e]veryone seem[ed] to have cast reason to the winds."[144] On February 18, 1972, teenagers

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[132] *See infra* Section II.B.
[133] *See infra* Section II.C.
[134] *See infra* Section II.C.
[135] *See infra* Section II.B.2.
[136] *See infra* Section II.C.
[137] *See infra* Section II.C.
[138] 457 U.S. 731 (1982).
[139] 457 U.S. 800 (1982).
[140] *See infra* Sections II.B, II.C, & III.A. Justice White's deep influence seems to have been overlooked in the few discussions that touch on qualified immunity's history. *See, e.g.*, Crocker, *supra* note 26, at 1429–31 (focusing on "Justice Powell's [r]elevance").
[141] DENNIS J. HUTCHINSON, THE MAN WHO ONCE WAS WHIZZER WHITE: A PORTRAIT OF JUSTICE BYRON R. WHITE 357, 382 (1998).
[142] *Id.* at 346, 355–56, 365, 373–74.
[143] *See infra* Sections II.B and II.C.
[144] Bench Memorandum from Ron Carr, Law Clerk, U.S. Supreme Court, to Lewis F.

Peggy Strickland, Virginia Crain, and Jo Wahl were expelled from their high school in Polk County, Arkansas, for spiking the punch at a school-sponsored function of *Future Homemakers of America* with a bottle of 3.2% malt liquor.[145] Their concoction had an alcohol content of 0.91%.[146] Nonetheless, the school board expelled them for having violated a school regulation prohibiting the use of an "intoxicating beverage" at a school-sponsored function.[147] When the school board refused to reconsider its decision, Peggy's and Virginia's parents filed a § 1983 suit, alleging they had been deprived of due process.[148] The district court directed verdicts for the defendant school board officials because the parents failed to show malice under the qualified immunity's good-faith requirement standard.[149] In so ruling, the district court treated the qualified-immunity standard as entirely subjective.[150] For the Eighth Circuit, however, "[t]he test [was] an objective, rather than a subjective, one": whether defendants acted in good faith was to be determined by considering at all the circumstances under a general reasonableness standard.[151] The Eighth Circuit also held that the school board, having misconstrued its own regulation, had deprived the school girls of substantive due process, and reversed.[152]

To Justice White, this case presented on opportunity to make the qualified-immunity standard more objective. He did so by clarifying that the *Scheuer* standard, properly construed, consisted of two prongs. To be entitled to immunity, a school board official had to show that "he [neither] knew [nor] reasonably [could] have known that [his] action . . . would violate the constitutional rights of the student affected" and that he did not "[take] the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student."[153] "Any lesser standard," Justice White contended, "would deny much of the promise of § 1983."[154]

In making this innovation, Justice White capitalized on a false dichotomy between the district and appellate courts' viewpoints. The Eighth Circuit's objective standard had been an outlier among the federal courts.[155] As commentators at the time observed, taking the middle ground between the Eighth Circuit and the district

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Powell, Jr., Assoc. Justice, U.S. Supreme Court (Oct. 14, 1974), 414 POWELL PAPERS 15, https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1710&context=casefiles [https://perma.cc/3DX5-5U4Q].

[145] Brief for Respondent, Wood v. Strickland, 420 U.S. 308 (1975) (No. 73-1285), 1974 WL 186252, at *5–6.

[146] *Id.* at *5–7.

[147] *Id.* at *7–12. *See also Wood*, 420 U.S. at 311, 311 n.3.

[148] Strickland v. Inlow, 384 F. Supp. 244 (W.D. Ark. 1972).

[149] *Id.* at 247, 250–53.

[150] *Id.* at 250–51.

[151] Strickland v. Inlow, 485 F.2d 186, 191 (8th Cir. 1973).

[152] *Id.* at 190.

[153] *Wood*, 420 U.S. at 322.

[154] *Id.*

[155] *See id.* at 315, 315 n.7 (listing cases that are all wholly or partially subjective).

court was thus a novel move in the direction of objectivity.[156] Justice Powell, too, picked up on this innovation and, along with three other Justices, dissented on this issue, arguing that the objective prong was a new, onerous requirement.[157] It, in effect, required 20,000 school board officials to keep abreast of a complex, rapidly evolving area of constitutional law.[158]

2. Broader Concerns

At the time, Justice White's new objective prong may seem unwise from a *Marburian* perspective. While an in-depth discussion of the due process revolution is beyond the scope of this Article, it was clear to scholars and judges at the time that federal rights had been broadly and innovatively expanded under procedural and substantive due process.[159] Indeed, shortly after *Wood* had been briefed and argued, the Supreme Court recognized education as a protected liberty interest under the Fourteenth Amendment in *Goss v. Lopez*.[160] The Court thus found itself at an early crossroads in its qualified-immunity jurisprudence: as federal rights expanded, more and more § 1983 cases were brought into the federal courts.[161] Theodore Eisenberg observed that, in light of this expansion, "there are at least two competing visions of section 1983": restricting it to "address[] a limited historical problem in post–Civil War race relations" on the one hand, and making it "the primary civil mechanism for vindicating all constitutional rights" on the other.[162] Justice White's adding of an objective prong to the qualified-immunity analysis thus promoted *Marbury*'s wisdom: as the Court was holding up the banner for federal rights, it expanded its range of motion on the remedies side by creating a more predictable—and judicially

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[156] *See, e.g.*, Patricia L. Stearns, Wood v. Strickland*: Objectifying the Standard of Good Faith for School Board Members in Defense to Personal Liability Under Section 1983*, 10 LOY. L.A. L. REV. 149, 158, 167–70, 167 nn.72–87 (1976); Richard Briffault, *Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1212–17 (1977).

[157] *Wood*, 420 U.S. at 329 (Powell, J., dissenting).

[158] *Id.* at 331.

[159] *See, e.g.*, Erwin N. Griswold, *The Due Process Revolution and Confrontation*, 119 U. PA. L. REV. 711 (1971); William G. Buss, *Procedural Due Process for School Discipline: Probing the Constitutional Outline*, 119 U. PA. L. REV. 545 (1971); Henry J. Friendly, *"Some Kind of Hearing,"* 123 U. PA. L. REV. 1267, 1268 (1975); JERRY L. MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE 9 (Yale Univ. Press 1985).

[160] 419 U.S. 565, 572–76 (1975).

[161] *See* Stearns, *supra* note 156, at 149–53, 149 nn.1–13 (discussing the trend and collecting cases); Theodore Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482, 483 (1982) ("Rapid expansion of constitutional guarantees inevitably strains a provision that associates a private damages action with each new constitutional right."); Brief for Petitioner, Procunier v. Navarette, 434 U.S. 555 (1978) (No. 76-446), 1977 WL 189397, at *16, 16 n.24 (discussing increase federal civil rights caseloads: approximately 300 in 1960, and 8,400 in 1974).

[162] Eisenberg, *supra* note 161, at 483.

administrable—objective standard.[163] This backdrop, which was by no means restricted to the educational rights,[164] illustrates the Court's institutional concerns at the time it decided *Wood v. Strickland*: docket management and diminishing judicial independence; potential politicization of the courts; and threats to judicial legitimacy in becoming reviewing bodies for state judicial decisions. Justice White's addition of an objective component to the qualified-immunity inquiry thus ran counter to *Marbury*'s wisdom, as it seemed to place a thumb on the scale for plaintiffs on the rights side while beginning to empower federal courts to judiciously administer the remedies side.

3. *Procunier v. Navarette* and *Harlow v. Fitzgerald*: Securing the Objective Standard

The *Marburian* wisdom of Justice White's move soon became apparent in *Procunier v. Navarette*.[165] In this decision, Justice White initially aspired to drop the subjective component.[166] While ultimately unsuccessful, he managed to de-emphasize the subjective prong by holding that claiming mere negligence could never meet the malice requirement.[167] At the same time, he made the objective prong more permissible by lifting *Wood*'s dictum that the allegedly violated constitutional right had to be "clearly established"[168] into the qualified-immunity standard.[169] This tightening was another innovation, as the question before the Court revolved around whether

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[163] Wood v. Strickland, 420 U.S. 308, 330–31 (1975) (Powell, J., dissenting). Relatedly, some commentators and conservative members of the Court began to raise federalism concerns. A permissive § 1983 liability scheme to enforce broad-sweeping constitutional rights threatened to draw traditionally local decision-making powers—such as school discipline—into the federal forum. Brief for Petitioner, Wood v. Strickland, 420 U.S. 308 (1975) (No. 73-1285), 1974 WL 186251, at *22–23; *see also Developments in the Law: Academic Freedom*, 81 HARV. L. REV. 1045, 1051–55 (1968). Even more worryingly, if a state or local claim was lost, § 1983 seemed to open an avenue to relitigating those claims in federal court, so long as a constitutional hook could be found. Paul v. Davis, 424 U.S. 693, 699–701 (1976). According to Justice Rehnquist, combining § 1983 with the due process revolution risked "mak[ing] of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States." *Paul*, 424 U.S. at 701.

[164] Stearns, *supra* note 156, at 149–51.

[165] 434 U.S. 555, 561 (1978). Here, a prisoner had filed a § 1983 suit against state prison officials for knowingly, or alternatively, inadvertently, interfering with [his outgoing] mail in violation of his First Amendment right to free expression and his due process rights. *Id.* at 555–58.

[166] Letter from Byron R. White, Assoc. Justice, U.S. Supreme Court, to Lewis F. Powell, Jr., Assoc. Justice, U.S. Supreme Court (May 21, 1982), *in* 84 POWELL PAPERS at 77, https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1139&context=casefiles [https://perma.cc/468G-ZD63].

[167] *Navarette*, 434 U.S. at 565–66.

[168] *Wood*, 420 U.S. at 322.

[169] *Navarette*, 434 U.S. at 562. The right now had to be "clearly established at the time of [the] challenged conduct." *Id.*

an allegation that a state official acted negligently when violating a plaintiff's federal rights was insufficient to overcome the qualified-immunity standard's subjective bad-faith prong.[170] Justice White continued to thread the needle in *Kissinger v. Halperin*,[171] in which his vigorous arguments in favor of an objective standard eroded Justice Powell's bare majority and caused the eight Justices on the case to split four-to-four.[172]

Thus, when *Harlow v. Fitzgerald*, penned by Justice Powell, dropped the subjective prong in the late drafting stages,[173] that change did not come out of nowhere. Rather, it was the result of an eight-year effort by Justice White, aided by several opportune factors at the time. First, the Court was just as splintered on the qualified-immunity standard for high-ranking officials as it had been in *Halperin*. As Justice Powell confided to his law clerk Richard Fallon, "we probably would have a badly fractured Court if I retain the [subjective] 'malice' component."[174] But, persuaded now that Justice White's position on a purely objective standard was "basically right," Justice Powell reasoned that "Byron thinks . . . that the Chief and possibly even Rehnquist—would join this reformulation of the standard [in objective terms]."[175] A purely objective standard promised a strong majority in a high profile case. Such a prospect was even more compelling to Justice Powell when considering that, in the companion case *Nixon v. Fitzgerald*, the Justices was fiercely split along ideological lines.[176]

Second, Justice Powell was especially eager to compromise if he could win the vote of Justice Rehnquist, who had taken the position four years earlier that all federal executive officials should receive absolute immunity.[177] Making the standard an objective one would turn qualified immunity into a purely legal analysis that

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[170] The question that the Supreme Court certified was "[w]hether negligent failure to mail certain of a prisoner's outgoing letters states a cause of action under section 1983?" *Id.* at 570 n.6. *But see id.* at 566–67 (Burger, C.J., dissenting) ("I dissent because the Court's opinion departs from our practice of considering only the question upon which certiorari was granted or questions 'fairly comprised therein.'" (internal citation omitted)).

[171] 452 U.S. 713 (1981).

