

# GETTING IT RIGHT: WHETHER TO OVERTURN QUALIFIED IMMUNITY

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## ABSTRACT

*Qualified immunity, the defense available to police officers and other government officials facing civil rights lawsuits, has increasingly come under attack. In recent opinions, Justice Clarence Thomas has noted his growing concern that the Court's current qualified immunity jurisprudence, which deals with whether a right is "clearly established," strays from Congress's intent in enacting the Civil Rights Act of 1871 (the statute giving rise to civil rights claims). Other jurists and legal scholars similarly criticize the doctrine, with many calling for the Court to revisit its qualified immunity jurisprudence and abolish or significantly alter the doctrine.*

*Given that the Court's qualified immunity precedents have been routinely followed for decades, should the Court overturn them, even if they are wrong? After all, as Justice Brandeis recognized, "[s]tare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right."<sup>1</sup> Moreover, qualified immunity is derived from statutory precedent, and the Court counsels that stare decisis concerns weigh heavily with such judicial doctrines.*

*Assuming the Court erred in its current qualified immunity jurisprudence, this Article considers whether stare decisis concerns should be relaxed to allow qualified immunity to be overturned. This Article first addresses why relaxing stare decisis for statutory precedents is appropriate in the case of qualified immunity. The Article then builds*

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1. *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting), *overruled in part* by *Helvering v. Bankline Oil Co.*, 303 U.S. 362 (1938), *overruled in part* by *Helvering v. Mt. Producers Corp.*, 303 U.S. 376 (1938); *see, e.g.*, *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (arguing that stare decisis is the "preferred course").

*on and applies a stare decisis framework advanced by Professor Randy Kozel<sup>2</sup> to the Court’s qualified immunity jurisprudence to determine whether stare decisis requires the Court to preserve qualified immunity in its current form. After applying this framework, the Article ultimately concludes that the Court’s current “clearly established” law standard should be overturned, but some form of qualified immunity should remain.*

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## INTRODUCTION

This Article considers whether *stare decisis* requires the Court to maintain its current test for qualified immunity. Qualified immunity is a defense available to police officers and other government actors facing civil rights lawsuits under 42 U.S.C. § 1983. Under the Court’s current formulation of the qualified immunity doctrine, “officers are entitled to qualified immunity under § 1983 unless (1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was ‘clearly established at the time.’”<sup>3</sup> Thus, to win a civil rights suit against a police officer or other government official, a showing that an officer violated an individual’s constitutional rights is not enough. In addition, a plaintiff must illustrate that the unlawfulness of the officer’s conduct was “clearly established” by then existing law.

The killing of George Floyd and other recent high-profile police incidents has ushered in a renewed national discussion on policing, and more specifically, on qualified immunity and its prong requiring “clearly established” law.<sup>4</sup> The discussion surrounding the doctrine proceeds on several different fronts. Some states and localities passed legislation eliminating qualified immunity for police officers for state or municipal causes of action.<sup>5</sup> Nationally, debate has ensued over whether a police reform act should eliminate or alter qualified immunity.<sup>6</sup> Scholars and jurists from across the ideological spectrum

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3. *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018) (quoting *Reichle v. Howards*, 566 U.S. 658, 664 (2012)).

4. See Madeleine Carlisle, *The Debate Over Qualified Immunity Is at the Heart of Police Reform. Here’s What to Know*, TIME (June 3, 2021), <https://time.com/6061624/what-is-qualified-immunity/> (“As calls for greater police accountability gained momentum in 2020, the decades-old doctrine that protects officers from some lawsuits came under fresh scrutiny”). See also George Floyd Justice in Policing Act of 2021, H.R. 1280, 117th Cong. (2021) (eliminating qualified immunity for law enforcement officers).

5. See An Act Concerning Police Accountability, H.R. 6004, 2020 Leg., July Spec. Sess. (Conn. 2020) (limiting governmental immunity for civil actions, and eliminating it for civil actions for equitable relief); S.R. 20-217, 72nd Gen. Assemb., 2d Reg. Sess. (Colo. 2020) (“Qualified immunity is not a defense to liability.”); H.R. 4, 55th Leg., 1st Sess. (N.M. 2021) (eliminating “the defense of qualified immunity” in claims under the act, for people acting under the color of law who deprive people of “rights, privileges, or immunities”); Press Release, N.Y. St. Sen., Senator Zellnor Y. Myrie to Introduce Bill to End Police “Qualified Immunity” (June 26, 2020), <https://www.nysenate.gov/newsroom/press-releases/zellnor-myrie/senator-zellnor-y-myrie-introduce-bill-end-police-qualified> (discussing the introduction of a bill to end qualified immunity in New York); NAT’L CONF. OF ST. LEGS., *Qualified Immunity* (Jan. 12, 2021), <https://www.ncsl.org/research/civil-and-criminal-justice/qualified-immunity.aspx> (discussing state limitations of the qualified immunity defense).

6. See H.R. 1280; Marianne Levine & Nicholas Wu, *Lawmakers Scrap Qualified Immunity Deal in Police Reform Talks*, POLITICO (Aug. 17, 2021 5:38 PM), <https://www.politico.com/news/2021/08/17/lawmakers-immunity-police-reform-talks-505671>

have called for qualified immunity to be abolished or at least revisited by the Supreme Court.<sup>7</sup> Much of the attention focuses on the current requirement for “clearly established” law.<sup>8</sup>

Other factions are unified in their support of qualified immunity. Police organizations, many politicians (especially conservative lawmakers), legal scholars, and jurists highlight the benefits of the doctrine.<sup>9</sup> Supporters argue that it allows officers to make split-second

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(outlining the debate amount lawmakers surrounding potential limitations on qualified immunity); Jacqueline Alemany, *Power Up: Republican Sen. Mike Braun to Unveil New Bill Scaling Back Qualified Immunity for Police*, WASH. POST (June 23, 2020), <https://www.washingtonpost.com/news/powerpost/paloma/powerup/2020/06/23/powerup-republican-sen-mike-braun-to-unveil-new-bill-scaling-back-qualified-immunity-for-police/5ef1163c88e0fa32f8240186/> (discussing a Republican senator’s proposed bill to limit qualified immunity, in the context of the national debate surround the issue).

7. See, e.g., *Hoggard v. Rhodes*, 141 S. Ct. 2421 (2021) (Thomas, J., statement respecting the denial of certiorari) (discussing issues with the qualified immunity doctrine, including its lack of grounding in text or history); *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017) (Thomas, J., concurring in part and concurring in the judgment) (stating his “concerns about our qualified immunity process”); *Baxter v. Bracey*, 140 S. Ct. 1862 (2020) (Thomas, J., dissenting from the denial of certiorari) (reaffirming his previously expressed doubts concerning qualified immunity); *Kisela v. Hughes*, 138 S. Ct. 1148, 1161 (2018) (Sotomayor, J., dissenting) (disagreeing with the use of qualified immunity “as an absolute shield” and misuse of the “clearly established” standard); see generally Scott Michelman, *The Branch Best Qualified to Abolish Immunity*, 93 NOTRE DAME L. REV. 1999 (2018) (“[Q]ualified immunity is a mess of the Supreme Court’s making, and the Supreme Court should clean it up.”); William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 88 (2018) (“[T]he doctrine lacks legal justification, and the Court’s justifications are unpersuasive.”); 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, 1254 (2015) (criticizing the Court’s current qualified immunity jurisprudence as “risk[ing] turning federal judges from protectors of the Constitution into unreasoning deniers of worthy claims of constitutional rights”).

8. See, e.g., *Kisela*, 138 S. Ct. at 1161 (Sotomayor, J., dissenting) (calling attention to the high level of specificity the majority was requiring for the “clearly established” law standard); *Hoggard*, 141 S. Ct. at 2421 (Thomas, J., statement respecting the denial of certiorari) (noting that the Court’s “clearly established” law standard cannot be found in § 1983’s text and “may have little basis in history”).

9. See *Harlow v. Fitzgerald*, 457 U.S. 800, 813–14 (1982) (discussing how the doctrine balances interests on both sides); Richard G. Schott, J.D., *Qualified Immunity: How it Protects Law Enforcement Officers*, FBI L. ENFORCEMENT BULLETIN (Sept. 1, 2012), <https://leb.fbi.gov/articles/legal-digest/legal-digest-qualified-immunity-how-it-protects-law-enforcement-officers> (explaining the need for qualified immunity such as the high risks of the job and burden of lawsuits); POLICE FOUND., *Qualified Immunity and Accountability in Policing*, <https://www.policefoundation.org/qualified-immunity-and-accountability-in-policing/> (last visited Oct. 4, 2021) (explaining the “substantial” impact of lawsuits, and accountability alternatives outside ending qualified immunity); NAT’L POLICE SUPPORT FUND, *Why We Need Qualified Immunity* (Feb. 18, 2021), <https://nationalpolicesupportfund.com/why-we-need-qualified-immunity/> (“[Q]ualified immunity is essential for allowing police to do their jobs without fear of baseless legal actions that could ruin their reputations and their careers.”); Graham Moomaw, *At First Debate, McAuliffe Walks Back Support for Ending Qualified Immunity for Police*, VIRGINIA MERCURY (Sept. 16, 2021 9:51 PM),

and sometimes life-or-death decisions without unduly laboring over whether their decision might expose them to liability.<sup>10</sup> Qualified immunity arguably helps retain and recruit officers, especially in an environment where crime is up, and perceived respect for the profession is down.<sup>11</sup> Moreover, the doctrine protects local government coffers from the expenses of litigation and payouts; parties incur lower time-related litigation expenses through the early dismissal of frivolous lawsuits.<sup>12</sup>

Other scholars and jurists focus less on the merits of qualified immunity and instead call for the legal underpinnings of the doctrine to be fundamentally reexamined by the Court. Notably, Justice Clarence Thomas highlighted that the Court’s “qualified immunity jurisprudence stands on shaky ground” and that the current test “cannot be located in § 1983’s text and may have little basis in

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<https://www.virginiamercury.com/2021/09/16/at-first-debate-mcauliffe-walks-back-support-for-ending-qualified-immunity-for-police/> (former Gov. Terry McAuliffe of Virginia explains his support for qualified immunity and why this protection for police should remain); Manu Raju & Jessica Dean, *Changes to Qualified Immunity in Policing Deal Face Senate GOP Resistance*, CNN (May 26, 2021 9:12 PM), <https://www.cnn.com/2021/05/26/politics/policing-deal-qualified-immunity-senate-republicans/index.html> (explaining Sen. John Cornyn and other republican Senate members of the republican party expressed concern and hesitation in eliminating qualified immunity).

10. See *Kingsley v. Hendrickson*, 576 U.S. 389, 399–400 (2015) (explaining how qualified immunity benefits officers in high risk situations); *Graham v. Connor*, 490 U.S. 386, 396–97 (1989) (discussing how decisions in the heat of the moment are viewed differently than with hindsight); *Mullins v. Cyranek*, 805 F.3d 760, 766–67 (6th Cir. 2015) (discussing the difference in ability to judge “at the scene” versus after the fact).

11. See, e.g., David Migoya, *More than 200 Police Officers Have Resigned or Retired Since Colorado’s Police Reform Bill Became Law*, DENVER POST (Aug. 18, 2020 6:00 AM) (explaining more than 200 police officers resigned or retired within weeks after a Colorado law prohibited qualified immunity); Leigh Patterson & Scott Franz, *Following a Tough Year, Some Colorado Departments Lose Officers and Struggle to Hire*, KUNC (Sept. 1, 2021 at 2:00 PM), <https://www.kunc.org/news/2021-09-01/following-a-tough-year-some-colorado-departments-lose-officers-and-struggle-to-hire> (reporting on the high number of resignations at police departments, and difficulties hiring replacements).

