Qualified Immunity's 51 Imperfect Solutions

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ABSTRACT

Qualified immunity has no perfect solution. On one hand, qualified immunity can prevent individuals whose civil rights have been violated from receiving monetary compensation—obviously, a bad outcome. On the other hand, without qualified immunity, government officials who fear liability may hold back from protecting the public—another bad outcome. Qualified immunity seeks to strike a balance between those bad outcomes: Plaintiffs can recover damages only if a government official violated clearly established law. Some individuals thus will have their rights violated but receive no compensation, while other individuals may be harmed because the government does not come to their aid. Qualified immunity's goal, however, should be to produce an outcome that is best for the public overall. Whether qualified immunity strikes the right balance is a topic of intense debate, which intensified following the killing of George Floyd and subsequent public protests in the summer of 2020. Many scholars, judges, and policymakers have since urged a rebalancing. Some even call for qualified immunity to be eliminated altogether. Others counter, however, that reforming qualified immunity will do more harm than good.

In our contribution to this symposium on the future of qualified immunity, we offer a partial path forward. Regardless of whether qualified immunity is reformed at the federal level, states have acted and can further act as laboratories of democracy to experiment with different balances. To illustrate the benefits of this approach, we identify reforms

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We are grateful for helpful feedback from Kami Chavis, David Coyle, Jennifer Laurin, Darrell Miller, and the rest of the symposium participants.

to qualified immunity that have been proposed at the federal level to demonstrate how they could be applied at the state level. We also expand the conversation by identifying other potential civil-rights litigation reforms that could be implemented in the states, including changes related to (i) pleading standards; (ii) anti-stagnation rules; and (iii) availability of appellate review. Although state-led reform is not a panacea, 51 imperfect solutions may be better than one imperfect solution.

INTRODUCTION

The U.S. Supreme Court has admitted that qualified immunity will always be imperfect because it is targeted at a problem for which there can be no perfect solution. On one hand, "an action for damages may offer the only realistic avenue for vindication of constitutional guarantees."[1] But on the other hand, "claims frequently run against the innocent as well as the guilty—at a cost not only to the defendant officials, but to society as a whole," as "fear of being sued [may] 'dampen the ardor of all but the most resolute, or the most irresponsible public officials, in the unflinching discharge of their

1. Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982) (citing Butz v. Economou, 438 U.S. 478, 506 (1978)).

duties.'"[2] Neither outcome is good. Hence, "resolution of immunity questions inherently requires a balance between the evils inevitable in any available alternative."[3] There can be no perfect solution—i.e., an outcome with no downside—when any balance involves allowing some evil. Instead, per the Court's account, the best the legal system can do is to try to strike the optimal balance.

Efforts to strike balances often tend to attract controversy.[4] But in the context of qualified immunity, striking a balance is especially controversial because the stakes are exceptionally high, the issues are deeply personal, and there is a great deal of empirical uncertainty and disagreement about how "civil-rights ecosystems"[5] and policing dynamics work.[6] Especially in the wake of the tragic killing of George Floyd and the subsequent public protests in the summer of 2020,[7] it is unsurprising that an increasing number of scholars and commentators argue that qualified immunity's balance is too heavily tilted in favor of immunity. Indeed, numerous litigants have called on the Supreme Court to overrule or curtail qualified immunity, thus far unsuccessfully, on the theory that Congress never authorized qualified immunity and that it produces unjust outcomes.[8] Likewise, on the legislative front,

2. *Id.* (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949)).

3. *Id.* at 813.

4. *See, e.g.*, Joseph Fishkin, *Equal Citizenship and the Individual Right to Vote*, 86 IND. L.J. 1289, 1325 (2011) ("There is something philosophically unsatisfying about a balancing test that involves balancing two incommensurable things: burdens on an individual right, and interests of the state or polity.").

5. *See* Joanna C. Schwartz, *Civil Rights Ecosystems*, 118 MICH. L. REV. 1539, 1541 (2020) (describing the paradoxical nature of the relationship between the number of successful lawsuits filed against urban police departments and the frequency and severity of police misconduct).

6. *See, e.g.*, Aaron L. Nielson & Christopher J. Walker, *Qualified Immunity and Federalism*, 109 GEO. L.J. 229, 283 n.310, 303 (2020) (identifying empirical disagreement about the effects of qualified immunity). For a thoughtful response, *see generally* Joanna C. Schwartz, *Qualified Immunity and Federalism All the Way Down*, 109 GEO. L.J. 305 (2020) (arguing that qualified immunity does not serve federalism values).