[172] GRAETZ & GREENHOUSE, *supra* note 99, at 319; *see generally* Paul J. Wahlbeck et al., Kissinger v. Halperin, *452 U.S. 713 (1981)*, *in* THE BURGER COURT OPINION WRITING DATABASE, http://supremecourtopinions.wustl.edu/index.php?rt=pdfarchive/details/2091 [https://perma.cc/22TL-J8E5].

[173] The Court had granted certiorari in this case on June 22, 1981, heard oral argument on November 30, 1981, and announced its decision on June 24, 1982. Justice Powell seems to have concluded he could garner support for an objective standard in early March 1982. *See* Memorandum from Lewis F. Powell, Jr., Assoc. Justice, U.S. Supreme Court, to Richard Fallon, Law Clerk, U.S. Supreme Court (Mar. 1, 1982), *in* 84 POWELL PAPERS, *supra* note 166, at 3–4 [hereinafter Powell Memo. to Fallon].

[174] *Id.*

[175] *Id.*

[176] *See infra* Section II.C.2.

[177] Butz v. Economou, 438 U.S. 478, 517–18, 525–30 (1978) (Rehnquist, J., dissenting).

would facilitate the elimination of insubstantial lawsuits before they went to trial[178]—a key concern for Justice Rehnquist.[179]

Third, with a purely objective standard on the cards, Justice White was willing to use his influence to bring Justices Brennan and Marshall into majority.[180] In the end, Justice Powell, with Justice White's support,[181] was able to draw together an eight-member majority to sign on to the new standard that "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[182]

Justice Powell, driven by "strong institutional reason[s] for avoiding fractionalization,"[183] managed to perform a *Marburian* move in *Harlow*: The objective standard, which explicitly sought to balance the "vindication of constitutional guarantees" against government efficiency,[184] was a middle ground between absolute immunity that some members of the Court had favored, and a more permissive qualified immunity standard. It drew together a strong majority and managed to avoid the charge of being a politically driven outcome.[185] *Harlow* also created a new judicial authority: the objective standard turned the immunity question into a question of law that was for judges to decide, not juries.[186]

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[178] Harlow v. Fitzgerald, 457 U.S. 800, 817 (1982).

[179] *See supra* note 163 and accompanying text.

[180] *See* Letter from Richard H. Fallon, Law Clerk, U.S. Supreme Court, to Lewis F. Powell, Jr., Assoc. Justice, U.S. Supreme Court (May 27, 1982) ("What to do? [Justice Brennan] has not joined the opinion. According to his clerks, he and several others are awaiting the lead of [Justice White]."), *in* 84 POWELL PAPERS, *supra* note 166, at 96.

[181] *See* Powell Memo. to Fallon, *supra* note 173, at 3–4; *see also* Letter from Lewis F. Powell, Jr., Assoc. Justice, U.S. Supreme Court, to Byron R. White, Assoc. Justice, U.S. Supreme Court (June 7, 1982), *in* 84 POWELL PAPERS, *supra* note 166, at 115 ("I am grateful to you for your help. At this season of the year, one's own problems more than suffice to overwhelm. At least mine do!").

[182] *Harlow*, 457 U.S. at 818.

[183] Draft Letter from Lewis F. Powell, Jr., Assoc. Justice, U.S. Supreme Court, to Warren E. Burger, Chief Justice, U.S. Supreme Court (Dec. 16, 1981), *in* 81 POWELL PAPERS at 120, https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1134&context=casefiles [https://perma.cc/JSJ7-BT5B].

[184] *Harlow*, 457 U.S. at 814.

[185] *See* Linda Greenhouse, *High Court Holds President Immune from Damage Suits*, N.Y. TIMES (June 25, 1982), *in* 81 POWELL PAPERS, *supra* note 183, at 238–39 (focusing on Nixon v. Fitzgerald); Fred Barbash, *Presidents Given Immunity from Suits*, WASH. POST, June 25, 1982), *in* 81 POWELL PAPERS, *supra* note 183, at 234–35.

[186] *Harlow*, 457 U.S. at 816–18, 816 n.27. Indeed, Justice Powell explicitly mentioned this to his law clerk Richard Fallon during the drafting process of *Harlow*. *See* Powell Memo. to Fallon, *supra* note 173, at 3 ("[Justice White] agrees now that virtually every plaintiff can make a jury case by alleging malice—a subjective issue of an officer's good faith. . . . [But] this should be a question of law for the court to decide."); *see also* Chen, *supra* note 23, at 232, 262–70.

While the trend towards objectification followed a fairly linear *Marburian* trajectory, the trend towards a uniform, functional analysis when it came to deciding whether an official received qualified or absolute immunity, went less smoothly.

C. Towards a Uniform Standard: "My Vote or Byron's!"

1. *Imbler v. Pachtman* and *Butz v. Economou*: Settling on the Functional Approach

Justice White developed the functional approach in a quick succession of opinions between 1975 and 1978.[187] In pursuing this path, he recognized that the common law had long recognized strong policy reasons that justified absolute immunity for legislative and judicial acts.[188] But when it came to executive functions, the common law invoked a different policy analysis that did not immunize all executive acts under all circumstances—executive acts, according to Justice White, had always received only qualified immunity.[189] In making the initial determination of whether an official could invoke absolute or qualified immunity for her challenged acts, the Court, under Justice White's approach, first had to determine the nature of the official's acts.[190] For acts that were legislative or judicial in nature—*e.g.*, initiating prosecution,[191] presiding over an administrative adjudication,[192] or presenting evidence in court[193]—the officer would receive absolute immunity. For acts that were executive—*e.g.*, gathering evidence or other investigative activities—immunity would be qualified.[194] Notably, Justice White's functional analysis did not look to the branch of government to which the official technically belonged, nor did it consider the rank that she held within that branch.[195]

Justice White's focus on the official's function over her rank and branch membership paved the way for a uniform qualified immunity standard. This was because the determination of whether an official's actions were executive or non-executive in nature in order to assign them qualified or absolute immunity was intricate enough. Distinguishing *among* executive acts and tailoring qualified-immunity standards to them would have resulted in an unadministrable standard. *Scheuer*'s sliding scale

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[187] *See, e.g.*, Butz v. Economou, 438 U.S. 478, 508–12 (1978); Stump v. Sparkman, 435 U.S. 349, 356–58 (1976); Imbler v. Pachtman, 424 U.S. 409, 434–35 (1976) (White, J., concurring).

[188] *See, e.g.*, *Butz*, 438 U.S. at 508–12; *Stump*, 435 U.S. at 356–58; *Imbler*, 424 U.S. at 434–35 (White, J., concurring).

[189] *Butz*, 438 U.S. at 503–08; *Imbler*, 424 U.S. at 433 (White, J., concurring); Wood v. Strickland, 420 U.S. 308, 320–22 (1975).

[190] *Butz*, 438 U.S. at 508–10; *Imbler*, 424 U.S. at 433–34 (White, J., concurring).

[191] *Imbler*, 424 U.S. at 441 (White, J., concurring).

[192] *Butz*, 438 U.S. 513–17.

[193] *Id.* at 516–17.

[194] *Id.* at 508–10.

[195] *Id.* at 512–13.

was thus recast into a binary through *Butz* and *Harlow*. Qualified immunity was assigned to officials who performed executive functions, while absolute immunity was assigned to officials who performed legislative, judicial, or quasi-judicial functions.[196] Justice White had laid the foundation for this analysis in his majority opinions in *Stump v. Sparkman*[197] and *Butz v. Economou*,[198] as well as his concurrence in *Imbler v. Pachtman*.[199] The analysis in all of these opinions culminated in the decision of whether the immunity accorded should be absolute or qualified. *Butz* made the functional approach a requirement for determining whether qualified or absolute immunity applied. It thereby set the stage for *Harlow*'s standard that applied "across the board" for all federal officials[200]—and soon to state officials as well.[201]

However, *Butz* was a hard-fought case, decided by a bare majority. In fact, Court papers on *Butz* published by the Burger Court Opinion Writing Database suggest that Justice Rehnquist—who sought to award absolute immunity to all the executive officials involved in that case[202]—was initially writing for a majority.[203] But when Justice White convinced the wavering Justice Powell to join his side,[204] Justice Rehnquist announced that he would "now . . . convert[ ] [his] original memorandum . . . into a dissent."[205] In that dissent, Justice Rehnquist made his position abundantly clear:

> My biggest concern . . . is not with the illogic or impracticality of today's decision, but rather with the potential for disruption of Government that it invites. The steady increase in litigation,

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[196] *Butz*, 438 U.S. at 504–08.

[197] 435 U.S. 349 (1978).

[198] 438 U.S. 478 (1978).

[199] 424 U.S. 409, 432–47 (1976) (White, J., concurring).

[200] Harlow v. Fitzgerald, 457 U.S. 800, 821 (1982)).

[201] *See* Crocker, *supra* note 26, at 1432–33 (discussing the ambiguity of when exactly the Court seems to have decided that the same qualified-immunity standard applies to federal and state officials).

[202] *Butz*, 438 U.S. at 517–18, 525–30 (Rehnquist, J., dissenting).

[203] *See* Note from Byron R. White, Assoc. Justice, U.S. Supreme Court, to William H. Rehnquist, Assoc. Justice, U.S. Supreme Court (Jan. 5, 1978), *in* Paul J. Wahlbeck et al., Butz v. Economou*, 438 U.S. 478 (1978)*, THE BURGER COURT OPINION WRITING DATABASE 12 [hereinafter *Butz* Papers], http://supremecourtopinions.wustl.edu/files/opinion_pdfs/1977/76-709.pdf [https://perma.cc/NUW7-W8GR] (telling Justice Rehnquist he would "circulate a memorandum . . . dissenting in part with the memorandum you have circulated.").

[204] *Compare* Note from Lewis F. Powell, Jr., Assoc. Justice, U.S. Supreme Court, to William H. Rehnquist, Assoc. Justice, U.S. Supreme Court (Jan. 6, 1978) (expressing agreement with Rehnquist's judgment, but tentative agreement with White's reasoning), *with* Note from Lewis F. Powell, Jr., Assoc. Justice, U.S. Supreme Court, to Byron R. White, Assoc. Justice, U.S. Supreme Court (May 27, 1978) (confirming that he wants to join White's opinion), *in Butz* Papers, *supra* note 203, at 27, 29.

[205] Note from William H. Rehnquist, Assoc. Justice, U.S. Supreme Court, to Byron R. White, Assoc. Justice, U.S. Supreme Court (May 22, 1978), *in Butz* Papers, *supra* note 203, at 42.

> much of it directed against governmental officials and virtually all of which could be framed in constitutional terms, cannot escape the notice of even the most casual observer.[206]

For Justice Rehnquist, there was no *Marburian* "middle ground" to hold between vindicating constitutional rights and ensuring vigorous exercise of governmental functions—admirable, but ultimately impossible aspiration.[207] The former simply had to give, and he left little doubt that the last word on the matter had not yet been spoken.[208]

Justice White's victory on behalf of the functional approach meant a victory for qualified immunity, a middle position between the conservative Justices' preference for absolute immunity and § 1983's strict liability scheme. With *Butz* on the books, the stage was set for the twin cases *Harlow* and *Nixon v. Fitzgerald*. Qualified immunity would become the standard for executive officials across the board (except for the President of the United States). Yet, the hard-fought battles behind the scenes leading up to *Harlow* already contained the first signs that the Court would soon depart from the *Marburian* wisdom that qualified immunity embodied. *Harlow v. Fitzgerald* cannot be understood without the fractious disagreements that engulfed the Court in *Nixon v. Fitzgerald*. It is thus worth analyzing *Nixon* in some detail.

2. Ignoring *Marbury*'s Wisdom: Absolute Immunity for the President

During the conference in which the Justices discussed the *Nixon* case, three different merits positions emerged.[209] Justices Marshall and White favored a narrow holding that *Bivens* suits for retaliatory termination did not lie against the President.[210] Justices Powell and Stevens preferred to hold more broadly that no *Bivens* suit could lie against the President, but leaving open the question of whether Congress could impose liability on the President by statute.[211] The Chief Justice and Justices Rehnquist and O'Connor sought to bar *any* civil suit against the President for official acts done

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[206] *Butz*, 438 U.S. at 526 (Rehnquist, J., dissenting).