12. *Harlow*, 457 U.S. at 814 (listing the social costs of in the absence of qualified immunity, including the expense of litigation); compare Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 NOTRE DAME L. REV. 1853, 1879–80 (2018) (referencing a study conducted by Joanna Schwartz. In analyzing this study, approximately one-third – 29.9–31.6 percent– of government officials who raised qualified immunity were denied a motion to dismiss during pleadings, and 32.2 percent at summary judgement), with Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L. J. 2 (2018) (concluding only 3.9 percent of cases in which qualified immunity *could* be raised were dismissed on qualified immunity grounds. For the 1,183 § 1983 cases surveyed – whether qualified immunity was raised or not – 0.6 percent were dismissed at the motion to dismiss stage, and 2.6 percent were dismissed at summary judgement on qualified immunity grounds) (emphasis added); see also NAT’L CONF. OF ST. LEGS., *supra* note 5 (explaining qualified immunity protects state and local government from paying money damages).

history.”<sup>13</sup> As Justice Thomas explains it, not only is qualified immunity absent in the text of § 1983, but the Court’s current test requiring “clearly established” law “is not grounded in the common-law backdrop against which Congress enacted § 1983.”<sup>14</sup> That common-law backdrop includes “certain immunities [that] were so well established” when Congress passed the Act prompting § 1983 liability, such that the Court reads those immunities into the statute.<sup>15</sup> Yet, in Justice Thomas’ view, because the Court’s current qualified immunity analysis is neither grounded in the statute’s text nor its common-law backdrop, the Court has “substituted [its] own policy preferences for the mandates of Congress.”<sup>16</sup> By making this statement, Justice Thomas is expressing what he sees as “the Court adopt[ing] the [“clearly established law”] test not because of ‘general principles of tort immunities and defenses’ [that existed at common law when Congress enacted § 1983] ... but because of a ‘balancing of competing values’ about litigation costs and efficiency.”<sup>17</sup>

But if it is true that the Court’s qualified immunity jurisprudence is misguided, even terribly so, should the Court abolish the doctrine? After all, even if qualified immunity stands on shaky legal underpinnings, it has consistently been a defense to claims under § 1983 for more than half a century—the Court first recognized qualified immunity in 1967, in *Pierson v. Ray*.<sup>18</sup> Although the Court has at times modified the contours of the defense,<sup>19</sup> it has consistently applied the

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13. *Hoggard v. Rhodes*, 141 S. Ct. 2421, 2421 (2021) (Thomas, J., statement respecting the denial of certiorari).

14. *Id.* at 2422 (quoting *Turning Point USA at Ark. State Univ. v. Rhodes*, 973 F.3d 868, 879 (2020)).

15. *Ziglar v. Abbasi*, 137 S.Ct. 1843, 1870 (2017) (Thomas, J., concurring in part and concurring in the judgment).

16. *Hoggard*, at 2422 (Thomas, J., concurring in part and concurring in the judgment)) (alteration in original) (quoting *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1872 (2017)).

17. *Baxter v. Bracey*, 140 S.Ct. 1862, 1864 (2020) (Thomas, J., dissenting from the denial of certiorari) (citations omitted).

18. 386 U.S. 547, 557 (1967) (holding that a defense of good faith was available to officers under the civil rights act).

19. *See, e.g., Harlow*, 457 U.S. at 818 (changing the test for qualified immunity to the “clearly established” law standard); *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) (clarifying that cases need not be “fundamentally” or “materially” similar to satisfy the “clearly established” law standard); *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011) (clarifying that “clearly established” law should not be defined “at a high level of generality”).

doctrine despite calls to reconsider<sup>20</sup> or abolish it.<sup>21</sup> As the saying goes, “in most matters it is more important that the applicable rule of law be settled than that it be settled right.”<sup>22</sup> Moreover, qualified immunity derives from statutory precedent, an area where *stare decisis*, the legal doctrine requiring judges to uphold precedent, weighs heavily.<sup>23</sup> *Stare decisis* aims to “promot[e] ‘the evenhanded, predictable, and consistent development of legal principles,’ and contribut[e] to ‘the actual and perceived integrity of the judicial process.’”<sup>24</sup> Without attention to precedent, judges risk being seen as political actors bending the law to fit their ideological aims, rather than neutral stewards of our legal system.

The purpose of this Article is not to analyze whether the Court erred in its qualified immunity precedents—that is a topic that has been thoroughly explored by many legal scholars.<sup>25</sup> Rather, this Article takes as its starting point the assumption that the Court erred in grafting qualified immunity onto § 1983. Assuming the Court erred in creating the “clearly established” law standard, this Article questions whether *stare decisis* precludes overturning the Court’s qualified immunity jurisprudence.

Part I briefly explores the history of the Court’s qualified immunity jurisprudence and highlights arguments that the Court’s rationale is

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20. See, e.g., *Hoggard*, 141 S. Ct. at 2421 (Thomas, J., statement respecting the denial of certiorari) (“[I]n an appropriate case, we should reconsider either our one-size-fits-all test or the judicial doctrine of qualified immunity more generally.”); *Ziglar*, 137 S. Ct. at 1872 (Thomas, J., concurring in part and concurring in the judgment) (noting that the Court “should reconsider our qualified immunity jurisprudence”).

21. See, e.g., Michelman, *supra* note 7 (“[Q]ualified immunity is a mess of the Supreme Court’s making, and the Supreme Court should clean it up.”); Baude, *supra* note 7 at 88 (“[T]he doctrine lacks legal justification, and the Court’s justifications are unpersuasive.”); Reinhardt, *supra* note 7 at 1254 (criticizing the Court’s current qualified immunity jurisprudence as “risk[ing] turning federal judges from protectors of the Constitution into unreasoning deniers of worthy claims of constitutional rights.”).

22. *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting); see, e.g., *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (quoting *Burnet*, 285 U.S. at 406 (Brandeis J. dissenting)).

23. BRYAN A. GARNER ET AL., *THE LAW OF JUDICIAL PRECEDENT* 333 (2016) (noting that for statutory questions *stare decisis* “applies with special force.”).

24. See *Vasquez v. Hillery*, 474 U.S. 254, 265-266 (1986) (describing the Court’s penchant for adhering to the principles of *stare decisis*).

25. See, e.g., Michelman *supra* note 7 at 1999 (“[Q]ualified immunity is a mess of the Supreme Court’s making, and the Supreme Court should clean it up.”); Baude, *supra* note 7 at 88 (“[T]he doctrine lacks legal justification, and the Court’s justifications are unpersuasive.”); Reinhardt, *supra* note 7 at 1254 (criticizing the Court’s current qualified immunity jurisprudence as “risk[ing] turning federal judges from protectors of the Constitution into unreasoning deniers of worthy claims of constitutional rights”).

misguided. The Article then considers whether stare decisis should prevent the Court from abolishing the doctrine. Part II proceeds in four sections. Section A explains the rationale behind stare decisis and highlights the factors the Court typically considers when doing a stare decisis analysis. Section B introduces Prof. Randy Kozel’s framework for stare decisis analysis which aims to enhance the values underlying the doctrine, and then builds on that work. Section C first explains why the usual heightened form for stare decisis for statutory cases should be relaxed in the qualified immunity context, and then goes on to apply the Kozel framework to the Court’s qualified immunity doctrine. Ultimately, although there is a strong argument that the current test for qualified immunity should be overturned, qualified immunity should not be eliminated entirely. Instead, the Court should overrule its more recent qualified immunity jurisprudence, and revert to the test for qualified immunity established in *Pierson v. Ray*.

### I. THE HISTORY OF QUALIFIED IMMUNITY AND CALLS TO ABOLISH IT

Although a full exploration of the history of the qualified immunity doctrine is beyond the scope of this Article, it is important to briefly chart the course the doctrine has taken. This helps inform the stare decisis analysis that comes later in this Article and ultimately sheds light on how the doctrine might further evolve.

Qualified immunity is a defense to civil rights actions under 42 U.S.C. § 1983. The relevant section of the statute states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.<sup>26</sup>

The statute does not explicitly mention “qualified immunity”; nor

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26. 42 U.S.C. § 1983.

does it discuss the current qualified immunity test that requires the search for “clearly established” law. The Court, however, has read the statute “in harmony with general principles of tort immunities and defenses rather than in derogation of them.”<sup>27</sup> The Court does so because “certain immunities were so well established in 1871 ... that [the Court] presume[s] that Congress would have specifically so provided had it wished to abolish them.”<sup>28</sup> Thus, in *Pierson v. Ray*, the Court held that officers could claim qualified immunity for a § 1983 false arrest claim if the officers acted in good faith and on probable cause because “the defense of good faith and probable cause” was available to officers at common law.<sup>29</sup>

#### A. *The Current “Clearly Established” Law Standard*

Under the Court’s current qualified immunity test, “officers are entitled to qualified immunity under § 1983 unless (1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was ‘clearly established at the time.’”<sup>30</sup> Thus, a police officer (or other government official) is given impunity so long as his or her actions did not violate “clearly established” law. In other words, unless factually similar cases exist where an officer’s (or other government official’s) conduct was found to violate someone’s civil rights, the officer is likely to be entitled to immunity.<sup>31</sup> If similar cases do not exist, or the officer’s conduct is not clearly violative of the Constitution, then the law is not “clearly established” and the case against the officer is dismissed.<sup>32</sup>

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27. *Ziglar v. Abbasi*, 137 S.Ct. 1843, 1870 (2017) (Thomas, J., concurring in part and concurring in the judgment) (quoting *Malley v. Briggs*, 106 S.Ct. 1092 (1986)).

28. *Id.* (citation and internal quotation marks omitted).

29. *Pierson v. Ray*, 386 U.S. 547, 557 (1967).

30. *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018) (quoting *Reichle v. Howards*, 566 U.S. 658, 664 (2012)).

31. *See id.* at 589, 590 (2018) (“To be clearly established, a legal principle must have a sufficiently clear foundation in then-existing precedent . . . . Thus, we have stressed the need to ‘identify a case where an officer acting under similar circumstances . . . was held to have violated the Fourth Amendment.’” (quoting *White v. Pauly*, 580 U.S. 137 S. Ct. 548, 552 (2017) (per curiam)); *Ashcroft v. al-Kidd*, 563 U.S. 731, 741–42 (2011) (explaining that for the law to be clearly established it is necessary that there be “controlling authority” or “a robust ‘consensus of cases of persuasive authority’” (quoting *Wilson v. Layne*, 526 U.S. 603, 617 (1999))).

32. *See Wesby*, 138 S. Ct. at 590 (noting that while “there can be the rare ‘obvious case,’ where the unlawfulness of the officers’ conduct is sufficiently clear . . . ‘a body of relevant case law’ is usually necessary” (quoting *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) (per curiam)); *al-Kidd*, 563 U.S. at 741, 742 (“We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate . . . . The general proposition, for example, that an unreasonable search or seizure violates the Fourth Amendment is of little help in determining whether the violative nature of particular conduct is clearly

Qualified immunity cases often turn on how factually identical the relevant precedent must be. The current test requires a high level of specificity to qualify as “clearly established” law.<sup>33</sup> Several jurists and scholars, find that the Court’s current practice of requiring “extreme factual specificity” effectively makes qualified immunity “nearly absolute.”<sup>34</sup>

It is important to note that the “clearly established” law standard is objective.<sup>35</sup> An officer’s subjective good faith is irrelevant, and instead, courts determine “the objective reasonableness of an official’s conduct, as measured by reference to clearly established law.”<sup>36</sup> Thus, courts look to “clearly established” law to determine whether “every ‘reasonable official would understand that what he is doing’ is unlawful.”<sup>37</sup>

### B. *The Road to The “Clearly Established” Law Standard*

Originally, the test was not the objective “clearly established” law standard in use today. Rather, the test included a subjective component derived from the common law. In *Pierson v. Ray*, the Court held that “the defense of good faith and probable cause” was available to the officer alleged to have made an unconstitutional arrest because that defense was “available to the officers in the common-law action for false arrest and imprisonment.”<sup>38</sup> Under the test announced, the officers would be entitled to a qualified immunity if they acted in good faith while making an arrest supported by probable cause for a violation of a statute that they reasonably believed to be valid, but which was later held unconstitutional.<sup>39</sup> The subjective component of the test considered whether the officer claiming qualified immunity “took the action with the malicious intention to cause a deprivation of constitutional rights or other injury.”<sup>40</sup> Thus, under the test first

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established.”).