7. *See, e.g.*, Holly Bailey, *Derek Chauvin Sentenced to 22½ Years in Prison for the Murder of George Floyd*, WASH. POST (June 25, 2021), https://www.washingtonpost.com/nation/2021/06/25/derek-chauvin-sentencing-george-floyd/.

8. *See* Nielson & Walker, *supra* note 6, at 231–32 (describing numerous instances of courts attacking the doctrine of qualified immunity on the ground that has not been authorized by Congress). We have argued that under traditional principles of stare decisis, the Supreme Court is not the right body to overhaul qualified immunity. *See generally* Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 NOTRE DAME L. REV. 1853 (2018). Thus far, the Supreme Court appears to agree, as it has repeatedly rejected calls to do just that. *Cf.* Daniel T. Higgins II, *The Battle Over Qualified Immunity*, 45 OKLA. CITY U.L. REV. 37, 49 (2020) ("[T]he Court, considering stare decisis principles, is hard-pressed to make further changes to the doctrine" of qualified immunity.); Gerard Magliocca, *Qualified Immunity and Stare Decisis*, PRAWFSBLAWG (Sept. 27, 2019) ("Stare decisis, the Court has told us a million times, is at its apex in statutory cases. Qualified immunity, for better or worse, is an interpretation

some policymakers have proposed to eliminate qualified immunity, or at least to narrow it in significant ways.[9] It is doubtful that qualified immunity has ever before received so much attention.

As the nation debates what to do with qualified immunity, we offer a partial path forward: federalism. Elsewhere, we have urged that federalism considerations should play a role in how we think about qualified immunity in at least three respects: (i) how courts interpret Section 1983,[10] the primary federal cause of action that plaintiffs use to sue state and local officials for monetary damages; (ii) how the U.S. Supreme Court should evaluate stare decisis, given the fact that state and local governments have arranged their internal affairs and entered into financial obligation against the backdrop of dozens of Supreme Court decisions recognizing limits on liability; and (iii) which level of government (federal versus state) is best positioned to reform qualified immunity.[11]

In this Essay, we elaborate on that third point.[12] In our view, rather than focusing on a single imperfect solution—viz., one federal standard for the entire nation—the better course includes pursuing 51 (or more) imperfect solutions.[13] State and local governments can strike their own balances between vindicating rights and chilling beneficial governmental action. Nothing prevents state governments from creating their own causes of action to enforce rights that mirror federal rights but with defenses that do not mirror federal defenses.[14] To be

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of Acts of Congress."). We have also explained, however, that that does not mean that legislators should not consider reforming qualified immunity. *See* Nielson & Walker, *supra* note 6, at 302–03.

9. *See* Part II.A *infra* (describing three recent legislative proposals attempting to reform or eliminate qualified immunity).

10. 42 U.S.C. § 1983 (Section 1983 creates the primary federal cause of action that plaintiffs use to sue state and local officials for monetary damages).

11. *See* Nielson & Walker, *supra* note 6, at 234–38 (arguing in favor of using federalism to protect the ability of states to make decisions regarding qualified immunity reforms). Since our article was published, a trio of scholars has reached a similar conclusion about the power of federalism to address such issues. *See generally* James E. Pfander, Alex Reinert & Joanna C. Schwartz, *New Federalism and Civil Rights Enforcement*, 116 NW. U. L. REV. 737, 745 (2021) (arguing state and local officials should not rely on the possibility of federal-level reforms regarding qualified immunity but should instead make legal and policy changes themselves at the local level).

12. *See* Nielson & Walker, *supra* note 6, at 294 (arguing that Congress, not the federal courts, should reform qualified immunity legislation at the federal level, because it is best suited to consider each states' reliance interests).