[207] *Id.* at 529.

[208] *Id.* at 529–30. In *Harlow*, too, Rehnquist made his convictions clear. While he felt compelled to join the majority with *Butz* on the books, he advertised that he would a "reexamine [the] holding in *Butz* . . . with alacrity" if that opportunity presented itself. Harlow v. Fitzgerald, 457 U.S. 800, 822 (1982) (Rehnquist, J., concurring). See *infra* Section III.B.1, for Chief Justice Rehnquist's efforts to recalibrate qualified immunity as more forgiving for government officials.

[209] Justices Brennan and Marshall voted to dismiss certiorari as improvidently granted when they found out that a contingent settlement agreement between Nixon and Fitzgerald may have mooted the case. *See* 81 POWELL PAPERS, *supra* note 183, at 75–76.

[210] Lewis F. Powell, Jr., Notes on Second Conference, Nixon v. Fitzgerald (No. 79-1738) (Dec. 14, 1981), *in* 81 POWELL PAPERS, *supra* note 183, at 90–92.

[211] *Id.*

in office (statutory or implied), and voted for absolute immunity.[212] While all three holdings would have brushed up against the *Marburian* principle of broadly recognizing rights but judicially calibrating remedies, there was a wide gulf between Justice White's position foreclosing a single cause of action against the President and the Chief Justice's barring of all such suits.

Justice Powell initially sought to corral a majority around the broad no-*Bivens* rationale. To him, the result would be virtually identical to finding absolute immunity, as he could not imagine that Congress would attempt to impose statutory liability on the President.[213] By the same token, Justices White and Marshall could concur in the judgment on the narrow no-*Bivens* rationale,[214] while the only dissent—by Justice Blackmun—would have been on the ground that certiorari had been improvidently granted.[215] The Court could have essentially spoken with a single voice in a case involving "a highly controversial president,"[216] without straying too far from the *Marburian* balance. But Chief Justice Burger and Justice Rehnquist drove a hard bargain, insisting that absolute immunity was the threshold issue to be resolved first—and that they would not budge on it.[217] This would have led to a fractured Court without a majority opinion. To avoid this outcome, Justices Powell and Stevens abandoned their idea to reason with the Chief,[218] and decided to join the absolute-immunity bloc with Chief Justice Burger and Justices Rehnquist and O'Connor.[219]

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[212] *Id.*

[213] Draft Letter from Lewis F. Powell, Jr., Assoc. Justice, U.S. Supreme Court, to Warren E. Burger, Chief Justice, U.S. Supreme Court (Dec. 16, 1981), *in* 81 POWELL PAPERS, *supra* note 183, at 119.

[214] *Id.*

[215] *Id.*

[216] *Id.* at 116.

[217] *See, e.g.*, Note from Lewis F. Powell, Jr., Assoc. Justice, U.S. Supreme Court, to self (Dec. 14–15, 1981) ("I used these notes—to no avail—in trying to persuade the CJ + WHR to go with 'no cause of action.'"), *in* 81 POWELL PAPERS, *supra* note 183, at 94.

[218] Draft Letter from Lewis F. Powell, Jr., Assoc. Justice, U.S. Supreme Court, to Warren E. Burger, Chief Justice, U.S. Supreme Court (Dec. 16, 1981) ("not sent—see my letter to CJ of [Dec. 17, 1981]"), *in* 81 POWELL PAPERS, *supra* note 183, at 96.

[219] Letter from Lewis F. Powell, Jr., Assoc. Justice, U.S. Supreme Court, to Warren E. Burger, Chief Justice, U.S. Supreme Court (Dec. 17, 1981), *in* 81 POWELL PAPERS, *supra* note 183, at 126–27. This was far from ideal for Justice Powell, who worried about the partisan optics of a bare majority giving absolute immunity to the President where "each of the five [majority Justices had] been appointed by Republicans." Burger, Powell, and Rehnquist had been appointed by Nixon, the very president who was a party in this suit; Stevens had been appointed by Ford, who had pardoned Nixon; and O'Connor was a Reagan appointee. Personal Notes of Lewis F. Powell, Jr., Assoc. Justice, U.S. Supreme Court (Dec. 14–15, 1981) (observing that, if he and Justice Stevens were to join the Chief Justice and Justices Rehnquist and O'Connor in their absolute-immunity rationale, "the vote for Nixon would be 5–4—with each of the five having been appointed by Republican[s]"), *in* 81 POWELL PAPERS, *supra* note 183, at 94.

This hard line predictably irked Justice White, who, at conference, had given up *his* initial preference for qualified immunity for the President in exchange for settling on the no-*Bivens* rationale.[220] Justice White now set out to write a vociferous four-Justice dissent that provided quotable lines to the press that the majority put the President "above the law."[221] He exposed the extralegal status the majority was to award the President by pointing out an unaddressed ambiguity in the majority opinion: if the President was absolutely immune from suit on constitutional grounds, the implication was not only that the President was exempted from *Bivens* suits, but also that Congress could not create causes of action against the President by statute if it wished to do so.[222] This undermined Justice Stevens's resolve to stick with the majority, as he had only agreed to vote for the absolute immunity position on the condition that the issue of whether Congress could create statutory causes of action against the President would not be explicitly addressed.[223] Chief Justice Burger, on the other hand, would not vote for an opinion that expressly reserved that question. When Justice White's draft dissent pointed out the avoidance of that issue, Justice Powell was forced to mediate between Justice Stevens and Chief Justice Burger, either of whose defection would have reduced the majority opinion to a plurality.[224] Powell, beseeching the Chief that "[a] plurality on an issue as inflammatory as this one . . . [would] invite future challenges when the composition of the Court changes,"[225] was finally able to win him over without having to explicitly foreclose Congress's authority to crate statutory liability for the President.[226]

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[220] Lewis F. Powell, Jr., Notes on Second Conference, Nixon v. Fitzgerald (No. 79-1738) (Dec. 14, 1981), *in* 81 POWELL PAPERS, *supra* note 183, at 90.

[221] *Compare* Nixon v. Fitzgerald, 457 U.S. 731, 766 (1982) (White, J., dissenting), *with* Linda Greenhouse, *High Court Holds President Immune from Damage Suits*, N.Y. TIMES (June 25, 1982), *in* 81 POWELL PAPERS, *supra* note 183, at 238, *and* Fred Barbash, *Presidents Given Immunity from Suits*, WASH. POST (June 25, 1982), *in* 81 POWELL PAPERS, *supra* note 183, at 234.

[222] *Nixon*, 457 U.S. at 765 (White, J., dissenting). Justice Blackmun made the point even more emphatically in his dissent. *See id.* at 797–98 (Blackmun, J., dissenting).

[223] Letter from Lewis F. Powell, Jr., Assoc. Justice, U.S. Supreme Court, to Warren E. Burger, Chief Justice, U.S. Supreme Court (Dec. 17, 1981), *in* 81 POWELL PAPERS, *supra* note 183, at 127.

[224] *See* Letter from Warren E. Burger, Chief Justice, U.S. Supreme Court, to Lewis F. Powell, Jr., Assoc. Justice, U.S. Supreme Court (June 8, 1982), *in* 81 POWELL PAPERS, *supra* note 183, at 171 (discussing his concurrence in the judgment and urging Powell to "bite the bullet" and not reserve the question of statutory liability).

[225] Letter from Lewis F. Powell, Jr., Assoc. Justice, U.S. Supreme Court, to Warren E. Burger, Chief Justice, U.S. Supreme Court (June 8, 1982), *in* 81 POWELL PAPERS, *supra* note 183, at 172–73.

[226] The Chief joined on June 11, 1982. Personal Note Chart of Lewis F. Powell, Jr., Assoc. Justice, U.S. Supreme Court, *in* 81 POWELL PAPERS, *supra* note 183, at 229. For the final formulation, see *Nixon*, 457 U.S. at 748 n.27 ("[O]ur holding today need only be that the President is absolutely immune from civil damages liability for his official acts in the absence of explicit affirmative action by Congress.").

This standoff between Justice White and Chief Justice Burger was rooted in a principled disagreement over which basic analytical approach was appropriate that had already led to a standoff in *Butz* four years earlier. Chief Justice Burger wanted absolute immunity for the President on constitutional grounds *and* for his aides on a theory of derivative immunity.[227] This threatened to create a doctrinal conflict with the functional approach that Justice White had established in *Butz*.[228] In essence, the Chief Justice wanted to reverse course and abandon the *Marburian* middle ground. Justice White, on the other hand, was committed to holding the middle ground of recognizing rights, but reserving discretion on the remedy.[229] In *Nixon*, Chief Justice Burger prevailed as to the President and high-ranking officials by foreclosing any cause of action against them—despite the Court's reservation of the issue of statutory liability. By contrast, *Harlow* marked a victory for Justice White's middle position. *Harlow* and *Nixon* thus present a clear contrast: in the former, the Court managed to hew closely to *Marbury*'s wisdom; in the latter, it did not.

D. Summing Up: Qualified Immunity's Marburian *Origins*

The long first decade of qualified immunity doctrine, from *Pierson v. Ray* to *Harlow v. Fitzgerald*, was a modern *Marburian* move. While the "Congress [of 1871 had] recognized the need for original federal jurisdiction as a means to provide [some] federal control over the unconstitutional acts of state officials,"[230] the political realities of the 1970s required a partial "high-minded[] refus[al]."[231] The Court threaded the needle by standing for the proposition that, while the "very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws,"[232] rights and remedies do not necessarily coincide when it comes to suits against a government official.[233] Individuals should be able to bring claims, but *courts* should have a significant say in determining when such claims go to trial and how

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[227] Harlow v. Fitzgerald, 457 U.S. 800, 822–29 (1982) (Burger, C.J., dissenting).

[228] *See* Butz v. Economou, 438 U.S. 478, 504–16 (1978).

[229] *Harlow*, 457 U.S. 822–29 (Burger, C.J., dissenting).

[230] District of Columbia v. Carter, 409 U.S. 418, 428 (1973).

[231] MCCLOSKEY, *supra* note 47, at 26.

[232] *Butz*, 438 U.S. at 485 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803)); *see also* Nixon v. Fitzgerald, 457 U.S. 731, 783, 789, 797 (1982) (White, J., dissenting) (quoting the same language three separate times). Indeed, White charged that giving the President absolute immunity abandoned *Marbury*'s fundamental principle. *Id.* at 768 (White, J., dissenting) (criticizing that "if the laws furnish no remedy for the violation of a vested legal right" the government can no longer be "termed a government of laws, and not of men" (quoting *Marbury*, 5 U.S. at 163)). The majority laconically responded that "*Marbury* does not establish that the individual's protection must come in the form of a particular remedy. Marbury, it should be remembered, *lost* his case in the Supreme Court." *Id.* at 754 n.37 (majority opinion).

[233] *See* Jeffries, *supra* note 37; Fallon, *supra* note 1, at 942–46; Amar, *supra* note 46, at 1491 n.262; *see generally* Huq, *supra* note 46.

they fare at that stage. Seemingly refusing the congressional grant of jurisdiction over constitutional and statutory claims, the Court created and claimed a different judicial authority: deciding to decide when to hear those claims.