33. See, e.g., *al-Kidd*, 563 U.S. at 742 (“We have repeatedly told courts—and the Ninth Circuit in particular . . . not to define clearly established law at a high level of generality.”).

34. *Jamison v. McClendon*, 476 F. Supp. 3d 386, fn 129 (S.D. Miss. 2020) (quoting John C. Jeffries, Jr., *What’s Wrong with Qualified Immunity?*, 62 FLA. L. REV. 851, 859 (2010)); see also *Kisela v. Hughes*, 138 S. Ct. 1148, 1161 (2018) (Sotomayor, J., dissenting) (criticizing the Court’s current jurisprudence as effectively requiring “a factually identical case to satisfy the ‘clearly established’ standard”)

35. *Harlow v. Fitzgerald*, 457 U.S. 800, 818–819 (1982) (noting that the Court is “defining the limits of qualified immunity essentially in objective terms.”).

36. *Id.*

37. *Wesby*, 138 S. Ct. at 589 (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)).

38. *Pierson v. Ray*, 386 U.S. 547, 557 (1967).

39. *Id.* at 555–557.

40. *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982).

announced in *Pierson*, an officer's motivations for their actions becomes important.

Fifteen years later, this subjective standard was overturned in favor of the objective "clearly established" law standard in *Harlow v. Fitzgerald*.<sup>41</sup> In *Harlow*, the Court announced 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."<sup>42</sup>

Although the test moved to an objective one in *Harlow*, initially there was some indication that "clearly established" law could be defined at a more general level. In other words, "clearly established" law could be found in more general constitutional principles, rather than sifting through precedent to find a factually identical case to follow. As the Court explained in 2002 in *Hope v. Pelzer*, "officials can still be on notice that their conduct violates established law even in novel factual circumstances."<sup>43</sup> Under *Hope* then, cases need not be "fundamentally" or "materially" similar for there to be "clearly established" law—all that is required is that the existing law "give respondents fair warning" that the alleged conduct is unconstitutional.<sup>44</sup>

This more relaxed approach to "clearly established" law quickly yielded to a more exacting standard, with the Supreme Court often chastising lower courts for defining "clearly established" law too generally. In *Ashcroft v. al-Kidd*, the Court admonished, "[w]e have repeatedly told courts—and the Ninth Circuit in particular ... not to define clearly established law at a high level of generality."<sup>45</sup> More recent cases continue to echo this exacting standard.<sup>46</sup> Accordingly, in

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41. See *Harlow*, 457 U.S. at 816–819 (explaining that the subjective standard had proved problematic, and that the test would be an objective one that looks to "clearly established" law to determine if an officer should be granted immunity); see, e.g., *Wesby*, 138 S. Ct. at 590 (endorsing the "clearly established" law standard); *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (explaining how the "clearly established" standard provides clarity and "fair warning.").

42. *Harlow*, 457 U.S. at 818.

43. *Hope v. Pelzer*, 536 U.S. 730, 741 (2002).

44. *Id.* Thus, *Hope* made clear that a plaintiff did not have to find a case on all fours to satisfy the "clearly established" law standard. Rather, the law could be sufficiently clear to provide fair warning in situations where "a general constitutional rule already identified in the decisional law" applied "with obvious clarity to the specific conduct in question, even though 'the very action in question has [not] previously been held unlawful.'" *Id.* (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

45. *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011).

46. See, e.g., *District of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018) ("We have repeatedly

*District of Columbia v. Wesby*, the Court explained that the “existing law must have placed the constitutionality of the officer’s conduct ‘beyond debate.’”<sup>47</sup> Thus, under this “demanding standard,” “[i]t is not enough that the rule is suggested by then-existing precedent.”<sup>48</sup> Instead, “[t]he precedent must be clear enough that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply.”<sup>49</sup>

This high level of specificity required in defining “clearly established” law has been criticized by Justice Sotomayor.<sup>50</sup> In a 2018 dissent, Justice Sotomayor pointed out that, under *Hope*, “[o]fficials can still be on notice that their conduct violates established law even in novel factual circumstances.”<sup>51</sup> Justice Sotomayor went on to criticize the majority for requiring a “factually identical case” to fulfill the test, as the Court’s qualified immunity cases had “never required a factually identical case to satisfy the ‘clearly established’ standard.”<sup>52</sup> By requiring such a case, Justice Sotomayor argued that the majority was sending “an alarming signal to law enforcement officers and the public” that officers “can shoot first and think later, and ... palpably unreasonable conduct will go unpunished.”<sup>53</sup>

The purpose of this section is to review the course the Court has taken with regard to its qualified immunity jurisprudence. While the Court’s qualified immunity test initially had a subjective component that considered an officer’s motivation, that test was replaced by an objective standard looking to whether the law was “clearly established.” This “clearly established” law standard has led to criticisms that it functionally requires a near identical case to overcome

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stressed that courts must not ‘define clearly established law at a high level of generality, since doing so avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced.’” (quoting *Plumhoff v. Rickard*, 572 U.S. 765, 779 (2014)); *Kisela v. Hughes*, 138 S. Ct. 1148, 1152–53 (2018) (noting that “Specificity is especially important in the Fourth Amendment context” and that “police officers are entitled to qualified immunity unless existing precedent ‘squarely governs’ the specific facts at issue” (quoting *Mullenix v. Luna*, 577 U.S. 7, 11 (2015) (per curiam))); *Mullenix*, 577 U.S. at 12 (citing *al-Kidd* 563 U.S. at 742 for the proposition that “We have repeatedly told courts . . . not to define clearly established law at a high level of generality.”).

47. 138 S. Ct. 577, 589 (2018) (quoting *al-Kidd*, 563 U.S. at 741).

48. *Id.* at 590.

49. *Id.*

50. See *Kisela*, 138 S. Ct. at 1155–62 (Sotomayor, J., dissenting) (disagreeing with the outcome due to use of the highly specific standard).

51. *Id.* at 1159 (quoting *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)).

52. *Id.* at 1161 (quoting *Hope*, 536 U.S. at 739).

53. *Id.* at 1162.

immunity. Awareness of the Court's current test and its evolution is important to understanding the criticisms of the doctrine to which this Article turns next.

### C. *Calls to Overturn or Reconsider Qualified Immunity*

In recent years, calls to abolish or radically alter the qualified immunity doctrine have intensified from a variety of voices. The Cato Institute, a libertarian think tank, has made the elimination of qualified immunity one of its top priorities, arguing “[t]he doctrine was invented by the Supreme Court in the 1960s, with no basis [in] statutory text, legislative intent, or sound public policy.”<sup>54</sup> The American Civil Liberties Union (“ACLU”), a nonprofit dedicated to defending individual rights and liberties, also announced its intent to end qualified immunity.<sup>55</sup> According to the ACLU, the “clearly established law” test makes it “nearly impossible” to sue public officials and shields officers from accountability.<sup>56</sup> Black Lives Matter, an organization dedicated to eradicating white supremacy, called on Congress and the White House to take immediate action to make ending qualified immunity a top priority.<sup>57</sup> According to Black Lives Matter, officers are able “to hide behind the guise of qualified immunity” to prevent being held accountable for their actions.<sup>58</sup> Even the Sierra Club, an environmental organization, endorsed federal legislation “which would end qualified immunity for police officers accused of wrongdoing.”<sup>59</sup>

Justice Thomas called attention to problems with the doctrine. In a statement respecting the denial of certiorari in *Hoggard v. Rhodes*, Justice Thomas argued that the Court's “qualified immunity jurisprudence stands on shaky ground” and the Court's “clearly established” law test, “cannot be located in § 1983's text and may have

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54. *End Qualified Immunity*, CATO INST., <https://www.cato.org/qualified-immunity> (last visited Sept. 7, 2021).

55. See Ed Yonka et al., *Ending Qualified Immunity Once and For All is the Next Step in Holding Police Accountable*, ACLU (Mar. 23, 2021), <https://www.aclu.org/news/criminal-law-reform/ending-qualified-immunity-once-and-for-all-is-the-next-step-in-holding-police-accountable/> (noting opposition to qualified immunity and the difficulty of overcoming the defense's high standards).

56. *Id.*

57. *Demand Congress End Qualified Immunity*, BLACK LIVES MATTER (July 22, 2021), <https://blacklivesmatter.com/demand-congress-end-qualified-immunity>.

58. *Id.*

59. Leslie Fields, *Racial Justice Is Environmental Justice: The Sierra Club's advocacy is intersectionality in action*, SIERRA CLUB (May 26, 2021), <https://www.sierraclub.org/sierra/racial-justice-environmental-justice>.

little basis in history.”<sup>60</sup> Justice Thomas argued that the current approach is “[not] grounded in the common-law backdrop against which Congress enacted [§ 1983].”<sup>61</sup> As suggested above, even if qualified immunity is not found in the text of § 1983, the common-law backdrop against which § 1983 was enacted may support its application. But the Court is no longer looking to this backdrop to support its position as it once did in *Pierson* and prior cases. According to Justice Thomas, the Court has “‘substitute[d] [its] own policy preferences for the mandates of Congress by conjuring up blanket immunity and then fail[ing] to justify [its] enacted policy.”<sup>62</sup> These policy preferences deal with a “balancing of competing values about litigation costs and efficiency.”<sup>63</sup> Essentially, Justice Thomas contends that the Court has abdicated its duty to interpret the law when it comes to qualified immunity. Instead, in developing the current qualified immunity framework, the Court is simply balancing competing policy interests, which is supposed to be the role of “Congress, not the Courts.”<sup>64</sup> Justice Thomas believes that in the appropriate case, the Court should fundamentally reconsider qualified immunity.<sup>65</sup>

The academic literature is similarly rife with criticisms of qualified

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60. *Hoggard v. Rhodes*, 141 S. Ct. 2421, 2421 (2021) (Thomas, J., statement respecting the denial of certiorari). *See, e.g., Ziglar v. Abbasi*, 137 S. Ct. 1843, 1870–71 (2017) (Thomas, J., concurring in part and concurring in the judgment) (“I write separately, however, to note my growing concern with our qualified immunity jurisprudence.”); *Baxter v. Bracey*, 140 S. Ct. 1862, 1862 (2020) (Thomas, J., dissenting from the denial of certiorari) (restating concerns with qualified immunity as “stray[ing] from the statutory text”).

61. *Hoggard*, 141 S. Ct. at 2422 (Thomas, J., statement respecting the denial of certiorari) (alternation in original).

62. *Id.* (Thomas, J., concurring in part and concurring in the judgment) (quoting *Ziglar*, 137 S. Ct. 1843, 1872).

63. *Baxter v. Bracey*, 140 S.Ct. 1862, 1864 (2020) (Thomas, J., dissenting from the denial of certiorari).

64. *Ziglar*, 137 S. Ct. at 1872 (Thomas, J., concurring in part and concurring in the judgment).

65. *See Hoggard*, 141 S. Ct. at 2422 (Thomas, J., statement respecting the denial of certiorari) (stating that qualified immunity is not consistent with statutory text or history, and therefore should be reconsidered); *Baxter*, 140 S. Ct. at 1862 (Thomas, J., dissenting from the denial of certiorari) (reaffirming his previous concerns with qualified immunity and calling again to reexamining the doctrine). Lower courts have also questioned the doctrine, while nonetheless following the commands of the Supreme Court. For example, in a recent case before Judge Carlton W. Reeves of the Southern District of Mississippi, Judge Reeves granted qualified immunity because the law was not “clearly established” in a case in which an officer unconstitutionally searched a plaintiff’s car. *Jamison v. McClendon*, 476 F.Supp.3d 386 (S.D. Miss. 2020). Despite granting qualified immunity, Judge Reeves criticized the doctrine noting that “the harm in this case to one man sheds light on the harm done to the nation by this manufactured doctrine.” *Id.* at 392.

immunity and calls to overhaul the doctrine.<sup>66</sup> This Article does not weigh into that debate. Nevertheless, given the significant criticism and widespread disagreement over the doctrine, it would appear that the qualified immunity doctrine is ripe for reconsideration.

## II. SHOULD STARE DECISIS GIVE WAY TO ALLOW FOR THE OVERTURNING OF QUALIFIED IMMUNITY?

Given this Article's assumption that the Court erred when it decided that qualified immunity was a defense to civil rights actions under § 1983, the remainder of this Article examines whether stare decisis should preclude overturning qualified immunity.

This part proceeds in three sections. Section A reviews the factors the Court considers in its stare decisis analysis and highlights why stare decisis considerations are traditionally heightened for statutory precedents. Section B endorses a framework that best supports the underlying values inherent in the concept of stare decisis. Section C applies that framework, and particularly its emphasis on reliance interests, to analyze whether the Court should overturn qualified immunity. After considering qualified immunity under this framework, this Article concludes that stare decisis should not preclude overruling the "clearly established" law test for qualified immunity, but some form of qualified immunity should nonetheless remain. Specifically, the Court should revert to its framework under *Pierson*.

### A. *The Importance of Stare Decisis and the Factors the Court Considers*

The importance of stare decisis cannot be overstated in a legal system that prides itself on the rule of law, stability, and impersonality of the law. As one jurisprudential scholar has observed, the Court "has lauded *stare decisis* as . . . contributing to 'the actual and perceived integrity of the judicial process.'"<sup>67</sup> Stare decisis serves interests that are

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66. See, e.g., Michelman, *supra* note 7 at 1999 ("[Q]ualified immunity is a mess of the Supreme Court's making, and the Supreme Court should clean it up."); Baude, *supra* note 7 at 88 ("[T]he doctrine lacks legal justification, and the Court's justifications are unpersuasive."); Reinhardt, *supra* note 7 at 1254 (criticizing the Court's current qualified immunity jurisprudence as "risk[ing] turning federal judges from protectors of the Constitution into unreasoning deniers of worthy claims of constitutional rights.").

67. Kozel, *Stare Decisis as Judicial Doctrine*, *supra* note 24, at 412–13 (citations omitted) (quoting *Payne v. Tennessee*, 501 U.S. 808, 827). See also *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 854 (1992) (noting that when the Court "reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the

paramount not just to the rule of law, but also the public's support for and trust in the legal system.

To serve these interests, the Court has enumerated various factors to be considered in a *stare decisis* analysis. The first is workability. This factor focuses on “whether the rule has proven to be intolerable simply in defying practical workability.”<sup>68</sup> This factor looks to the ease by which judges are able to interpret and apply the precedent. In fact, *Planned Parenthood v. Casey*, the seminal case which considered the importance of precedent established in *Roe v. Wade*, served as a platform for the Court to underscore the workability of relying on precedent: while “*Roe* ha[d] engendered opposition,” it had not proved unworkable.<sup>69</sup> The determinations required for judges to *apply Roe*'s precedent fell “within judicial competence.”<sup>70</sup> In other words, the test was clear enough that judges could apply it without great difficulty.

The second factor is reliance. Under this factor the Court looks at “whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation.”<sup>71</sup> In other words, the Court considers whether individuals are making decisions in reliance on the continued existence of the precedent. Thus, in *Planned Parenthood*, the Court concluded that “while the effect of reliance on *Roe* cannot be exactly measured, neither can the certain cost of overruling *Roe* for people who have ordered their thinking and living around that case be dismissed.”<sup>72</sup> Where there is strong reliance on precedent, that precedent is unlikely to be overturned.

The next factor examines the development of the law in other areas and asks “whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine.”<sup>73</sup> In other words, has jurisprudence developed in ways that render the precedent a product of outdated thinking? For example, in *Planned Parenthood*, the Court found that since *Roe*, constitutional law had not developed in such a way to leave “*Roe* behind as a mere survivor of obsolete constitutional thinking.”<sup>74</sup> Thus, *Roe*'s legal underpinnings

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rule of law, and to gauge the respective costs of reaffirming and overruling a prior case.”).

68. *Casey*, 505 U.S. at 854 (citing *Swift & Co. v. Wickham*, 382 U.S. 111, 116 (1965)).

69. *Id.* at 855 (citing *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546 (1985)).

70. *Id.*

71. *Id.* at 854 (citing *United States v. Title Ins. & Trust Co.*, 265 U.S. 472, 486 (1924)).

72. *Id.*

73. *Id.* at 855 (citing *Patterson v. McLean Credit Union*, 491 U.S. 164, 173–174 (1989)).

74. *Id.* at 857.

had not so developed to render its holding invalid.

The final factor to consider looks at the facts underlying a decision, and asks “whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.”<sup>75</sup> Under this factor, advances in science or additional data can shed light on the facts critical to an opinion. If these facts are shown to be incorrect, the case for stare decisis is lessened. In *Planned Parenthood*, advances in healthcare made for safe abortions to the mother later in pregnancy, and therefore the point of viability was now somewhat earlier than it was when *Roe* was decided.<sup>76</sup> Nonetheless, these changes to the underlying facts had no bearing on the ultimate holding of *Roe*, “that viability marks the earliest point at which the State’s interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions.”<sup>77</sup> Although some facts underlying precedent might change, if they do not change so much that a rule articulated in the prior case no longer applies, the precedent is less susceptible to being overruled.

Typically, for questions of statutory construction, stare decisis “applies with special force.”<sup>78</sup> For example, in *Kimble v. Marvel Entertainment, LLC*, the Court underscored the “enhanced force” of stare decisis with regard to whether to overrule a precedent interpreting a patent statute.<sup>79</sup> Given that qualified immunity is a defense to claims under § 1983, the doctrine raises questions of statutory construction. Therefore, this heightened form of stare decisis could apply to qualified immunity.

There are three different levels of stare decisis:

The U.S. Supreme Court gives strong effect to statutory

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75. *Id.* at 855 (citing *Burnet v. Colorado Oil & Gas Co.*, 285 U.S. 393, 412 (1932) (Brandeis, J., dissenting)). *See also* *Ramos v. Louisiana*, 140 S. Ct. 1390, 1405 (2020) (explaining the traditional factors as “the quality of the decision’s reasoning; its consistency with related decisions; legal developments since the decision; and reliance on the decision”); GARNER ET AL., *supra* note 23 at 404 (2016) (enumerating numerous factors which militate against overruling precedent: the decision has stood unchallenged for many years; the same or other courts have approved and followed the decision in many later decisions; the decisions have been universally accepted, acted on, and acquiesced in by courts, the legal profession, and the general public; the decision has become a rule of property; reliance has been placed on the prior decision: contracts have been made, business transacted, and rights adjusted in reliance on the decision for a long time or to a great extent; the prior decision involved interpreting a statute).

76. *Casey*, 505 U.S. at 860.

77. *Id.*

78. GARNER ET AL., *supra* note 23, at 333 (2016).

79. 576 U.S. 446, 456 (2015).

precedents, medium effect to common-law precedents, and weaker effect to constitutional precedents. With statutory interpretation, unlike (for practical purposes) constitutional interpretation, the legislature can alter an erroneous statutory holding. Hence courts generally won't depart from a settled judicial interpretation of a statute even if the earlier holding is of questionable validity.<sup>80</sup>

To decide whether to overrule a case that interprets a statute, the same factors still apply.<sup>81</sup> The Court does not apply a different stare decisis test to statutory precedents, but rather stare decisis simply “carries enhanced force.”<sup>82</sup>

### *B. The Optimal Test for Stare Decisis*

Underlying the doctrine of stare decisis is a commitment to the rule of law, the impersonality of our system of justice, and the stability, continuity, predictability, integrity and perceived integrity of our legal system. How can these interests best be served through a stare decisis analysis? Stated differently, what does a stare decisis framework look like if its goal is to advance these interests? In his work on stare decisis, Prof. Kozel developed a theory aimed at enhancing these commitments while “insulat[ing] stare decisis from disputes over interpretive philosophy.”<sup>83</sup> Because our legal system encompasses longstanding disagreement over interpretation, a theory of stare decisis requires a theory “attuned to the challenges of judicial disagreement and the value of precedent in overcoming them.”<sup>84</sup> The key problem arises in developing a test for stare decisis that judges can apply in a neutral way regardless of where they fall on the philosophical spectrum.<sup>85</sup>

80. *Id.* at 334–35 (footnotes omitted).

81. *See* *Kimble v. Marvel Entm't, LLC*, 576 U.S. 446, 456–62 (2015) (noting the “superpowered form of *stare decisis*” for decisions interpreting a statute and then going on to analyze the traditional factors of reliance, workability, legal underpinnings and factual underpinnings).

82. *Id.* at 456 (citing *Patterson v. McLean Credit Union*, 491 U.S. 164, 172–173 (1989)).

83. RANDY J. KOZEL, *SETTLED VERSUS RIGHT: A THEORY OF PRECEDENT* 103 (2017) [hereinafter KOZEL, *SETTLED VERSUS RIGHT*].

84. *See id.* at 6. (Prof. Kozel explains the problem with the Court's current stare decisis jurisprudence as follows: “the problem with the Supreme Court's current approach to precedent is not that the justices are behaving in an unprincipled manner. The problem is that the modern doctrine of stare decisis is undermined by principled disagreements among justices acting in good faith. The doctrine's structure and composition all but guarantee that conclusions about the durability of precedent will track the justices' individual views about whether decisions are right or wrong and whether mistakes are harmful or benign”).

85. *See id.* at 13. (“In our world of pervasive interpretive disagreement, we need to think about the role of precedent differently than we would under conditions of widespread interpretive

Under Prof. Kozel’s approach, those core “factors that are susceptible to principled application by justices across the philosophical spectrum” are “a decision’s procedural workability, the accuracy of its factual premises, and the reliance it has yielded.”<sup>86</sup> Because these factors are the ones that inoculate a stare decisis analysis from philosophical ideologies, their application enhances the values that stare decisis is intended to advance.<sup>87</sup>

It should be noted that Prof. Kozel’s framework is designed to respond to stare decisis in the context of constitutional interpretation, as opposed to statutory or common law. Yet, as Prof. Kozel notes, although “[t]he intricacies of constitutional stare decisis” are his focus, “many aspects of [the] analysis will apply to statutory (and common law) decisions as well.”<sup>88</sup>

There are several reasons why Prof. Kozel’s framework should apply with equal force to statutory precedents—especially controversial precedent like the Court’s qualified immunity jurisprudence. First, Prof. Kozel’s work focuses on developing a system of stare decisis that can furnish common ground to judges who see the law through different philosophical and methodological lenses. This noble goal should also apply to statutory precedents, especially one as thorny as the Court’s qualified immunity jurisprudence. Moreover, as will be explained more fully in section C.1., there is good reason to be skeptical about statutory precedent receiving greater deference, especially in the context of qualified immunity.