Indeed, by charting such a middle course by refusing one authority but creating another, and by preserving a cause of action but rationing the remedy,[234] the Court avoided aligning itself with either side in cases that were often highly political. *Pierson v. Ray* pitted police whose "real aim was to preserve segregation"[235] against activists "provok[ing] a breach of the peace in the form of violence."[236] *Scheuer v. Rhodes* featured competing narratives of incontestable "immunity for [firing] upon a mob in insurrection"[237] against "inadequately trained and incapable troops [who engaged in] conduct which greatly increased the risk of shooting [innocents]."[238] The subtext of *Wood v. Strickland* was a shift in disciplinary thinking in the school context, especially for "rebellious" teenage women flaunting traditional standards of morality. And *Harlow v. Fitzgerald* featured the aides of a "highly controversial President"[239] against a whistle-blower who undermined government business and failed to understand that "loyalty was the name of the game."[240] (*Nixon*, as noted above, was the exception that proved the rule underlying *Marbury*'s wisdom.[241])

Indeed, all of those cases arose in contexts of larger struggles between "the people" and the government: the Freedom Rides, student protests against the Vietnam War, initiatives to introduce due process protections in public schools, efforts to combat a rising prison population in the incipient War on Crime,[242] and President Nixon's "rogue government" that "had mounted a campaign of extralegal and illegal activities."[243] At a time when the caseload of federal civil rights cases had gone from 296 in 1961 to 13,113 in 1977,[244] and when eroding trust in government and public institutions led to a crisis of authority in the United States,[245] the Supreme Court

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[234] Huq, *supra* note 46, at 41–43.

[235] *Pierson Petitioner's Brief*, *supra* note 58, at 17.

[236] *Pierson Respondent's Brief*, *supra* note 83, at 18.

[237] Krause v. Rhodes, 471 F.2d 430, 435 (6th Cir. 1972).

[238] Brief for Petitioner, Scheuer v. Rhodes, 416 U.S. 232 (1974) (No. 72-914).

[239] Draft Letter from Lewis F. Powell, Jr., Assoc. Justice, U.S. Supreme Court, to Warren E. Burger, Chief Justice, U.S. Supreme Court (Dec. 16, 1981), *in* 81 POWELL PAPERS, *supra* note 183, at 116.

[240] Nixon v. Fitzgerald, 457 U.S. 731, 736 (1982) (quoting a memorandum of presidential aide Alexander Butterfield recommending not to reemploy Fitzgerald for a while).

[241] *See supra* Section II.C.2.

[242] *See* Procunier v. Nararette, 434 U.S. 555, 557–60 (1978).

[243] SCHULMAN, *supra* note 113, at 43–44.

[244] Butz v. Economou, 438 U.S. 478, 526 (1978) (Rehnquist, J., dissenting) (citing statistic of the Director of the Administrative Office of the United States Courts). *But see* Eisenberg, *supra* note 161, at 484 (presenting, as early as 1982, empirical indicating that "section 1983 cases are not overwhelming the federal courts").

[245] SCHULMAN, *supra* note 113, at 9–10, 48, 51, 147.

made its best efforts not to take sides. Soon, however, the Court would lose sight of that wisdom.

III. LOSING SIGHT OF *MARBURY*: THE DOOMED PROJECT OF *SAUCIER V. KATZ*

The Court had carved out a new standard in *Harlow v. Fitzgerald* and turned the page on many of the questions it had debated for years. Qualified immunity was to be a standard that applied equally to all officers performing executive functions (federal and state). It was objective. It struck a balance between vindicating constitutional rights and giving officers reasonable room for error in the execution of their duties. And ideally (but not necessarily), it would resolve the immunity question before discovery.[246]

Yet, questions surrounding the new standard continued to dog the Court in the years following *Harlow*. First, the Court had to clarify the meaning of "clearly established law of which a reasonable official would have known," especially when the underlying constitutional right was also assessed under a reasonableness standard.[247] Second, the Court faced the conundrum of how to sequence and distinguish the immunity analysis from the analysis of the underlying constitutional claim.[248] In both arenas, the Court would slowly abandon the institutional considerations underlying the *Marburian* move by both restricting access to individual rights and chipping away at the availability of remedies.[249]

A. Two Departures from Marbury

In the twenty years after *Harlow*, many of the Supreme Court's qualified-immunity decisions continued to follow the *Marburian* policy balance of making § 1983 suits available to individual plaintiffs, carefully determining where qualified, instead of absolute, immunity was appropriate and shoring up its discretion to determine the appropriate remedy.[250] The truly knotty issues, however, lay in spelling out the content and analytical structure of the new qualified-immunity standard. Here, a decidedly anti-*Marburian* picture began to emerge—again, through two separate but interrelated trends. One trend consisted of the increasingly stringent threshold question of whether the allegedly violated right existed at all. The other consisted of the Court's interpretation of "clearly established" as requiring an increasingly granular level of specificity for the right in question. And just as with *Harlow*, these two developments would converge in a key decision: this time, *Saucier v. Katz*.[251]

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[246] *See supra* Sections II.B–C.

[247] For example, the Fourth Amendment right to be free of unreasonable searches and seizures. *See infra* Section III.B.2.

[248] *See infra* Section III.B.1.

[249] *See infra* Sections III.B.1–3.

[250] *See infra* Section IV.B.

[251] 533 U.S. 194 (2001).

1. Chief Justice Rehnquist's Long Game: Questioning the Underlying Right

One of *Saucier*'s key holdings was that courts deciding a § 1983 or *Bivens* suit had to first determine whether plaintiff had sufficiently alleged a rights violation on the merits, and then, if necessary, proceed to the immunity analysis of whether that right was clearly established at the time of the challenged conduct.[252]

This sequencing requirement had been a long time in the making. Between *Harlow* and *Saucier*, the Court treated the question of whether a constitutional violation had been properly alleged as a threshold matter (and suggested to lower courts to do the same) in six cases: *Graham v. Connor*,[253] *Siegert v. Gilley*,[254] *Hunter v. Bryant*,[255] *County of Sacramento v. Lewis*,[256] *Conn v. Gabbert*,[257] and *Wilson v. Layne*.[258] Four of those opinions—*Graham*, *Siegert*, *Conn*, and *Wilson*—were authored by Chief Justice Rehnquist. In *Lewis*, too, Rehnquist explicitly concurred to reiterate the proper sequencing of the analysis.[259] Indeed, the proposition that "[t]he first inquiry in any § 1983 suit . . . is whether the plaintiff has been deprived of a [constitutional] right" goes back to *Baker v. McCollan*, penned by then-Justice Rehnquist in 1979.[260]

The anti-*Marburian* tendencies of this threshold analysis become clear from three observations. First, the inquiry was not *which* right plaintiff alleged to have been violated, but *whether* a rights violation had been alleged. This initial showing that a plaintiff had to make for her claim to survive at the outset, introduced a one-way ratchet running counter to *Marbury*'s broad recognition of individual rights.[261]

Second, as early as 1976, then-Justice Rehnquist had made no secret of his concern that § 1983 become "a font of tort law to be superimposed upon . . . the States."[262] Indeed, his *McCollan* opinion was issued just one year after he had strongly dissented from *Butz v. Economou*'s holding that all officials performing executive functions were to receive qualified immunity.[263] Justice Rehnquist ominously announced that "the all but inevitable result of [qualified immunity doctrine's attempt] to gain and hold a middle ground" would either result in "a significant impairment of . . . officials to carry out the[ir] duties" or in a "necessarily unprincipled and erratic judicial 'screening' of claims."[264]

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[252] *Id.* at 201.
[253] 490 U.S. 386, 393 (1989).
[254] 500 U.S. 226, 231 (1991).
[255] 502 U.S. 224, 228–29 (1991).
[256] 523 U.S. 833, 841 n.5 (1998).
[257] 526 U.S. 286, 290 (1999).
[258] 526 U.S. 603, 609 (1999).
[259] *Lewis*, 523 U.S. at 854–55.
[260] 443 U.S. 137, 140 (1979).
[261] *See, e.g.*, Saucier v. Katz, 533 U.S. 193, 201 (2001).
[262] Paul v. Davis, 424 U.S. 693, 701 (1976).
[263] 438 U.S. 478, 517–30 (1978) (Rehnquist, J., dissenting).
[264] *Id.* at 529–30.

Third, out of the six post-*Harlow* cases that employed the merits-first-immunity-second sequence, five found that the plaintiff had *failed* to allege a constitutional violation.[265] (The sixth—*Wilson v. Layne*—found that the right in question was not clearly established at the time, and thus awarded qualified immunity at the second step.[266])

Chief Justice Rehnquist's threshold inquiry whether there was any right at all that had been violated thus amounted to an anti-*Marburian* step in the qualified-immunity analysis. This inquiry was later combined with a second anti-*Marburian* step, this time on the remedies side. It was that the "clearly established" right be defined at a high degree of specificity, first formulated by Justice Scalia in *Anderson v. Creighton*.

2. *Anderson v. Creighton*'s Restriction of the Remedy: "Clearly Established" as "Highly Specific"

Anderson v. Creighton[267] introduced a simple, yet non-self-evident notion into qualified-immunity law: When *Harlow* said the right had to be "clearly established," it meant that the right had to be *specific*. In *Anderson*, a federal agent had entered and searched the Creighton family's home without a warrant, mistakenly believing that he would find a bank robber there.[268] In the ensuing *Bivens* litigation for an unreasonable search under the Fourth Amendment, the Eighth Circuit held that the Creightons' claim survived summary judgment on both the merits and under qualified immunity.[269] According to the appeals court, the right to be free from warrantless searches in the home absent probable cause and exigent circumstances was clearly established, and the Creightons had raised a genuine issue of fact on that issue to survive summary judgment.[270]

The first holding, Justice Scalia observed in *Anderson*, did not give proper effect to *Harlow*'s new standard. "[I]f the test of 'clearly established law' were to be applied

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[265] *See* Graham v. Connor, 490 U.S. 386, 396 (1989) (holding that police excessive-force claims in the stop, search, or seizure context had to be exclusively brought under the Fourth Amendment, thus foreclosing plaintiff's excessive-force claim under substantive due process); Siegert v. Gilley, 500 U.S. 226, 230–31 (1991) (holding that the defendant was entitled to qualified immunity because plaintiff never allege a cognizable constitutional claim); Hunter v. Bryant, 502 U.S. 224, 227–28 (1991) (holding that the undisputed facts established probable cause for arrest); County of Sacramento v. Lewis, 523 U.S. 833, 854 (1998) (holding that plaintiff's alleged facts failed to meet the proper fault standard in a substantive due process claim in a high-speed police chase resulting in death); Conn v. Gabbert, 526 U.S. 286, 292 (1999) (holding that a prosecutor causing an attorney to be searched while his client is questioned by a grand jury does not implicate attorney's Fourteenth-Amendment right to freely choose his vocation).

[266] 526 U.S. 603 (1999) (holding that bringing media reporters in the execution of a warrant in the home violated the Fourth Amendment but was not clearly established at the time of the alleged conduct).

[267] 483 U.S. 635 (1987).

[268] *Id.* at 636.

[269] Creighton v. St. Paul, 766 F.2d 1269, 1277 (1985).

[270] *Id.*

at this level of generality, it would bear no relationship to the 'objective legal reasonableness' that is the touchstone of *Harlow*."[271] If the *Harlow* standard merely required allegations of "violation[s] of extremely abstract rights"[272] (as the Eighth Circuit had defined it in Justice Scalia's view), it would give no additional leeway to judges to eliminate insubstantial suits against government officers before trial.[273] Thus, *Harlow* required that "[t]he contours of the right . . . be sufficiently clear that a reasonable official would understand that what he is doing violates that right."[274] This meant that an officer could be mistaken in his judgment that probable cause existed, but still receive qualified immunity when the law was not clear enough as to make his mistake unreasonable.[275] In the Fourth-Amendment context, the allegedly violated right for qualified immunity purposes had to be *more* specific than the right violation alleged on the merits. The Court later reiterated this more-specificity requirement for suits brought for unreasonable arrests[276] and for police executing warrants with parties not reasonably related to the warrant's objective.[277]

While Justice Scalia's reasoning in *Anderson* was plausible, *Harlow* by no means compelled it. Abstract rights can be clearly established (by, for example, a long, uncontroverted body of case law that speaks to a legal principle). *Harlow*'s policy goal of eliminating insubstantial lawsuits at the summary judgment stage was one desideratum among several, not the overriding goal in the way that Scalia made it out to be.[278] And nothing in *Harlow*'s reasonableness formula suggested that it could not sometimes merge with the merits standard if it, too, was a reasonableness standard as in the Fourth Amendment search-and-seizure context. Indeed, Justice Scalia himself admitted that he had freely derived the requirement by asserting that the Court "ha[d] never suggested that the precise contours of official immunity can and should be slavishly derived from the often arcane rules of the common law."[279]

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[271] *Anderson*, 483 U.S. at 639.