Before analyzing qualified immunity under the stare decisis framework advanced by Prof. Kozel, it is worth elaborating on the three core factors advanced by Prof. Kozel. Procedural workability—the degree to which courts, litigants, and others can understand and apply a precedent—is analyzed first. In applying this factor, the critical step

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harmony. The question is no longer which factors are potentially relevant to a precedent’s retention or overruling. The inquiry must be narrowed to include only those factors that are susceptible to principled application by justices across the philosophical spectrum.”).

86. *Id.*

87. *See, e.g., id.* at 110 (explaining that a principled application of procedural workability “does not depend on whether a particular justice is an originalist, a pragmatist, or a common law constitutionalist” and this thus makes it appropriate for the doctrine of stare decisis in a world of interpretive pluralism); *id.* at 113 (explaining that a principled application of the accuracy of the factual premises factor “is not bound up with any particular methodology of interpretation” making it an appropriate consideration); *id.* at 116 (explaining that “the neutrality of reliance expectations might help to explain their prominent status in the modern doctrine, which itself provides further reason for preserving reliance as part of the stare decisis calculus.”).

88. *Id.* at 8.

becomes “rejecting the premise that a precedent becomes unworkable because a justice disagrees with its rationale or is troubled by its results.”<sup>89</sup> This factor examines “whether courts, litigants, and other stakeholders have been able to understand and apply a rule without undue difficulty.”<sup>90</sup> Thus, “[a] rule of decision that is hopelessly convoluted or exceedingly vague renders a precedent unworkable regardless of its rationale and substantive effects.”<sup>91</sup>

The next factor to consider is factual accuracy. Here, “[a]s with their treatment of workability, courts occasionally conflate diagnoses of factual error with assessments of a precedent’s legal reasoning.”<sup>92</sup> Under this factor, factual content should be understood narrowly and “driven by empirical observations that do not depend on methodological or normative commitments.”<sup>93</sup>

The next factor to consider is reliance.<sup>94</sup> To insulate the reliance analysis from “debates about interpretive philosophy,” courts must focus on “concrete expectations of stakeholders” as opposed to more abstract and vague notions of reliance.<sup>95</sup> Thus, private reliance and governmental reliance *do* matter, but the more nebulous concept of “societal reliance” *does not* hold weight.<sup>96</sup>

In addition to the three Kozel factors, a fourth factor is also “susceptible to principled application by justices across the

89. *Id.* at 110.

90. *Id.*

91. *Id.*

92. *Id.* at 111.

93. *Id.*

94. *See id.* at 116 (“Reliance interests have a sweep that exceeds methodological bounds . . . . [t]his breadth brings its own kind of neutrality . . . . [i]ndeed, the neutrality of reliance expectations might help to explain their prominent status in the modern doctrine, which itself provides further reason for preserving reliance as part of the stare decisis calculus going forward.”); *see also* Kozel, *Stare Decisis as Judicial Doctrine*, *supra* note 24, at 414 (“Most of the considerations that populate the Court’s current [stare decisis] jurisprudence are best understood—or perhaps, reimagined—as efforts to gauge the *reliance interests* that would be affected by the decision to overrule a given precedent.” Kozel goes on to argue that the Court should clear the proxies for reliance and instead “construct a new framework for rigorous and systematic analysis of the underlying reliance interests themselves”).

95. KOZEL, *SETTLED VERSUS RIGHT: A THEORY OF PRECEDENT*, *supra* note 97, at 116-17. Kozel provides two examples of where the Court has looked to societal reliance in its stare decisis analysis. In *Planned Parenthood*, “the Court recognized the interests of ‘people who have ordered their thinking and living around’ the continued vitality of *Roe*” and in *Miranda* “the Court cited the status of the *Miranda* warnings as ‘part of our national culture.’” *Id.* at 117 (first citing *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 856 (1992); and then *Dickerson v. United States*, 530 U.S. 428, 428 (2000)).

96. *Id.* at 118.

philosophical spectrum.”<sup>97</sup> The final factor is whether overturning a decision leads to the complete elimination of a right or defense, or simply a modification to it. This inquiry should be a straightforward endeavor: if a right or defense is completely eliminated, such elimination weighs in favor of retaining the precedent. Underlying this fourth factor is the idea that the elimination of a right or defense is more detrimental to the stability and continuity of law than simply modifying a legal rule. Moreover, there is likely to be more individual and societal reliance on the existence of a right or defense, as opposed to the particular contours that right or defense takes as formulated by the Court.<sup>98</sup> This fourth factor is particularly important in the qualified immunity context, as qualified immunity is a defense.

Indeed, this concept already exists, at least implicitly, in the Court’s *stare decisis* jurisprudence. The Court has implied that the doctrine of *stare decisis* becomes weaker in cases where an underlying right or defense is preserved, even if its procedural limits or scope are slightly modified. For example, in *Planned Parenthood*, the Court acknowledged the need to uphold the basic underpinnings of *Roe*, while modifying the procedural limits in exercising those rights.<sup>99</sup>

### C. *Applying the Optimal Test for Stare Decisis to Qualified Immunity.*

Now that this Article has developed an optimal test for *stare decisis*, this *stare decisis* framework can be used to analyze whether the Court’s qualified immunity jurisprudence should be overruled. Before applying this optimal test, however, this Article must address why the heightened form of *stare decisis* reserved for statutory cases should not apply to the Court’s qualified immunity jurisprudence.

#### 1. Heightened *Stare Decisis* for Statutory Cases Should Not Apply to Qualified Immunity.

The Court and legal scholars typically advance two reasons why *stare decisis* should apply with particular force to statutory cases: that “Congress’ failure to revise a judicial interpretation might be a form of acquiescence” and that the Court should not vacillate after a statutory

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97. *Id.* at 13.

98. *Cf. id.* at 117 (noting that “[t]he objectives served by protecting societal reliance are promoted to a considerable extent by the very existence of a meaningful doctrine of *stare decisis*”).

99. *See Casey*, 505 U.S. at 871–73 (“We reject the trimester framework, which we do not consider to be part of the essential holding of *Roe*.”).

issue has been settled.<sup>100</sup> Both of these reasons are suspect, especially as applied to qualified immunity.

First, even if Congress has not acted, a conclusion cannot be drawn purely from such inaction that it has acquiesced to the Court's ruling, as there are various reasons for congressional inaction.<sup>101</sup> This could be anything from political gridlock to other issues topping Congress's agenda. Second, even if Congress's failure to override the Court represents acquiescence, this acquiescence is irrelevant for statutory interpretation. After all, this is only the intent of the current Congress. In interpreting the statute, the intent of the Congress that passed the statute, as opposed to the Congress that currently presides, is the intent that matters.<sup>102</sup>

Both of these criticisms apply with particular force to qualified immunity. First, Congressional inaction in the case of qualified immunity should not be viewed as consent to the Court's precedents. Again, there could be a variety of reasons, including today's heated political environment and other issues at the top of the legislative docket, to explain why today's Congress has not altered qualified immunity. Thus, this inaction does not necessarily signal approval of the status quo. In today's ultra-partisan political environment, accomplishing significant reform to something like qualified immunity likely reflects difficulties in the political process than the current Congress's acceptance of the Court's qualified immunity jurisprudence.

Second, even if the current Congress's inaction on qualified immunity signals its acquiescence, the current Congress's intent is not the intent that matters. The relevant congressional intent is that of the Congress that passed the Civil Rights Act of 1871, which included § 1983. Moreover, given the historical context in which the Civil Rights

100. KOZEL, SETTLED VERSUS RIGHT, *supra* note 97, at 25

101. See KOZEL, SETTLED VERSUS RIGHT, *supra* note 97, at 25 (first citing *Kimble v. Marvel Entm't, LLC*, 576 U.S. 446, 471–72 (2015) (Alito, J., dissenting); then *Johnson v. Transp. Agency*, 480 U.S. 616, 672 (1987) (Scalia, J., dissenting)) (“Congress’s failure to amend a statute might be for reasons other than its agreement with the judiciary’s interpretation, such as the limited capacity of the legislative agenda.”); Brian C. Kalt, *Three Levels of Stare Decisis: Distinguishing Common-Law, Constitutional, and Statutory Cases*, 8 TEX. REV. L. & POL. 277, 279–80 (2004) (“[L]egislatures do all sorts of things for all sorts of reasons.”).

102. *Id.* (“It is not clear why that position should matter to a court charged with interpreting a statute that was enacted by a *prior* Congress . . . Presumably it is the latter whose understanding is most relevant to disputed questions of statutory interpretation”); Kalt, *supra* note 116, at 280 (“[T]he legislature that passed the initial legislation might be long gone and the new legislature might be no better a guardian of the meaning of the original law than the new court is.”).

Act was passed, there is good reason to believe that today's Congress has a much different set of priorities than its predecessor. As Justice Thomas explained: "In the wake of the Civil War, Republicans set out to secure certain individual rights against abuse by the States.... Armed with its new enforcement powers, Congress sought to respond to 'the reign of terror imposed by the Klan upon black citizens and their white sympathizers in the Southern States.'"<sup>103</sup> It is against this backdrop that Congress passed the Civil Rights Act of 1871.<sup>104</sup> While the Congress that passed the Civil Rights Act was concerned with securing individual rights in the wake of the Civil War, today's Congress may be more motivated by securing campaign donations through exhibitions of extreme partisanship.<sup>105</sup> Additionally, there is no reason to think that today's Congress is better suited at understanding the enacting Congress' intent than the Court. Thus, even if congressional inaction on qualified immunity can be interpreted as acquiescence with the Court's prior precedents, this is ultimately irrelevant.

The argument that the Court should not vacillate after an issue has been settled is also problematic in the qualified immunity context because the Court has already materially altered the test. Significantly, the Court changed the subjective test under *Pierson* to today's "clearly established" law standard.<sup>106</sup> Because the Court has already amended qualified immunity before, the argument that it should not further adjust the standard carries less force.

Finally, heightened stare decisis should not apply to the Court's "clearly established" law test because the Court's precedent should not be seen as typical statutory interpretation.<sup>107</sup> In changing the test to the

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103. *Baxter v. Bracey*, 140 S.Ct. 1862 (2020) (Thomas, J., dissenting from the denial of certiorari).

104. *Id.*

105. *The New Yorker*, A Retiring Democrat Places Blame for Paralysis in Congress, at <https://www.newyorker.com/news/news-desk/tears-from-a-democrat-as-paralysis-grips-congress> (highlighting Representative John Yarmuth's view that "Congress was taken over by media-obsessed performance artists, who would rather attract attention than govern" and that "[t]he growing need to please big campaign donors...has played a huge part in democracy's breakdown").

106. *See* Michelman, *supra* note 7, at 2008–10 (2018) (noting that the "Court's policymaking tendencies have been particularly acute regarding qualified immunity, in which the doctrinal twists and turns have" included a variety of decisions and "indeed, the Court itself has acknowledged that it has been 'forthright in revising the immunity defense for policy reasons'") (citing *Crawford-El v. Britton*, 523 U.S. 574, 594 n.15 (1998)); Baude, *supra* note 9 at 81 (noting that the Court "has openly tinkered with [qualified immunity] to an unusual degree.").

107. *See* Michelman, *supra* note 9, at 2009 ("In light of the Court's leading role in this area of law," some "have argued that § 1983 should be treated for purposes of statutory stare decisis as a common-law statute like the Sherman Act—an area that Congress expects the Court to shape and

“clearly established” law standard, the Court was not interpreting a statutory term like the Court would do in a typical statutory case, but rather crafting a defense largely for policy reasons.<sup>108</sup> As noted earlier, and as Justice Thomas has observed, the Court’s adoption of the “clearly established” law test is best seen as “a balancing of competing values about litigation costs and efficiency.”<sup>109</sup> In rationalizing its departure from the *Pierson* test for qualified immunity, the Court explained that the subjective component of the *Pierson* test led to a variety of negative effects.<sup>110</sup> The Court sought to mitigate “insubstantial claims” proceeding to trial, “distraction of officials from their governmental duties, inhibition of discretionary action, . . .deterrence of able people from public service,” and the “disrupt[on] of effective government.”<sup>111</sup> In response to these policy objectives, the Court withdrew from the subjective test and adopted the “clearly established” law standard. In other words, instead of interpreting the words of a statute to give effect to Congress’ intent, the Court deviated from precedent and created the “clearly established” law standard to achieve certain policy objectives.

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refine.” (citing Jack M. Beermann, *A Critical Approach to Section 1983 with Special Attention to Sources of Law*, 42 STAN L. REV. 51, 57 (1989)); *id.* at 2013 (“The special judicial power to craft a remedy in this area logically includes the power to define the contours of that remedy and its limits. That power, combined with fifty years’ worth of history of treating § 1983 like a common-law statute that Congress expects the Court to interpret, overcomes the usually rigorous application of stare decisis in the context of statutory precedents.”); Baude, *supra* note 9, at 80 (“[I]t is not entirely clear that the Court views qualified immunity as a purely statutory rule, as opposed to a constitutionally protected one”); *id.* at 81 (“Felix Frankfurter argued that reconsidering the interpretation of Section 1983 was ‘the Court’s responsibility’ because it was not ‘merely a mine-run statutory question,’ but rather one that ‘has significance approximating constitutional dimension’” (citing *Monroe v. Pape*, 365 U.S. 167, 221–22 (1961) (Frankfurter, J., dissenting))).

108. See *Harlow v. Fitzgerald*, 457 U.S. 800, 814–19 (1982) (explaining that the “balancing of competing interests” required an adjustment to the “good faith test” standard for qualified immunity); see also *Hoggard v. Rhodes*, 141 S. Ct. 2421, 2422 (2021) (Thomas, J., statement respecting the denial of certiorari) (noting that that the Court has “‘substituted [its] own policy preferences for the mandates of Congress’ by conjuring up blanket immunity and then failed to justify [its] enacted policy.”); *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1872 (2017) (Thomas, J., concurring in part and concurring in the judgment) (“Until we shift the focus of our inquiry to whether immunity existed at common law, we will continue to substitute our own policy preferences for the mandates of Congress.”); *Baxter v. Bracey*, 140 S. Ct. 1862, 1864 (2020) (Thomas, J., dissenting from the denial of certiorari) (noting that the Court adopted the “clearly established law” test “not because of general principles of tort immunities and defenses . . . but because of a balancing of competing values about litigation costs and efficiency.”) (internal quotations and citations omitted).

109. *Baxter v. Bracey*, 140 S.Ct. 1862, 1864 (2020) (Thomas, J., dissenting from the denial of certiorari).

110. *Harlow*, 102 S.Ct. at 2737-2738.

111. *Id.*

Some legal scholars argue that it does not matter that qualified immunity analysis is not typical statutory interpretation, and therefore, heightened statutory stare decisis should still apply.<sup>112</sup> These scholars rely on *Kimble v. Marvel Entertainment, LLC* to argue that “the ‘enhanced’ form of stare decisis for statutes applies even if the Court’s earlier decision looked beyond the law’s text and instead relied on its sense of ‘the policies and purposes’ behind the statute.”<sup>113</sup>

This argument carries weight as applied to *Pierson*, where the Court interpreted the Civil Rights Act of 1871 and found implicit support for qualified immunity within the statute itself since the statute did not explicitly abrogate the common law that existed at the time of enactment. But, the Court’s analysis in *Harlow* is different. In *Harlow*, the analysis of the proper test for qualified immunity was no longer grounded in the common law backdrop in which the Civil Rights Act was enacted, nor did the Court announce a judicially created doctrine designed to implement a federal statute.<sup>114</sup> Instead, the Court crafted a defense similar to what they would do in common law or constitutional cases.

Finally, the Court employed no stare decisis analysis when it failed to embrace the test in *Pierson* and adopted the test in *Harlow*. Therefore, it would seem odd that the Court would be required to apply heightened stare decisis if it were to consider overruling *Harlow* now.

## 2. Procedural Workability

Given that the heightened form of stare decisis reserved for statutory cases should not apply to qualified immunity, especially with regard to the *Harlow* decision announcing the “clearly established” law test, this Article now applies the optimal stare decisis framework to qualified immunity.

The procedural workability factor weighs in favor of overruling the Court’s “clearly established” law test for qualified immunity. As highlighted earlier, the degree of specificity required in defining

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112. See Nielson & Walker, *A Qualified Defense of Qualified Immunity*, *supra* note 14, at 1856 (pointing to the Court’s holding in *Kimble v. Marvel Entertainment* that “stare decisis carries enhanced force” in statutory cases); see also Aaron L. Nielson & Christopher J. Walker, *Qualified Immunity and Federalism*, 109 GEO. L. J. 229, 250 (2020) [hereinafter, Nielson & Walker, *Qualified Immunity and Federalism*].

113. Nielson & Walker, *Qualified Immunity and Federalism*, *supra* note 131, at 250 (citing *Kimble v. Marvel Entm’t, LLC*, 576 U.S. 446, 456 (2015)).

114. See *Hoggard v. Rhodes*, 141 S. Ct. 2421, 2421–22 (2021) (Thomas, J., statement respecting the denial of certiorari).

“clearly established” law has led to much confusion in the lower courts. Again, the Court tacitly acknowledged this in *Ashcroft v. al-Kidd*, lamenting that “[w]e have repeatedly told courts—and the Ninth Circuit in particular . . . not to define clearly established law at a high level of generality.”<sup>115</sup> Reaching the level of specificity required by this test continues to prove difficult for courts and litigants, not just the Ninth Circuit. In *District of Columbia v. Wesby*, the Court overturned a denial of qualified immunity because the D.C. Circuit Court and the lower court erred in their “clearly established” law analysis.<sup>116</sup> The Court explained that the D.C. Circuit relied on a single decision to find that it was “clearly established” that the officers did not have probable cause to arrest, but that case was not sufficiently analogous to “say anything about whether the officers here” had probable cause given the unique evidence.<sup>117</sup> According to the Court, the D.C. Circuit failed to “identify[] a single precedent—much less a controlling case or robust consensus of cases—finding a Fourth Amendment violation ‘under similar circumstances.’”<sup>118</sup> As these examples demonstrate, the “clearly established” law test is problematic. It continues to create much confusion regarding just how much specificity is required in identifying “clearly established” law. The frequency with which lower courts identify the level of specificity incorrectly in defining “clearly established” law suggests the test has significant workability issues.<sup>119</sup>

The “clearly established” law test generates errors in the opposite direction as well. For example, in *Estate of Jones v. Martinsburg*, the Fourth Circuit reversed the lower court’s grant of summary judgment on qualified immunity grounds where the lower court identified “clearly established” law at too specific a level.<sup>120</sup> There, the lower

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115. *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011) (citing *Brosseau v. Haugen*, 543 U.S. 194, 198–99 (2004) (per curiam)).

116. *District of Columbia v. Wesby*, 138 S.Ct. 577, 591 (2018).

117. *Id.* at 591 (this unique evidence included the following: “[t]he officers found a group of people in a house that the neighbors had identified as vacant, that appeared to be vacant, and that the partygoers were treating as vacant;” “[t]he group scattered, and some hid, at the sight of law enforcement;” the group’s “explanations for being at the house were full of holes;” and “[t]he source of their claimed invitation admitted that she had no right to be in the house, and the owner confirmed that fact”).

118. *Id.*

119. *See, e.g., id.* (“We have repeatedly stressed that courts must not ‘define clearly established law at a high level of generality.’” (quoting *Plumhoff v. Rickard*, 572 U.S. 765, 770 (2014))); *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011) (“We have repeatedly told courts—and the Ninth Circuit in particular . . . not to define clearly established law at a high level of generality.”).

120. *See Estate of Jones v. Martinsburg*, 961 F.3d 661, 670 (4th Cir. 2020) (after conducting a “clearly established” law analysis quoting another Fourth Circuit case for the proposition that “Indeed, it is just common sense that [shooting] someone who is already incapacitated is not

court found that “shoot[ing] a man 22 times as he lay motionless on the ground” did not violate “clearly established” law.<sup>121</sup> The lower court made this conclusion because the particular facts of the case did “not squarely align with the established precedent.”<sup>122</sup> The Fourth Circuit found the lower court’s analysis too exacting and noted that “it is just common sense that [shooting] someone who is already incapacitated is not justified under these circumstances.”<sup>123</sup> The *Martinsburg* case further highlights the difficulty of defining “clearly established” at the adequate level of specificity. As one legal scholar put it, trying to determine “at what level of specificity a legal principle has been established can devolve into an almost metaphysical exercise” in which judges are required “to make a legal determination based on vague and malleable concepts.”<sup>124</sup>

Although the Court altered the *Pierson* qualified immunity test due to purported workability concerns, the resulting test does not preclude similar criticisms. In *Harlow*, the Court removed the qualified immunity test’s subjective component largely because the “good faith” test was too generous to plaintiffs, led to substantial costs associated with subjecting government officials to the risk of trial, and could cause the disruption of effective government.<sup>125</sup> The Court explained that the ease with which plaintiffs could defeat the subjective “good faith” component on a motion for summary judgment unduly subjected more government officials to trial and discovery.<sup>126</sup> Thus, the Court found that the subjective component of the test was unworkable when it came to achieving a desirable balance of competing values.<sup>127</sup> While at first glance, the Court’s comments in *Harlow* may appear to go to procedural workability, they do not under the *stare decisis* framework advanced by Prof. Kozel. In applying this factor, it is critical that a jurist “reject[] the premise that a precedent becomes unworkable because a justice ... is troubled by its results.”<sup>128</sup> The change in the test from *Pierson* to *Harlow* is more a reflection of dissatisfaction with the

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justified under these circumstances.”)

121. *Id.*

122. Estate of Jones v. Martinsburg, 2018 WL 4289325, at \*5 (N.D. W.Va. Sept. 7, 2018)

123. Estate of Jones v. Martinsburg, 961 F.3d 661, 670 (4th Cir. 2020) (quoting Brockington v. Boykins, 637 F.3d 503, 508 (4th Cir. 2011)).

124. Michelman, *supra* note 9 at 2016.

125. Harlow v. Fitzgerald, 457 U.S. 800, 815–17 (1982).

126. *Id.* at 816–17.

127. *Id.* at 816–817 (noting that the test needed to be changed consistent with the balancing of competing values it had previously tried to achieve).

128. KOZEL, SETTLED VERSUS RIGHT *supra* note 96, at 110.

negative externalities yielded by the *Pierson* test for litigants, than of the ability of judges to properly apply the test. In other words, it was not that judges were not competent to apply the test, but rather the Court did not deem the *Pierson* test was sufficiently protective to government officials.

Thus, the workability factor weighs in favor of allowing stare decisis to give way to overturn the Court's "clearly established" law test for qualified immunity. That the original "good faith" test tipped the scales too much in favor of plaintiffs in the Court's eyes does not factor into the workability analysis.

### 3. Factual Accuracy

The next factor to consider is factual accuracy. Qualified immunity necessitates certain factual assumptions underlying the Court's qualified immunity precedents. The basic assumption is that the officers would be chilled in their duties if they were not entitled to some form of immunity for their actions taken in good faith.<sup>129</sup> Thus, in *Pierson*, before fashioning a qualified immunity defense based on good faith and probable cause, the Court noted, "[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."<sup>130</sup> Similarly, in *Harlow*, the Court explained that government officials are entitled to some form of immunity because this protection is needed "to shield them from undue interference with their duties and from potentially disabling threats of liability."<sup>131</sup>

Qualified immunity further requires the assumption that officers who are chilled in their duties impose certain costs on municipal governance. The Court elaborated on the costs to society from suits against public officers:

These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally, there is the danger that fear of being sued will "dampen the ardor of all but the most resolute, or the most irresponsible

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129. See *Pierson v. Ray*, 386 U.S. 547, 555 (1967) (describing the standard for police officer conduct); see also *Harlow*, 457 U.S. at 813 ("The resolution of immunity questions inherently requires a balance between the evils inevitable in any available alternative.").