[272] *Id.*

[273] *Id.* at 639–40.

[274] *Id.* at 640.

[275] *Id.* at 643.

[276] Hunter v. Bryant, 502 U.S. 224, 228 (1991) (per curiam) ("Even if we assumed, arguendo, that [the officers] erred in concluding that probable cause existed to arrest Bryant, [they] would nevertheless be entitled to qualified immunity because their decision was reasonable, even if mistaken.").

[277] Wilson v. Layne, 526 U.S. 603, 613–15 (1999) (finding media ride-alongs to arrest warrant executions in the home unconstitutional, but giving qualified immunity to the arresting officers because their mistake of law was reasonable).

[278] *Anderson*, 483 U.S. at 639 ("Plaintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights."). Justice Stevens, in dissent, pointed that the majority's "double-counting approach [of reasonableness] reflects . . . an overriding interest in unfettered law enforcement. It ascribes a far lesser importance of the privacy interest of innocent citizens . . . ." *Id.* at 664 (Stevens, J., dissenting).

[279] *Id.* at 645; *see also* Crawford-El v. Britton, 523 U.S. 574, 611–12 (1998) (Scalia, J.,

From a *Marburian* perspective, Scalia's interpretation of the clearly established requirement planted the seed for a momentous shift in the doctrine. Qualified immunity had originally been a defense that could be pleaded to give the courts discretion over remedies.[280] But tethering the immunity standard, at least in the Fourth Amendment context, to the substantive right itself—making the reasonableness requirement for qualified immunity more stringent than the reasonableness requirement on the merits—essentially transformed the standard into a further restriction of the rights side of the ledger.

Yet, the anti-*Marburian* thrust of *Anderson*'s "more-specific right" requirement would not show its full implications until the Court decided *Saucier v. Katz*.

3. Forging the *Saucier*-Two-Step

"Justice Scalia may see what you mean, but I'm not sure I do," Chief Justice Rehnquist laconically interjected at oral argument, drawing laughs from the observers in the Court.[281] Justice Scalia had just thrown Deputy Solicitor General Paul Clement a bone in spelling out how the Fourth Amendment's reasonableness standard gave officers room for error in the excessive force cases—and how the reasonableness standard of qualified immunity created additional room for error.[282] But this raised the paradoxical question whether an officer could "reasonably" act unreasonably. And if that was so, should the analysis start with whether she had acted reasonably for qualified-immunity purposes, or unreasonably on purposes of the constitutional merits? Those were the tangled questions that the Justices confronted when they sat for oral argument in *Saucier v. Katz*.[283]

Respondent Elliot Katz, an elderly animal rights activist, claimed that military police officers had violently thrown him into a van while he was protesting alleged animal rights abuses during a speech by Vice President Al Gore.[284] Katz brought a *Bivens* claim for excessive force under the Fourth Amendment.[285] Confronted with two reasonableness inquiries, the Ninth Circuit concluded that the merits and immunity

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dissenting) ("[O]ur treatment of qualified immunity . . . has not purported to the common-law immunities that existed when § 1983 was enacted . . . . That is perhaps just as well. The § 1983 that the Court created in 1961 [with *Monroe v. Pape*] bears scant resemblance to what Congress enacted almost a century earlier. . . . We find ourselves engaged, therefore, in the essentially legislative activity of crafting a sensible scheme of qualified immunities for the statute we have intended—rather than applying the common law embodied in the statute that Congress wrote.").

[280] *See supra* Section I.C.

[281] *Oral Argument at 10:40*, Saucier v. Katz, 533 U.S. 194 (2001) (No. 99-1977), https://www.oyez.org/cases/2000/99-1977 [https://perma.cc/YN8L-RX7U].

[282] *Id.* at 10:10–10:38.

[283] *See generally Oral Argument at 10:40,* Saucier v. Katz, *supra* note 281.

[284] Saucier v. Katz, 533 U.S. 194, 197–98 (2001).

[285] *Id.* at 198–99.

analyses merged into one: *Graham v. Connor*[286] had clearly established the right to be free from excessive force in the arrest context.[287] Objective reasonableness under the Fourth Amendment, and objective reasonableness for the purposes of qualified immunity, thus reduced to the same analysis.[288]

The Justices thus had to grapple with several thorny questions: Should the constitutional and immunity analyses remain distinct in excessive force cases under *Bivens* (and, analogously, under § 1983)? If so, in what order should courts consider them? Should a jury be instructed on both at once, or separately?

The *Saucier* Court decided that the analyses must remain analytically and substantively distinct. To keep them distinct, it held that a court *first* had to determine whether a defendant's alleged conduct amounted to a constitutional violation, and *second* if the right was clearly established at the time of the challenged conduct.[289] The Court also emphasized that reasonableness under qualified immunity was not the same as reasonableness on the Fourth Amendment merits: "clearly established" required a higher degree of specificity.[290] Qualified immunity allowed officers to make reasonable mistakes when determining which laws applied to their conduct.[291]

On its face, the *Saucier* two-step seems to be a perfectly *Marburian* approach to balancing rights and remedies. "[A] court might find it necessary to set forth principles [to aid] the law's elaboration from case to case," while it should also "resolv[e] immunity questions at the earliest possible stage in litigation."[292] Upon closer examination, however, *Saucier* was the last gasp of a *Marburian* rationale that had been dissipating from the qualified-immunity doctrine for decades.

B. Dead on Arrival: Saucier*'s Internal Tensions*

It took only eight years for the Supreme Court to abandon its holding in *Saucier*.[293] This was because its anti-*Marburian* framework was unworkable. *Anderson*'s highly granular specificity requirement turned out to be too demanding for plaintiffs hoping to vindicate their rights, while the sequencing requirement originally devised by Chief

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[286] 490 U.S. 386 (1989).

[287] *Saucier*, 533 U.S. at 199–200 (citing Graham v. Connor, 490 U.S. 386 (1989)).

[288] *Id.* at 203.

[289] *Saucier*, 533 U.S. at 201.

[290] *Id.* at 200, 202 ([The Court in *Anderson* emphasized] "that the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates the right." (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)); *see also id.* at 205.

[291] *Id.* at 206.

[292] *Id.* at 201.

[293] Pearson v. Callahan, 555 U.S. 223, 236 (2009) ("On reconsidering the procedure required in *Saucier*, we conclude that . . . it should no longer be regarded as mandatory. The judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand.").

Justice Rehnquist introduced uncertainty as to whether the allegedly violated right even existed. Now that the two requirements had been joined, their interaction began to corrode qualified-immunity doctrine in unanticipated ways, stripping it of its *Marburian* wisdom. On the rights-side, the post-*Saucier* Court failed to affirm the existence of constitutional rights because it regularly splintered on the scope and existence of the right. The status of that right was even more questionable when the Court awarded qualified immunity at step two, making the constitutional ruling seem unnecessary and mere dicta. On the remedies side, *Anderson*'s more specific requirement would slowly move the Court towards more and more grants of qualified immunity. Between *Saucier* and *Pearson*, the Court never managed to strike the *Marburian* balance of recognizing a rights violation but denying the remedy again.[294]

1. Problems on the Rights Side

The Court in the first decade of the new millennium was becoming increasingly fractured, and it showed in the constitutional merits questions of its qualified immunity decisions.[295] The Court rarely agreed on the scope—or even the existence—of a constitutional right, which introduced uncertainty on the rights side of *Marbury*'s ledger. In *Hope v. Pelzer*, an Alabama state prisoner had been twice tied to a hitching post for punitive purposes, and once was left in the burning sun for hours without water or bathroom breaks.[296] Justice Stevens, writing for six Justices, found a plain violation of the Cruel and Unusual Punishment Clause.[297] Yet, Justice Thomas, in a dissent joined by two other Justices, dissected the record of what precisely was alleged against which prison guard, and remained unconvinced that a constitutional violation had been alleged.[298] *Groh v. Ramirez* featured a search warrant that, under "items to be seized," simply described the residence at which to conduct the search.[299] The Court, again through Justice Stevens, found the warrant facially deficient for failing the Fourth Amendment's particularity requirement.[300] Justice Thomas again dissented on the merits and argued that a warrant failing the particularity requirement need not always amount to an unreasonable search.[301]

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[294] *See, e.g.*, Hope v. Pelzer, 536 U.S. 730 (2002); Groh v. Ramirez, 540 U.S. 551 (2004); Brosseau v. Haugen, 543 U.S. 194 (2004); Scott v. Harris, 550 U.S. 372 (2007); Morse v. Frederick, 551 U.S. 393 (2007).

[295] *See generally* MARK TUSHNET, A COURT DIVIDED: THE REHNQUIST COURT AND THE FUTURE OF CONSTITUTIONAL LAW (2006) (discussing the late years of the Rehnquist Court); JOAN BISKUPIC, THE CHIEF: THE LIFE AND TURBULENT TIMES OF CHIEF JUSTICE JOHN ROBERTS (2019).

[296] *Hope*, 536 U.S. at 733–35.

[297] *Id.* at 736.

[298] *Id.* at 748–51 (Thomas, J., dissenting).

[299] *Groh*, 540 U.S. at 554–55.

[300] *Id.* at 557–63.

[301] *Id.* at 571–78 (Thomas, J., dissenting).

In *Scott v. Harris*[302] and *Brosseau v. Haugen*,[303] Justice Stevens now found himself in dissent against conservative majorities. In *Scott*, Justice Scalia announced the rule that, when a fleeing suspect in a high-speed chase poses a threat of serious physical injury to others, a police officer acts reasonably for Fourth-Amendment purposes when bumping the motorist off the road to end the chase.[304] Justice Stevens penned a lone dissent attacking both the rule and its application to the facts.[305] In *Brosseau*, the Court did not rule on the constitutional question but opined that, when a suspect fleeing by vehicle is armed and dangerous to bystanders, it is not unreasonable to seize them by shooting at them.[306] Justice Stevens again was the lone dissenter on the merits.[307]

The most telling case, however, was *Morse v. Frederick*, in which a high school student's banner saying "BONG HiTS 4 JESUS" at a school-sponsored event resulted in his suspension—and four different Supreme Court opinions on free speech.[308] Chief Justice Roberts's bare majority held that there was no violation of the First Amendment, as schools could take steps to restrict speech that could be reasonably interpreted to advocate illegal drug use.[309] Justice Thomas concurred, but emphasized that he believed students should have no rights at all on school grounds and instead be subject to the common law principle of *in loco parentis*.[310] Justice Alito concurred to emphasize the narrowness of the Court's holding, in that it in no way restricted political speech.[311] Justice Stevens, in turn, dissented on the ground that the majority had ignored basic First Amendment principles in allowing the prohibition of a "nonsense banner" that displayed a "silly message."[312]

In none of the cases between *Saucier* and *Pearson* did the Court manage to speak with a clear voice on the rights question, the way it had in *Marbury*. At best, it signaled that § 1983 and *Bivens* plaintiffs would face searching scrutiny before even having to face the defense of qualified immunity.

But disagreements on the constitutional merits were not the only issue that beset the *Saucier* framework. Even more troublingly from a *Marburian* perspective, Justice Breyer led the charge in attacking the *principal* validity of those constitutional holdings. Repeatedly, Breyer criticized that ruling on the merits was "unwise

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[302] 550 U.S. 372, 389–97 (2007).

[303] 543 U.S. 194, 202–08 (2004) (per curiam).