130. *Pierson*, 386 U.S. at 555.

131. *Harlow*, 457 U.S. at 806.

[public officials] in the unflinching discharge of their duties.”<sup>132</sup>

The factual assumptions underlying *Pierson* and *Harlow* have a logical appeal. If officers are not entitled to immunity, they are likely to be chilled in their duties as they try to avoid being sued. However, many scholars have pushed back on the assumption that without qualified immunity, officers will be overwhelmed with money damages because most officers are entitled to indemnity from their employers.<sup>133</sup> Indemnification schemes shield officers from personally paying money damages if they are sued for conduct arising out of the course of their employment. Thus, the factual assumptions underlying *Pierson* and *Harlow* may be flawed. In other words, in order to be protected against suit, officers do not need the broad protection of immunity, they just need indemnity. Theoretically, officers who know they have the backing of indemnity will not be chilled in their duties.

This near universal scheme of indemnification may be changing. Since the killing of George Floyd and renewed debate on policing, some states and localities have reconsidered qualified immunity and/or indemnification for officers.<sup>134</sup> In June 2020, Colorado passed a state law cause of action analogous to the federal § 1983 civil rights claim.<sup>135</sup> Under this cause of action, qualified immunity is not a defense, and officers can be personally responsible for as much as \$25,000 of any judgment or settlement if the officer’s employer determines “that the officer did not act upon a good faith and reasonable belief that the action was lawful.”<sup>136</sup>

Thus, while some of the factual assumptions underlying the Court’s qualified immunity precedents are problematic given the near universal system of indemnification, they are not completely erroneous either, given the uncertainty surrounding the future of indemnification provisions. This change accords less weight to arguments that

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132. *Id.* at 814.

133. *See, e.g.,* Michelman, *supra* note 9 at 2014 (“[O]fficials avoid liability because of the near universal government practice of indemnifying employees.”); Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885 (2014); Nielson & Walker, *Qualified Immunity and Federalism*, *supra* note 131 at 268–72; Joanna C. Schwartz, *Qualified Immunity and Federalism All the Way Down*, 109 GEO. L. J. 305, 330–33 (2020) [hereinafter Schwartz, *Qualified Immunity and Federalism All the Way Down*].

134. *See e.g.,* COLO. REV. STAT. § 13-21-131 (2021); An Act Concerning Police Accountability, H.R. 6004, 2020 Leg., Spec. Sess. (Conn. 2020); S.R. 20-217, 72nd Gen. Assemb., 2d Reg. Sess. (Colo. 2020); H.R. 4, 55th Leg., First Sess. (N.M. 2021); Press Release, *supra* note 7; NAT’L CONF. OF ST. LEGS, *supra* note 7.

135. COLO. REV. STAT. § 13-21-131 (2021).

136. *Id.*

indemnity provides sufficient protection. Nonetheless, because there are at least some inaccuracies in the Court's factual assumptions given the system of indemnification, this factor also weighs slightly in favor of *stare decisis* yielding to overrule qualified immunity.

#### 4. Reliance

The final factor to consider is reliance. Before analyzing this factor, a distinction should be made: the degree to which stakeholders (individuals and entities making decisions based on qualified immunity including, but not limited to, police officers and police departments) rely on the “clearly established” law test may be very different than the degree to which stakeholders rely on some form of qualified immunity for reasonable, good faith mistakes. The experiences in localities that have abandoned qualified immunity, such as Colorado and New York City, are providing a natural experiment on how much officers and police departments do actually rely on the doctrine. Although it is too early to determine the impacts of abolishing qualified immunity, there appears to be some anecdotal evidence of reliance. For example, after the passage of a new bill abolishing qualified immunity in Colorado, some police departments saw an uptick in resignations.<sup>137</sup> A survey “found that the law enforcement leaders believe [Colorado’s police reform legislation] was one of the main factors for people leaving,”<sup>138</sup> with 65 percent of respondents citing it as a reason for officer departures.<sup>139</sup>

Abolishing qualified immunity may have some impact on retention and recruitment as well. For example, data shows a steep decline in new officer hires across Colorado.<sup>140</sup> Moreover, according to a survey of

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137. See Elise Schmelzer, *Did Colorado Law Enforcement Flee the Profession in 2020? Depends on the Department.*, DENVER POST (Mar. 8, 2021, 6:00 AM), <https://www.denverpost.com/2021/03/08/colorado-police-sheriffs-leaving-2020/> (In a survey of 69 Colorado police chiefs and sheriffs, “[a]bout half of the surveyed leaders who lost law enforcement employees in the last six months said attrition rates were higher than the year before.”); To be clear, as qualified immunity is a defense to federal civil rights claims, Colorado cannot eliminate it. The new Colorado law simply creates a state law cause of action and makes clear that qualified immunity is not a defense to that state law cause of action. The end result is that individuals can now bring state law claims analogous to what they could bring under § 1983 and officers cannot rely on qualified immunity as a defense to those claims. COLO. REV. STAT. § 13-21-131 (2021)

138. *Id.*

139. Press Release, County Sheriffs of Colorado, Survey Outlines Challenges, Opportunities for Colorado Law Enforcement (Mar. 8, 2021) (on file with author).

140. See Schmelzer, *supra* note 154 (“Agencies reported 1,610 hires in 2020, down from the 2,378 recorded in 2019 and the 2,801 recorded in 2018.”).

chiefs and sheriffs, approximately 73 percent of Colorado law enforcement leaders reported a shortage of full-time officers and 51 percent reported that the shortage was worse than a year ago.<sup>141</sup> Almost three-quarters of the chiefs and sheriffs reported fewer applications to work for their agencies compared to a year ago.<sup>142</sup> According to one County Sheriff, in the past nine months, her department did not have “a single applicant who was qualified to be a patrol deputy.”<sup>143</sup>

Although the attrition rate increased significantly in some counties, this trend does not necessarily indicate that officers are leaving the force because of the loss of qualified immunity—such a finding would require further research. Even if the police reform legislation is driving officers away, that too is complicated, as the end of qualified immunity is just one piece of that legislation.<sup>144</sup> Nonetheless, this evidence suggests that police departments rely on qualified immunity for hiring and recruitment purposes. Moreover, there is a logical appeal to arguments that the loss of qualified immunity hurts recruitment and retention of even the most well-intentioned officers. By removing qualified immunity, officers lose a defense to claims made against them, including claims for actions made in good faith where the law is not clear and that involve split-second and sometimes life or death decision-making. The loss of this defense makes it more likely that an officer will be sued and face liability for their actions. This in turn makes the position less desirable to anyone who does not want to be embroiled by claims, ensuing litigation, and the possibility of a judgment against them. All else being equal, a position that becomes less desirable makes individuals more likely to leave, or never join in the first place.

Apart from hiring and retention, there is also the question of the degree to which officers and departments rely on qualified immunity in

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141. *Id.*

142. *Id.*

143. *Id.* Similarly, critics of the New York City legislation removing qualified immunity have argued that the reform “will hurt the recruitment and retention of qualified officers.” Tyler Kendall, *New York City Limits Qualified Immunity, Making it Easier to Sue Police for Misconduct*, CBS NEWS (Mar. 27, 2021), <https://www.cbsnews.com/news/nyc-qualified-immunity-police-misconduct/>. According to New York City Councilman Robert F. Holden, “[e]nding qualified immunity will prevent the best young men and women in our city from joining the police force.” Jeffery C. Mays & Ashley Southall, *It May Soon Be Easier to Sue the N.Y.P.D. for Misconduct*, N.Y. TIMES (Mar. 25, 2021), <https://www.nytimes.com/2021/03/25/nyregion/nyc-qualified-immunity-police-reform.html>.

144. Schmelzer, *supra* note 154; *see also* COLO. REV. STAT. § 13-21-131 (2021).

the performance of their duties. Again, the Court has suggested that without qualified immunity, officers might be less inclined to zealously perform their duties.<sup>145</sup> Police union responses to qualified immunity reform are similarly instructive: in response to the effort to eliminate qualified immunity in New York City, the union that represents NYPD officers, the Police Benevolent Association, noted that the legislation would “chill the operations of law enforcement.”<sup>146</sup> Similarly, the Executive Director of America’s largest police labor organization, the Fraternal Order of Police, contends that ending qualified immunity is “going to have a chilling effect on the kind of appropriately aggressive policing that has helped drive crime rates to historic lows.”<sup>147</sup>

Anecdotal evidence further suggests that officers and departments rely on qualified immunity in the performance of their duties, and that removing it will impact the operation of law enforcement. In response to the legislation in New York City, unions representing the police, sergeants, and captains of the NYPD issued guidance to its officers.<sup>148</sup> That guidance noted the following:

As a direct result of the passage of this law, and the unavailability of the defense of qualified immunity under its provisions, we advise that you proceed with caution when taking any police action which could lead to physical engagement with any person, and avoid physical engagement to the greatest extent possible while also assuring your own safety and the safety of others. Also, you are strongly cautioned against engaging in any stop & frisk (unless doing so for your own or other’s safety), search of a car, residence, or person unless you are certain that you are clearly and unequivocally within the bounds of the law, notwithstanding that your actions may be taken in good faith.<sup>149</sup>

If this directive is heeded, in light of the elimination of qualified

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145. See *supra* discussion in Part III.C.3. See also *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982) (“[D]ampen[ing] the ardor [of police officers] . . . in the unflinching discharge of their duties.”); *Pierson v. Ray*, 386 U.S. 547, 555 (1967) (noting tension between “dereliction of duty if [police officer] does not arrest” with “being mulcted in damages if he does.”).

146. Press Release, Police Benevolent Association, PBA Blasts City Council’s Anti-Cop Bills Amid Subway Violence Surge (Feb. 16, 2021), <https://www.nycpba.org/press-releases/2021/pba-blasts-city-councils-anti-cop-bills-amid-subway-violence-surge/>.

147. Zusha Elinson & Dan Frosch, *New Mexico Makes it Easier to Sue Police*, WALL ST. J. (Apr. 7, 2021, 3:25 PM), <https://www.wsj.com/articles/new-mexico-makes-it-easier-to-sue-police-11617823548>.

148. Sergeants Benevolent Ass’n of the N.Y. Police Dep’t (@SBANYPD), TWITTER (Apr. 1, 2021, 4:21 PM), <https://twitter.com/SBANYPD/status/1383168759997870085/photo/1>.

149. *Id.*

immunity in New York City, police officers are more likely to act with extreme caution, and avoid zealous policing in situations presenting novel factual scenarios where the law may not be immediately clear. Thus, there is an argument that officers and their unions have relied on qualified immunity in performing their duties.