[304] *Scott*, 550 U.S. at 381–83. Indeed, Justice Scalia announced this rule after holding that, at summary judgment, undoctored videotapes refuting the nonmoving party's version of events may be considered in deciding the motion. *Id.* at 378–81.

[305] *Id.* at 389–97 (Stevens, J., dissenting).

[306] *Brosseau*, 543 U.S. at 198–202.

[307] *Id.* at 210–17 (Stevens, J., dissenting).

[308] Morse v. Frederick, 551 U.S. 393 (2007).

[309] *Id.* at 403–10.

[310] *Id.* at 413–16 (Thomas, J., concurring).

[311] *Id.* at 422–25 (Alito, J., concurring).

[312] *Id.* at 435, 444 (Stevens, J., dissenting).

and unnecessary."[313] Oftentimes, he reasoned, the decisions would be "poorly presented,"[314] "difficult,"[315] "unusually portentous,"[316] and so "fact dependent that the result will be confusion rather than clarity."[317] Forcing courts to decide those questions conflicted with the principle of constitutional avoidance and would lead to constitutional rulings of questionable value.[318] Justice Breyer further insisted that, institutionally, it made little sense to speak with discordant voices on such merits questions, especially when, as in *Morse*, "decid[ing a] case on the ground of qualified immunity . . . would be *unanimous*."[319] Justices Stevens[320] and Ginsburg[321] joined Justice Breyer's line of attack. Chief Justice Rehnquist's introduction of the threshold inquiry on the existence or non-existence of a constitutional right had worked its anti-*Marburian* results across ideological lines. It splintered the Court on constitutional rights, left the existence and scope of those rights uncertain, and induced the liberal stalwart Breyer on the Court to attack the general validity of such holdings and conclude with the clarion call: "I would end the failed *Saucier* experiment now."[322]

2. Problems on the Remedies Side

When the Court reached step two in the *Saucier* framework in *Hope* (denying immunity), *Groh* (denying immunity),[323] and *Brosseau* (granting immunity), it disagreed on the immunity question, too, albeit not as vigorously. In *Hope*, the Stevens majority corrected the Eleventh Circuit's interpretation of the clearly established standard to be more permissive than requiring "materially similar" facts in a previous case. "[O]fficials can still be on notice that their conduct violates established law even in novel factual situations."[324] Justice Thomas, in dissent for three Justices, argued that the majority had misconstrued the Eleventh Circuit's standard

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[313] *Id.* at 425 (Breyer, J., concurring); *see also* Brosseau v. Haugen, 543 U.S. 194, 201 (Breyer, J., concurring).

[314] *Morse*, 551 U.S. at 431 (Breyer, J., concurring in part and dissenting in part).

[315] *Brosseau*, 543 U.S. at 201 (Breyer, J., concurring).

[316] *Morse*, 551 U.S. at 426–27 (Breyer, J., concurring in part and dissenting in part).

[317] Scott v. Harris, 500 U.S. 372, 388 (2007) (Breyer, J., concurring).

[318] *Morse*, 551 U.S. at 431 (Breyer, J., concurring in part and dissenting in part); *Scott,* 500 U.S. at 388 (Breyer, J., concurring).

[319] *Morse*, 551 U.S. at 431 (Breyer, J., concurring in part and dissenting in part).

[320] Bunting v. Mellen, 541 U.S. 1019, 1019 (2004).

[321] Brosseau v. Haugen, 543 U.S. 194, 200–02 (joining Breyer).

[322] *Morse*, 551 U.S. at 432 (Breyer, J., concurring in part and dissenting in part). As will be discussed below, after the *Saucier* order of battle was abandoned, the *Anderson* requirement for a *more* particular articulation of the right than would be necessary on the merits created a ready incentive to frequently dodge the constitutional question and leave it in limbo. *Infra* Section III.B.3.

[323] *Hope* and *Groh* were the last cases, as of June 2020, in which the Court denied qualified immunity and ordered that a case to go to trial.

[324] Hope v. Pelzer, 536 U.S. 730, 741 (2002).

and that his own construction of the allegedly violated right was not clearly established at the time.[325] He also distinguished the majority's view of circuit court law and other legal authorities, and drew on others to contest that the law was *not* clearly established at the time.[326] In *Groh*, four Justices, in two dissents, would have granted qualified immunity to the searching officer relying on the facially deficient warrant because his belief in its validity was reasonable.[327] In *Brosseau*, Justice Stevens dissented from the grant of qualified immunity by arguing the question should have been decided by a jury.[328] In *Scott* and *Morse*, there was no disagreement on the grant of qualified immunity at all.[329]

But while members of the Court could often agree on the outcome of the qualified immunity question, reaching that question put even more pressure on the *Saucier* framework than resolving the merits question. Specifically, in cases where a defendant lost on constitutional grounds, but won a favorable judgment by receiving qualified immunity, could she appeal the constitutional ruling? Allowing such reviews would go against the Court's longstanding prudential rule that it "review[ed] judgments, not statements in opinions."[330] In the Court's denial of certiorari in *Bunting v. Mellen*, a total of five Justices agreed that "[t]he perception of unreviewability undermines adherence to the sequencing rule we have created."[331] Justice Breyer—occasionally joined by Justices Scalia and Ginsburg—had voiced this concern in *Brosseau*,[332] and reiterated it in *Scott*[333] and *Morse*.[334] The remedy prong thus put pressure on the constitutional prong when qualified immunity was awarded. Was the constitutional ruling unreviewable law? Or, since it was immaterial to the judgment, was it dicta without binding effect? The latter view was most poignantly put by Second-Circuit Judge Pierre Leval, who called the *Saucier* rule "a puzzling misadventure in constitutional dictum."[335]

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[325] *Id.* at 761.

[326] *Id.* at 753–63. These strategies of contesting how clearly established a law was at a particular time will be discussed further in Section II.C, *infra*.

[327] Groh v. Ramirez, 540 U.S. 551, 566 (2004) (Kennedy, J., dissenting); *id.* at 579 (Thomas, J., dissenting).

[328] Brosseau v. Haugen, 543 U.S. 194, 202–03 (Stevens, J., dissenting) (Unlike most "excessive force" cases in which the degree of permissible force varies widely from case to case, the only issue in a "deadly force" case is whether the facts apparent to the officer justify a decision to kill a suspect in order to prevent his escape.").

[329] *See* Scott v. Harris, 550 U.S. 372 (2007); Morse v. Frederick, 551 U.S. 393 (2007).

[330] Bunting v. Mellen, 541 U.S. 1019, 1023 (2004) (Scalia, J., dissenting from denial of certiorari) (quoting California v. Rooney, 483 U.S. 307, 311 (1987)).

[331] *Id.* at 1025 (Scalia, J., dissenting from denial of certiorari). *Accord id.* at 1019 (Stevens, J.).

[332] *Brosseau*, 543 U.S. at 201–02 (Breyer, J., concurring).

[333] *Scott*, 550 U.S. at 388 (Breyer, J., concurring).

[334] *Morse*, 551 U.S. at 432 (Breyer, J., concurring in part and dissenting in part).

[335] Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1275 (2006).

3. The Center Did Not Hold: Sliding Into *Pearson*

In sum, the *Saucier* framework was inherently anti-*Marburian*. Each prong interfered with the other in a way that rendered the framework toothless and barely administrable. On one side, questioning the existence of a right at the first step invited disagreement that would rarely lead to law that was clearly established for the purposes of step two. Requiring all lower courts to pass on difficult constitutional questions certainly did not facilitate the law's clarification. On the other side, resolving cases at step two left it unclear what the legal status of the constitutional ruling at step one was. And when the defendant won qualified immunity but lost on the constitutional question, it was unclear whether the constitutional ruling—often eagerly passed over or treated cursorily by overburdened courts—was merely advisory.

This structural tension undermined the integrity of the judicial process itself by potentially leaving appellate court rulings immune to review. If government defendants who had won judgment on qualified-immunity grounds could not appeal an adverse constitutional ruling, what were the implications for judicial supremacy—the very concept that *Marbury v. Madison* had created? Even if that grand menace would be managed, *Saucier*'s mandatory constitutional step treaded on *Marbury*'s wisdom of maintaining judicial discretion and flexibility, and exercising judicial power sparingly.

Meanwhile, outside pressure on the Court began to grow. As § 1983 suits against police officers for excessive force, warrantless entry, and unreasonable searches began to multiply, so did the briefing by civil rights groups, police orders, and federal and state government actors.[336] Academics, too, increasingly criticized qualified immunity for its difficulty, favoritism toward government officials to the detriment of individuals' constitutional rights, and legal infirmity.[337] Most importantly, federal judges themselves began to criticize and skirt the *Saucier* regime.[338] But the framework's

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[336] See, for example, the docket sheets of *Saucier v. Katz*, *Scott v. Harris*, *Pearson v. Callahan*, and many other cases of the time. This kind of attention by interest groups outsized that of controversial cases such as *Scheuer v. Rhodes*, *Harlow v. Fitzgerald* and *Nixon v. Fitzgerald*, and *Mitchell v. Forsyth*. *Compare* Saucier v. Katz, 533 U.S. 194 (2001); Scott v. Harris, 550 U.S. 372 (2007), *and* Pearson v. Callahan, 555 U.S. 223 (2009), *with e.g.*, Scheuer v. Rhodes, 416 U.S. 232 (1974); Harlow v. Fitzgerald, 457 U.S. 800 (1982); Nixon v. Fitzgerald, 457 U.S. 731 (1982), *and* Mitchell v. Forsyth, 472 U.S. 511 (1985).

[337] Chaim Saiman, *Interpreting Immunity*, 7 U. PA. J. CONST. L. 1155, 1157–58 (2005); Mark R. Brown, *The Fall and Rise of Qualified Immunity: From* Hope *to* Harris, 9 NEV. L.J. 185, 185–87 (2008); John C. Jeffries, Jr., *Reversing the Order of Battle in Constitutional Torts*, 2009 SUP. CT. REV. 115, 131 (2009); John C. Jeffries, Jr., *What's Wrong With Qualified Immunity?*, 62 FLA. L. REV. 851, 852 (2010); *see also* Leval, *supra* note 335. Of course, academics had criticized qualified immunity much earlier. *See, e.g.*, Rudovsky, *supra* note 25; Armacost, *supra* note 27. But the unworkability and questionable legal status of constitutional rulings was new.

[338] Pearson v. Callahan, 555 U.S. 223, 234–35 (2009) (citing cases sidestepping the constitutional question).

inherent dilemmas, and the push-back that the Court felt from within and without the judiciary, did not create any efforts to rethink and reform qualified immunity. Instead, it created the even more anti-*Marburian* temptation to retreat from the constitutional question altogether when it was possible, resolve cases on qualified immunity grounds, and leave the constitutional issue in limbo. In *Pearson v. Callahan*, the Court gave in to this temptation.

IV. *MARBURY* TO THE WINDS: *PEARSON V. CALLAHAN* AND BEYOND

A. Pearson*'s Retreat*

In *Pearson v. Callahan*, police officers entered a Utah home as part of a drug sting, after a confidential informant had already entered it to purchase a small quantity of methamphetamines.[339] Two hours after the informant made his purchase and returned to them, they made a warrantless entry.[340] As other arguments for exceptions to the warrant requirement had failed, counsel put the full weight of his argument on extending the consent-once-removed doctrine to confidential informants—which the Tenth Circuit had held did not apply in its jurisdiction, creating a split with the Sixth, Seventh, and Ninth Circuits.[341]

At oral argument, Justice Souter pressed petitioner's counsel on why the Court should extend the exception when probable cause was clearly established by the informant's lawful entry and police had ample time to obtain a warrant.[342] When counsel conceded that he "d[id]n't know how to answer the question,"[343] he was rescued by Chief Justice Roberts, who reminded him that he did not have to "prove that [he was] right" on the constitutional question, only that "the contrary principle was not clearly established."[344] Why engage the difficult constitutional question when, in any event, qualified immunity shielded the officers from liability, and the Court from another contentious ruling?

Pearson, as many cases before, confronted the Court with a thorny constitutional issue, but an easy off-ramp through qualified immunity. And yet the two analyses could not be kept separate. If the consent-once-removed doctrine applied to confidential informants, clearly established law would authorize the warrantless entry. If the doctrine did not apply, the officers would have violated clearly established law, as no exception to the warrant requirement would have authorized their entry. The Court accordingly decided that it had to shed the strictures of *Saucier*.

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[339] *Pearson*, 555 U.S. at 227–28.

[340] *Id.* at 228.

[341] *Oral Argument at 4:30–5:18*, Pearson v. Callahan, 555 U.S. 223 (2009) (No. 07-751), https://www.oyez.org/cases/2008/07-751 [https://perma.cc/5TBS-MM6K].

[342] *Id.* at 13:05–14:07.

[343] *Id.* at 14:26.

[344] *Id.* at 14:39–14:52.

From *Pearson* onwards, "[t]he judges of the district courts and the courts of appeals [were] permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first."[345] The unanimous *Pearson* Court promptly exercised that discretion to sidestep the Fourth Amendment question, and granted qualified immunity on the second prong alone.[346]

B. Pearson*'s Dodge*

Pearson is not only interesting for the arguments it engaged in justifying its retreat from the *Saucier* two-step, but also for the arguments it chose *not* to engage. All of the reasons that the Court marshalled in favor of the qualified immunity's newly found flexibility were framed as interests squarely within the domain of the judiciary. *Saucier*'s rule wasted resources by requiring parties to litigate and courts to adjudicate the constitutional question.[347] It risked confusing lower courts when the constitutional rule in question depended on other cases currently pending on appeal or interpretations of ambiguous state laws.[348] It often led to premature adjudication of constitutional claims at summary judgment, when the factual record was thin and the parties' briefing was weak.[349] It risked insulating constitutional rulings from appeal when a defendant lost on the constitutional issue, but won judgment on qualified immunity.[350] It departed from the principle of constitutional avoidance.[351] And it infantilized lower courts by prescribing a rigid sequence of steps.[352] *Saucier*'s goal of "support[ing] the Constitution's 'elaboration from case to case'"[353] and *Harlow*'s original concern of balancing "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"[354] were mentioned in passing, but not treated in depth.

Indeed, the *Pearson* Court left the implications for the development of constitutional rights and government effectiveness entirely unaddressed, despite extensive briefing on both sides by civil rights organizations, police organizations, the federal government, and the states.[355] Nor did it take stock of how qualified immunity doctrine had shifted in recent years.[356] From the outset, the *Pearson* opinion made

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345 Pearson v. Callahan, 555 U.S. 223, 236 (2009).
346 *Id.* at 243–45.
347 *Id.* at 236.
348 *Id.* at 238.
349 *Id.* at 237.
350 *Id.* at 238.
351 *Id.* at 240.
352 *Id.* at 242.
353 *Id.* at 232 (quoting Saucier v. Katz, 533 U.S. 194, 201 (2001)).
354 *Id.* at 231.
355 *See infra* note 375 and accompanying text.
356 *Cf.* Malley v. Briggs, 475 U.S. 335, 341 (1986) ("As the qualified immunity defense

every effort to frame qualified immunity as a "rule [that] is judge made and implicates an important matter involving internal Judicial Branch operations. Any change should come from this Court, not Congress."[357] In *Pearson*, the Court further insulated the judiciary by allowing it to avoid constitutional questions in qualified immunity cases. This came at a time when the Court's qualified-immunity decisions had become a hotly contested battleground between civil rights groups and police interest groups and states on the issue of police overreach.[358] As the Court attempted to dodge the political implications of its decisions, it allowed qualified immunity to deviate even further from the *Marburian* wisdom of previous decades—the very same wisdom that was needed to stay above the fray.

C. Pearson*'s Aftermath*

Abandoning *Saucier*'s anti-*Marburian* framework did not lead the Court to return to a more middling position between broadly recognizing the existence of individual rights and restricting itself to managing the available remedies. In fact, the opposite occurred after *Pearson*, as qualified immunity stagnated and rigidified. With the abandonment of Chief Justice Rehnquist's sequencing requirement, the Court seized even more strongly on Justice Scalia's requirement from *Anderson v. Creighton* that "clearly established" law meant that it had to be so specific as to make the challenged conduct's "unlawfulness . . . apparent."[359] Kit Kinports has explained in great detail how the clearly established standard has become more and more demanding over time.[360] She has also tracked how the Court has repeatedly stripped back sources that count for clearly established law, while allowing more and more avenues to establish that the law is *not* clearly established.[361]

Beyond the clearly established standard, the doctrine itself has been refined and developed only four more times since then.[362] But given how little doctrinal innovation

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has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law.").

[357] *Pearson*, 555 U.S. at 233–34.

[358] *See infra* note 375 and accompanying text.

[359] Anderson v. Creighton, 483 U.S. 635, 640 (1987).

[360] *See generally* Kinports, *supra* note 7 (discussing the Court's progressive tightening of the standard).

[361] *Id.*

[362] *Camreta v. Greene* held that, even when a government official wins on qualified-immunity grounds but loses on the constitutional grounds, the Supreme Court may still review the appellate court's constitutional ruling. 563 U.S. 692, 700–10 (2011). *Ashcroft v. al-Kidd*, in passing, expanded that rationale to mean that, the Supreme Court has discretion to review both prongs of the qualified immunity analysis when an appellate court reaches them. 563 U.S. 731, 735 (2011). *Filarsky v. Delia* established the principle that a private individual whom the government hires temporarily to carry out its work receives the same qualified immunity protections as her permanently employed counterparts. 566 U.S. 377, 383–91 (2012). And lastly, *Plumhoff v. Rickard* clarified that, as a general matters, denials of qualified immunity

there has been since *Pearson*, the best way to tell qualified immunity's story over the last decade may be through numbers. Out of twenty-two cases, all found for the defendant official.[363] Twenty of them granted qualified immunity, while one resolved the case by finding no constitutional violation,[364] and another remanded on the question of whether plaintiff could bring a *Bivens* action in the first place.[365] No case denied qualified immunity. Out of the twenty cases granting immunity, seventeen reversed an appellate court's denial of it,[366] and three left a grant of immunity in place.[367] In its twenty-two cases since *Pearson*, the Court reached the constitutional question only six times. Four times, it found no violation,[368] once it found one,[369] and once it split the difference between several constitutional claims.[370] Only once, in other words, did the Court ever come close to a *Marburian* move.[371]

The picture is even starker when one looks at suits against police officers accused of excessive force or warrantless entry. In all eleven cases, the Supreme Court reversed the appellate court's denial of qualified immunity.[372] Only two reached the constitutional issue, but found no violation.[373] Moreover, of the nine post-*Pearson*

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are immediately appealable, so long as they are based on a legal determination. 572 U.S. 765, 771–79 (2014).

[363] *See infra* notes 411–13.

[364] *See generally* Nieves v. Bartlett, 139 S. Ct. 1715 (2019).

[365] *See generally* Hernandez v. Mesa, 137 S. Ct. 2003 (2017).

[366] Ashcroft v. al-Kidd, 563 U.S. 731, 741–45 (2011); Messerschmidt v. Millender, 565 U.S. 535, 553–55 (2012); Ryburn v. Huff, 565 U.S. 469, 474–77 (2012); *Filarsky*,, 566 U.S. at 393–94; Reichle v. Howards, 566 U.S. 658, 664–69 (2012); Stanton v. Sims, 571 U.S. 3, 4–9 (2013); Wood v. Moss, 572 U.S. 744, 756–59 (2014); *Plumhoff*, 572 U.S. at 779–81; Carroll v. Carman, 574 U.S. 13, 17–20 (2014); Taylor v. Barkes, 575 U.S. 822, 824–26 (2015); City of San Francisco v. Sheehan, 135 S. Ct. 1765, 1776–78 (2015); Mullenix v. Luna, 136 S. Ct. 305, 308–14 (2015); White v. Pauly, 137 S. Ct. 548, 550–53 (2015); Ziglar v. Abbasi, 137 S. Ct. 1843, 1865–69 (2017); District of Columbia v. Wesby, 138 S. Ct. 577, 589–93 (2018); Kisela v. Hughes, 138 S. Ct. 1148, 1152–55 (2018); City of Escondido v. Emmons, 139 S. Ct. 500, 501–04 (2019).

[367] Safford v. Redding, 557 U.S. 364, 377–79 (2009); Camreta v. Greene, 563 U.S. 692, 710–13 (2011); Lane v. Franks, 573 U.S. 228, 243–47 (2014).

[368] *al-Kidd*, 563 U.S. at 736–41; *Plumhoff*, 572 U.S. at 773–79; *Sheehan*, 135 S. Ct. at 1774–76; *Nieves*, 139 S. Ct. at 1721–28.

[369] *Lane*, 573 U.S. at 238–43.

[370] Safford v. Redding, 557 U.S. at 372–77.

[371] On another occasion, it equitably vacated the constitutional ruling because the opposing party's loss of interest in the matter had made the case moot. *Camreta*, 563 U.S. at 710–13.

[372] Messerschmidt v. Millender, 565 U.S. 535, 553–55 (2012); Ryburn v. Huff, 565 U.S. 469, 474–77 (2012); Stanton v. Sims, 571 U.S. 3, 4–9 (2013); *Plumhoff*, 572 U.S. at 779–81; Carroll v. Carman, 574 U.S. 13, 17–20 (2014); *Sheehan*, 135 S. Ct. at 1776–78; Mullenix v. Luna, 136 S. Ct. 305, 308–14 (2015); White v. Pauly, 137 S. Ct. 548, 550–53 (2015); District of Columbia v. Wesby, 138 S. Ct. 577, 589–93 (2018); Kisela v. Hughes, 138 S. Ct. 1148, 1152–55 (2018); City of Escondido v. Emmons, 139 S. Ct. 500, 501–04 (2019).

[373] *Plumhoff*, 572 U.S. at 773–79; *Sheehan*, 135 S. Ct. at 1774–76.

summary *per curiam* reversals, seven came in this subset of cases.[374] The numbers tell a story that current scholarship,[375] advocacy groups,[376] and media outlets[377] near-unanimously confirm: the Court has abandoned its *Marburian* middle ground and come out against constitutional rights. What was initially a defense in a constitutional suit against government officials is now a "one-sided approach [that has] transform[ed] the doctrine into an absolute shield for law enforcement officers."[378]

V. LESSONS AND A WAY FORWARD

It is easy to recognize that qualified immunity is broken, but much more difficult to imagine an achievable alternative. Justices Sotomayor[379] and Thomas[380] have signaled a willingness to amend the doctrine. However, public pressure notwithstanding, it seems unlikely that the Court will abolish qualified immunity outright. If it took the disapproval of five Justices—Rehnquist, Stevens, Scalia, Ginsburg, and Breyer (none of whom are on the Court any longer)—and a fiercely critical judiciary to retreat from the *Saucier* two-step, it seems unlikely that the Court will abandon decades of precedent that have entrenched a standard that does not simply protect police officers, but protects executive officials "across the board"[381] and would suddenly impose strict liability in damages under § 1983. In June of 2020, with outcries over the murder of George Floyd reviving public calls for abolishing qualified immunity,[382] the Supreme Court denied certiorari in all thirteen qualified immunity cases on its docket,[383] three of which petitioned to consider the question of whether qualified immunity should be recalibrated.[384] Congress may yet act and statutorily

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[374] *Ryburn*, 565 U.S. at 469; *Stanton*, 571 U.S. at 3; *Carroll*, 574 U.S. at 13; *Mullenix*, 136 S. Ct. at 305; *White*, 137 S. Ct. at 548; *Kisela*, 138 S. Ct. at 1148; *Emmons*, 139 S. Ct. 500. The other two per curiam decisions involved border patrol agents, Hernandez v. Mesa, 137 S. Ct. 2003 (2017), and prison guards, Taylor v. Barkes, 575 U.S. 822 (2015).