If abolishing qualified immunity causes shortages in police forces or less active policing, private citizens' reliance interests are potentially implicated to the extent that crime rates are related to qualified immunity. As explained above, qualified immunity arguably fosters more zealous policing in situations where officers are confronted with novel factual situations. Therefore, qualified immunity encourages officers to be more proactive—in turn, crime rates ostensibly remain low.<sup>150</sup> Further, individuals make a variety of decisions based in part on crime rate data and the presence of a well-functioning police department in their community, including where to live<sup>151</sup>, whether to

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150. While more social science research is necessary on whether police pulling back and shortages of officers will lead to increased crime, there is at least some evidence to suggest that officers pulling back, and shortages will in fact lead to more crime. See Jason Johnson, *Why Violent Crime Surged After Police Across America Retreated* (Apr. 9, 2021), <https://www.usatoday.com/story/opinion/policing/2021/04/09/violent-crime-surged-across-america-after-police-retreated-column/7137565002/> (explaining the reduction in proactive policing has resulted in record high crime rates for cities across the U.S. Last year, New York arrested 45,000 fewer individuals compared to previous years however there was a 58 percent increase in homicides. Similarly, Chicago made 31,000 fewer arrests yet the murder rate increased by 65 percent. In at least ten major cities in the U.S. violent crimes increased while “engaged policing fell.”); David C. Pyrooz et al., *Was There a Ferguson Effect on Crime Rates in Large U.S. Cities?*, 46 J. OF CRIM. JUST. 1, 3 (2016) (theorizing that after the shooting of a black man in Ferguson, Missouri, police may have become hesitant to respond to crime which could have led to increased crime rates); Eric Westervelt, *Cops Say Low Morale and Department Scrutiny Are Driving Them Away From the Job* (June 24, 2021), <https://www.npr.org/2021/06/24/1009578809/cops-say-low-morale-and-department-scrutiny-are-driving-them-away-from-the-job> (explaining there is a correlation between increasing crime rates nationwide and the drop in police staffing rates. Many departments are experiencing reduced staffing numbers due to officers retiring, resigning, or the lack of new recruits.); Greta Kaul, *Minneapolis is Hiring More Police Officers, Here's Why Some Advocates Argue That Won't Make the City Any Safer*, MINN. POST (Dec. 21, 2016), <https://www.minnpost.com/politics-policy/2016/12/minneapolis-hiring-more-police-officers-here-s-why-some-advocates-argue-won/> (noting “If Minneapolis doesn’t have enough officers, “[t]hey will simply be managing a 911 call load—you will see crime as a whole increase because that’s exactly what happened’ when police departments were understaffed previously.” The article continues to explain that there is a direct link to an increase in crime rates when fewer officers are staffed); Charles Fain Lehman, *America's Shrinking Police Forces Could Spell Trouble for Our Safety*, N.Y. POST (Feb. 8, 2020), <https://nypost.com/2020/02/08/americas-shrinking-police-forces-could-spell-trouble-for-our-safety/> (explaining the current—and continuing—reduction in police staffing rates will likely result in increased crime rates and a public safety crisis).

151. See Michael C. Lens et al., *Neighborhood Crime Exposure Among Housing Choice Voucher Households*, U.S. DEP'T OF HOUS. & URBAN DEV., 1 (Feb. 2011) (participants citing crime rate as a primary motivation for moving away from a distressed neighborhood); ZHAOHUA

own property,<sup>152</sup> whether to open a business,<sup>153</sup> even decisions regarding pregnancy and child rearing.<sup>154</sup>

The evidence surveyed here suggests that some reliance interests

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ZHANG & DIANE HITE, *HOUSE VALUE, CRIME AND RESIDENTIAL LOCATION CHOICE*, 25 (2015), (concluding participants in a housing study were more willing to pay more to move to a location with a lower crime rate); *see also* AreaVibes, *Know Your Neighborhood: Crime Statistics by City*, <https://www.areavibes.com/library/neighborhood-crime-statistics/> (last accessed Sept. 1, 2021) (offering national crime statistic information for prospective home buyers, current residents, or other members of the community).

152. *See* Martin Maximino, *The Impact of Crime on Property Values: Research Roundup*, JOURNALIST'S RESOURCE (2014), <https://journalistsresource.org/economics/the-impact-of-crime-on-property-values-research-roundup/> (Recent studies, in the U.S. and abroad, found an inverse relationship with crime reduction and property value. Several metropolitan areas in the U.S. (Seattle, Milwaukee, Houston, Dallas, Boston, Philadelphia, Chicago, and Jacksonville) experienced a 0.83 percent increase in property value coinciding with a 10 percent reduction in homicide. In Latin America, increased policing between 2008-2011 "generated a 15 [percent] increase in formal property transactions."); Vania Ceccato & Mats Wilhelmsson, *Do Crime Hot Spots Affect Housing Prices?*, 21 NORDIC J. OF CRIMINOLOGY 84, 97-99 (2020) (concluding increased crime rates have a depressive effect on housing prices. This is especially true in major cities in North America) (*citing* Thomas J. Kane, Stephanie K. Riegg, & Douglas O. Staiger, *School Quality, Neighborhoods, and Housing Prices*, 8 AM. L. & ECON. REV. 183, 183-212 (2006)).

153. Blaise R. Heid & Kathryn Heid, *High-Crime Areas Aren't Good for Business*, N.Y. TIMES (Jun. 21, 1990), <https://www.nytimes.com/1990/07/11/opinion/l-high-crime-areas-arent-good-for-business-495890.html> (explaining businesses are less likely to relocate or open new location if they perceive a high crime rate could be detrimental to business); *Minimizing the Risks to Your Business Using Security Measures and Disaster Planning*, WOLTERS KLUWER (Jan. 16, 2020), <https://www.wolterskluwer.com/en/expert-insights/minimizing-the-risks-to-your-business-using-security-measures-and-disaster-planning> (strategic site selection before opening a new business impacts the success of a business. Moving to a high-crime area can result in more risk to the business, and more investment for security).

154. *Cf.* Tom Clemens & Chris Dibben, *Living in Stressful Neighborhoods During Pregnancy: An Observational Study of Crime Rates and Birth Outcomes*, 27 EUR. J. OF PUB. HEALTH 197, 201 (2016) (study concludes that mothers in high crime areas are more likely to have a high-risk pregnancy and an increased risk to fetal development); Elissa Nadworny, *A High-Crime Neighborhood Makes it Harder to Show up For School*, NPR (Feb. 13, 2019), <https://www.npr.org/2019/02/13/693972661/a-high-crime-neighborhood-makes-it-harder-to-show-up-for-school> (a recent study from Johns Hopkins U. suggest that living in a high-crime area, or passing through one while traveling to school, can decrease a child's attendance. As of 2019, 1 in 7 students missed fifteen or more days of school each year); U.S. DEP'T OF JUSTICE, *Facts About Children and Violence*, <https://www.justice.gov/archives/defendingchildhood/facts-about-children-and-violence> (last accessed Sept. 1, 2021) (explaining 60 percent of children were exposed to violence, crime, or abuse which places them at greater risk for developing substance abuse, behavioral issues, mental health disorders, and truancy); Nancy G. Guerra, Ed.D. & Carly Dierkhising, M.A., *The Effects of Community Violence on Child Development*, ACTIVE PHYSIQUE 1, 2-5 (2011) (explaining exposure to violence or crime will negatively impact a child's psychological development and behavior, leading to a higher likelihood that these children will perpetuate similar violent behaviors into adulthood); Stephanie H. Keenshaw-Price, et al., *Neighborhood Crime-Related Safety and Its Relation to Children's Physical Activity*, 95 J. OF URBAN HEALTH 472, 482-87 (2015) (concluding that children have a reduction in physical activity in areas of police-reported high crime rates. This could be the result of parental perception and safety concerns in allowing children to be active outside of the home).

militate against overturning qualified immunity. Social science research studying the removal of qualified immunity in places like New York City and Colorado will further inform the extent and strength of those interests. For now, it is safe to say that some legitimate reliance interests may be in jeopardy if qualified immunity is overturned.<sup>155</sup>

The foregoing analysis, however, is better understood as reliance on *some* form of qualified immunity, not the specific form it takes in the “clearly established” law test. It seems clear that officers, police departments, citizens, and state and local governments rely on qualified immunity to some degree, but it is much less clear that they specifically rely on the Court’s current “clearly established” law test. With regard to police hiring, retention, and enforcement, an officer left with a qualified immunity test that may be more legally difficult to satisfy doesn’t seem as disruptive to reliance interests as an officer stripped of the defense completely, even for good faith and reasonable mistakes. More research is needed to further parse out the degree of reliance on qualified immunity altogether, and the Court’s current “clearly established” law standard more specifically. Early evidence suggests there is more reliance on having some form of qualified immunity than there is on the current test.<sup>156</sup>

##### 5. Eliminating a Right or Defense vs. Modifying a Right or Defense

The application of the final factor in the optimal test for stare decisis is straightforward. Again, the factor cautions that eliminating a right or defense deserves greater scrutiny than mere modification. Although overruling *Pierson* would eliminate qualified immunity altogether, simply overruling *Harlow*’s “clearly established” law standard would represent just a modification to the defense. Thus, under this final factor, stare decisis concerns would not affect the modification represented by overruling *Harlow*, but would caution against overruling *Pierson* and the complete elimination of the

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155. *But see* Michelman, *supra* note 9 at 2014 (“[Q]ualified immunity generates no legitimate reliance interests.”).

156. Moreover, reliance interests encompassed in indemnification schemes are better seen as a product of *Pierson* than of *Harlow*’s “clearly established” law test. As charted by Professors Nielson and Walker, “the broad indemnification schemes we have across the country today are creatures of the 1970s.”<sup>156</sup> Notably, this period is after the rise of qualified immunity coming out of *Pierson* in 1967, yet before the Court changed to the “clearly established” law test in 1982 in *Harlow*. Thus, state and localities indemnification schemes are better seen as reliant on having some form of qualified immunity, and not the specific test announced in *Harlow*.

qualified immunity defense.

In practice, if the Court were to overrule *Harlow*, it could return to the *Pierson* subjective standard or create a new test. Overruling *Harlow* would not eliminate the defense of qualified immunity altogether—officers would still be protected by the qualified immunity that existed under *Pierson* and the inquiry would revert to the subjective “good faith” standard. Thus, this factor favors overruling *Harlow*, but not abolishing qualified immunity completely.

### III. CONCLUSION

A closer look at procedural workability and reliance reveals a potential path forward for the Court. There is a strong case for eliminating the “clearly established” law test, while maintaining the prior form of qualified immunity announced in *Pierson*.

The Court’s “clearly established” law test and the ambiguity surrounding the proper level of specificity it requires, makes the test difficult for lower courts to apply in a systematic manner. Although the subjective test necessitated additional costs of litigation, and may have been too generous to plaintiffs, it was not entirely unworkable, like the Court’s current “clearly established” law standard has become. Again, just because a justice is troubled by the results of a rule, that does not mean the rule is procedurally unworkable.<sup>157</sup>

Although various stakeholders rely on qualified immunity to some degree, reliance is stronger on retaining some form of qualified immunity than on the specifics of the test. Thus, while there is reliance on the *Pierson* decision recognizing the defense of qualified immunity, the reliance argument is weaker when it comes to whether the Court should overrule the specific formulation of the defense as announced in *Harlow*.

Finally, because overruling *Harlow* represents a mere modification to the qualified immunity defense, rather than a complete abolition, *stare decisis* concerns have less influence.

If the Court were to follow the course advocated here and overturn *Harlow* while leaving *Pierson*’s subjective standard intact, officers would still be entitled to qualified immunity; however, the test would simply revert to *Pierson*’s more plaintiff-friendly standard. It is arguable whether this is an improvement, and there are likely to be

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157. KOZEL, SETTLED VERSUS RIGHT, *supra* note 96, at 110.

loud voices on both sides of the aisle criticizing such a move.<sup>158</sup> However, by an application of the factors advanced by Prof. Kozel, the Court can make a principled decision on the difficult issue of qualified immunity.

This Article charts a path forward for the Court to reconsider its qualified immunity jurisprudence. Although there is a strong argument that the Court should overrule its current “clearly established” law standard, the case to abolish qualified immunity completely is much more suspect. Instead, the Court should retain the defense, but reinstitute the more plaintiff-friendly standard it established in *Pierson*.

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158. See *supra* Part I(C).