[375] *See supra* Introduction.

[376] *See supra* note 21 and accompanying text.

[377] *See supra* Introduction.

[378] Kisela v. Hughes, 138 S. Ct. 1148, 1162 (Sotomayor, J., dissenting).

[379] *Id.*

[380] Ziglar v. Abbasi, 137 S. Ct. 1843, 1872 (2017) (Thomas, J., dissenting) ("In an appropriate case, we should reconsider our qualified immunity jurisprudence.").

[381] Harlow v. Fitzgerald, 457 U.S. 800, 819 (1982) (Brennan, J., concurring).

[382] *See, e.g.*, Debra Cassens Weiss, *Death of George Floyd Brings Debate on Qualified Immunity for Police Misconduct*, A.B.A. J. (June 2, 2020, 11:18 AM), https://www.abajournal.com/news/article/death-of-george-floyd-brings-debate-on-qualified-immunity [https://perma.cc/6EM7-KLTE].

[383] Jay Schweikert, *The Supreme Court's Dereliction of Duty on Qualified Immunity*, CATO AT LIBERTY (June 15, 2020, 11:27 AM), https://www.cato.org/blog/supreme-courts-dereliction-duty-qualified-immunity [https://perma.cc/GR4P-VR36].

[384] *Id.*

overrule it for police officers.[385] But barring such a result,[386] changing qualified immunity through litigation will require an alternative that is doctrinally feasible. Such an alternative will have to avoid the double mistake of requiring a highly specific right under the immunity analysis, while questioning the existence of the underlying right on the merits.

But this new litigation strategy need not be derived from scratch. It is already laid out in a 2019 opinion by Chief Justice Roberts, one that ingeniously performs the *Marburian* move all over again. The case is *Nieves v. Bartlett*.[387] Here, Bartlett, a winter festival attendee, drunkenly confronted a police officer, until a different officer—Nieves—intervened and arrested him for disorderly conduct.[388] Bartlett felt that the Nieves was retaliating against him, as Bartlett had previously badgered Nieves and nothing had happened *then*.[389] The festival attendee brought a § 1983 suit for retaliatory arrest under the First Amendment—and lost.[390]

But the *Nieves* Court did not dispose of the case on qualified immunity grounds, even though *Reichle v. Howards* had ruled seven years earlier that the law on the precise question at issue here—does the existence of probable cause foreclose a retaliatory arrest claim?—was not clearly established.[391] Instead, the Court went to the merits, clarified the standard, and held that the arresting officer could plead the existence of probable cause as a defense in a retaliatory arrest claim.[392] The reasoning of *Nieves* strikingly resembles that *Pierson v. Ray*, in which the Court made the defense of probable cause and good faith available in a *false* arrest claim.[393]

Just as in *Pierson*, the *Nieves* Court observed that, "[w]hen defining the contours of a claim under § 1983, we look to 'common-law principles that were well settled at the time of its enactment.'"[394] And "the consistent rule [at common law]" the Court continued, "was that officers were not liable for arrests they were privileged

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[385] At the time of writing this Article, the George Floyd Justice in Policing Act of 2020, H.R. 7120, 116th Cong. (2020), had passed the House of Representatives, https://www.congress.gov/bill/116th-congress/house-bill/7120. *See id.* § 102 (proposing to amend 42 U.S.C. § 1983 to ban police officers' defense that they acted in good faith or the law allegedly violated was not clearly established at the time).

[386] Li Zhou & Ella Nilsen, *The House Just Passed a Sweeping Police Reform Bill. It's Not Expected to Go Anywhere in the Senate, However*, VOX (June 25, 2020, 8:50 PM EDT), https://www.vox.com/2020/6/25/21303005/police-reform-bill-house-democrats-senate-republicans [https://perma.cc/E6BW-ZHC4].

[387] Nieves v. Bartlett, 139 S. Ct. 1715 (2019).

[388] *Id.* at 1720–21.

[389] *Id.* at 1721.

[390] *Id.* at 1721, 1728.

[391] Reichle v. Howards, 566 U.S. 658, 664–70 (2012).

[392] *Nieves*, 139 S. Ct. at 1726–27.

[393] Pierson v. Ray, 386 U.S. 547, 555 (1967); *see also supra* Part I.

[394] *Nieves*, 139 S. Ct. at 1726 (citing Kalina v. Fletcher, 522 U.S. 118, 123 (1997); Manuel v. Joliet, 137 S. Ct. 911, 920–21 (2017)).

to make based on probable cause."[395] The Court went on to hold that probable cause "generally defeat[s] a retaliatory arrest claim," with the added wrinkle that a plaintiff can rebut this defense by "present[ing] objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been."[396] Given the facts alleged, plaintiff Bartlett's claim failed that test as a matter of law, and reaching the question of qualified immunity was unnecessary.[397] *Pierson*, too, reasoned from the principle that § 1983 did not mean "to abolish wholesale all common law immunities."[398] As such, officers accused of the common-law tort of false arrest could plead the common-law defense of probable cause and good faith.[399] *Nieves* and *Pierson* thus follow the same path of reading a common-law defense into a common-law constitutional tort.

Nieves holds the key for a reform litigation strategy of qualified immunity. Its focus on a defense that belongs to the adjudication of the merits claim is highly unusual at a time when the Court has almost exclusively chosen to rely on the independent qualified-immunity analysis in its § 1983 cases.[400] This move revives the Court's original reasoning of when qualified immunity was, in fact, nothing but a common-law defense to a common-law tort.[401] A first step in recalibrating qualified immunity would therefore be to bring constitutional tort suits under § 1983 that have not been heavily litigated and induce the Court to spell out the common-law defenses available in those claims.

Once a robust body of case law reasoning along those lines is established, one of at least two things can happen. The first possibility is that the Court could become more willing to relax the clearly established prong over time, as common-law defenses to the merits claim will buffer the sudden loss of protection that government officials would experience if qualified immunity were abolished without anything in its place. This adjustment could be accelerated by the fact that clarifying a claim's defenses and underlying principles lends itself to creating more clearly established law. On this theory, qualified immunity would quietly be phased out over time. Defenses could be adjusted for each cause of action, calibrating when a claim fails at summary judgment, and when it goes to trial, where the defense remains available.

A second possibility is that, once the Court has become comfortable disposing of § 1983 cases by spelling out defenses to the merits claim, it could explicitly overrule, or purport to correct, qualified immunity. Since qualified immunity itself was originally a common-law defense, it would be redundant, or even plainly inconsistent, to duplicate the legal analysis. Qualified immunity may be justified on the principle that Congress did not intend to abolish common-law immunities and defenses when

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[395] *Id.* at 1727. This was an objective test for the *Nieves* Court. *Id.*
[396] *Id.*
[397] *Id.* at 1727–28.
[398] *Pierson*, 386 U.S. at 554.
[399] *Id.* at 554–57.
[400] *See supra* Part IV.
[401] *See supra* Section I.B.

it passed § 1983.[402] But Congress certainly never intended to have the common-law-derived defense of qualified immunity stacked *on top* of a claim's common-law defenses. A robust set of revived common-law defenses on the merits will thus remove the legal and logical basis of qualified immunity, allowing the Court to overrule it, or gently put it to rest.

In developing this case law, attorneys should observe three strategic maxims in light of the qualified immunity doctrine's history. First, the defenses should be objective. The subjective good-faith prong of qualified immunity before *Harlow v. Fitzgerald* was a constant bone of contention, as it was "easy to allege and hard to disprove."[403] Indeed, Chief Justice Roberts emphasized in *Nieves v. Bartlett* that the defense "provides an objective inquiry that avoids the significant problems that would arise from reviewing police conduct under a purely subjective standard."[404] Steering clear of subjective defenses will avoid qualified immunity's past mistakes and likely run into less resistance from the Court.

Second, litigation over the defenses should not involve inquiries into whether the allegedly violated right exists at all. Rather, the pleadings should be evaluated under the standards of *Ashcroft v. Iqbal*,[405] without giving rise to a judicial determination of what the right is, or an appellate court's change of the substantive right.[406] Such questions should only be reached if the case goes to trial on the merits and provides parties the chance to adequately brief and litigate them. This would avoid the instability that Chief Justice Rehnquist's threshold inquiry introduced and ultimately caused the Court to retreat from the merits question altogether.[407]

Third, the defense should not require the plaintiff to prevail under a more particularized articulation of the right than is required on the merits. Defenses should simply lay out what the officer may plead in response to the allegation and allow her to produce objective evidence to meet that pleading requirement. This would avoid Justice Scalia's mistake in *Anderson v. Creighton* that "clearly established" meant "more particular," and thus the temptation of leaving constitutional law in limbo by avoiding the merits question.[408]

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[402] *Pierson*, 386 U.S. at 554 (citing Tenney v. Brandhove, 341 U.S. 367 (1951)). For the long line of cases reiterating that principle, see *supra* Section III.A.

[403] Nieves v. Bartlett, 139 S. Ct. 1715, 1725 (2019) (quoting Crawford-El v. Britton, 523 U.S. 574, 585) (1998)).

[404] *Id.* at 1727.

[405] Ashcroft v. Iqbal, 556 U.S. 662 (2009).

[406] *See, e.g.*, Scott v. Harris 550 U.S. 372 (2007) (changing evidentiary admissibility requirements at summary judgment); Crawford-El v. Britton, 523 U.S. 574 (1998) (rejecting the appellate court's change in evidentiary burden in unconstitutional motive cases).

[407] Crawford-El v. Britton, 523 U.S. 574, 601–02 (1998) (Rehnquist, J., dissenting).

[408] Such a standard need not collapse the merits and defense analyses in cases where both depend on objective reasonableness (although this Article does not take issue with this outcome, and indeed endorses it). It would simply have to require evidence from the defendant for a pleading that plaintiff need not make in bringing the claim.

While this litigation strategy will not get rid of qualified immunity outright, it has the advantage of being relatively uncontroversial. Chief Justice Roberts will most likely support it, as he was the author of *Nieves v. Bartlett*. Justice Thomas will likely be with this approach, too, as his main reason for reconsidering qualified immunity is that the Court's "analysis is no longer grounded in the common-law backdrop against which Congress enacted the 1871 Act."[409] Justice Kagan can also be counted among the likely supporters, as she authored another recent opinion that, "[i]n defining the contours and prerequisites of a § 1983 claim . . . courts are to look first to the common law of torts."[410] And if this strategy is framed as a more plaintiff-friendly alternative to qualified immunity, Justice Sotomayor will likely join as well. Finding at least one more vote for a common-law-based approach among the remaining Justices should not be difficult.

But what a majority will ultimately have to acknowledge is that *Harlow*'s principle of resolving cases as early as possible—preferably at summary judgment[411]—can no longer be an ironclad requirement. Some cases will have to go to trial.[412] And while qualified immunity may be an "immunity from suit," the revived common-law defenses should be more properly seen as a mechanism to weed out cases when it becomes apparent that they are insubstantial. This can be at summary judgment, during trial, or at the end. Only this more flexible view will give effect to *Harlow*'s more overarching goal of balancing the vindication of constitutional rights with effective government.[413] In the end, the Court should never abandon its *Marburian* wisdom: give individuals a wide berth to pleading rights violations, and only maintain discretion on the *remedies* side.

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[409] Ziglar v. Abbasi, 137 S. Ct. 1843, 1871 (2017) (Thomas, J., concurring).

[410] Manuel v. Joliet, 137 S. Ct. 911, 921 (2017).

[411] Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); Saucier v. Katz, 533 U.S. 194, 201 (2001) ("[W]e repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage of litigation." (quoting Hunter v. Bryant, 502 U.S. 224, 227 (1991)).

[412] *See, e.g.*, *Crawford-El*, 523 U.S. at 591–92 (observing that the policy balance struck in *Harlow* does not require that all claims that ultimately lack merit be screened out before trial).

[413] *Harlow*, 457 U.S. at 813–15.