13. As evident by its title, this Essay is inspired by JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW (2018).

14. *See* Nielson & Walker, *supra* note 6, at 294 (finding, in fact, one of the benefits of federalism allows states to experiment with how each individually makes reforms to qualified

sure, federal law provides a floor; when an official violates clearly established law, a plaintiff can receive damages because qualified immunity does not apply, but federal law does not provide a ceiling; states are free to create additional liability.[15] State law thus can be "a font of individual liberties, [with] protections often extending beyond those required by the Supreme Court's interpretation of federal law."[16]

Importantly, this "51 imperfect solutions" approach to reforming qualified immunity is not just hypothetical. Some states have begun to fundamentally change the liability rules for police officers within their borders.[17] For decades, other jurisdictions have imposed state-specific limitations on the defenses that state and local officers can raise in civil-rights litigation.[18] Although this reality is often overlooked in qualified immunity debates, it should be at the forefront. Not only can a 51 imperfect solutions approach be implemented quicker and easier than national reform, it can also be *better* reform. In our federal system, different states can pursue different policy paths tailored to their unique circumstances, which, in turn, allows for greater experimentation.[19]

To illustrate this point more concretely, Part II of this Essay addresses a number of reforms that have been proposed at the federal level. Rather than evaluating them as federal solutions, however, we consider how such proposals could work at the state level. Our conclusion is that once a state has a state analogue to Section 1983, all

immunity defenses and liability); *accord* Pfander et al., *supra* note 11, at 768 (arguing that "state and local legislatures can enact a statutory analogue to Section 1983 that does not allow a qualified immunity defense, imposes vicarious liability, and mandates indemnification").

15. *See* Nielson & Walker, *supra* note 6, at 295 (arguing in favor of states treating federal law as the floor and enacting additional remedies for their citizens).

16. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

17. *See* Nielson & Walker, *supra* note 6, at 297 (explaining various approaches taken by several states to expand liability for officers beyond what is required by federal law); *Justice Cannot Be "Qualified"*, 57 TR. MAG. 46, 50 (Dec. 2021) ("Colorado, Connecticut, Massachusetts, and New Mexico have taken noteworthy steps toward eliminating qualified immunity for violations of state civil rights laws and providing increased accountability for unlawful police actions by limiting officer immunity from civil suits due to misconduct. Colorado's law is considered a model, offering a window into what a comprehensive approach to police reform looks like.").

18. *See, e.g.*, Pfander et al., *supra* note 11, at 740–42 (finding several state legislatures have barred officers from raising qualified immunity defenses in cases involving violations of the state's constitution).

19. Nielson & Walker, *supra* note 6 at 237; *see also* Bond v. United States, 564 U.S. 211, 221 (2011) ("[Federalism] allows States to respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power.").

of these reform proposals for qualified immunity could be on the table for implementation.

Moving beyond what has been proposed to date, Part III then identifies other reform ideas relevant to qualified immunity that can be tested through a 51 imperfect solutions approach.[20] For example, civil-rights plaintiffs in federal court must satisfy the *Iqbal* pleading standard, which requires that allegations be "plausible" before a court will allow discovery.[21] There is an ongoing debate over whether this pleading standard prevents injured civil-rights plaintiffs from obtaining compensation.[22] States, however, are free to disregard *Iqbal* and apply their own pleading standards, either generally or for civil-claims specifically. Similarly, scholars have long debated whether qualified immunity's procedural rules lead to "stagnation,"[23] as judges may dismiss claims on the ground that the alleged right is not clearly established without first determining whether the right exists, thus potentially preventing new rights from emerging.[24] States, however, can strike a different balance. Finally, the longstanding federal appellate principle that officers who have been denied qualified immunity may immediately appeal rather than having to wait for a final judgment[25] has also come under criticism in recent years.[26] Once more, states are free to experiment.

These are not the only areas in which state experimentation is possible, but they make the point: State and local governments have a great deal of flexibility in balancing competing concerns in civil-rights cases. Rather than just addressing qualified immunity in one fell, federal swoop, the time has come to explore 51 imperfect solutions.

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20. *See, e.g.*, New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

21. *See* Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)) ("To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'").

22. *See* Part III.A *infra* (explaining that some scholars argue the federal pleading standard is difficult for civil-rights plaintiffs to meet).

23. *See* Pearson v. Callahan, 555 U.S. 223, 236–37 (2009) (overruling the mandatory nature of a prior two-prong test to allow for federal district courts and courts of appeals more discretion in determining whether a constitutional right exists during their analysis of qualified immunity).

24. *See* Part III.B *infra* (arguing state legislatures can create their own procedural rules to apply to qualified immunity cases to prevent stagnation).

25. Mitchell v. Forsyth, 472 U.S. 511, 530 (1985).

26. *See* Part III.C *infra* (explaining some commentators believe this principle can give defendants unfair leverage during the settlement process).

I. UNDERSTANDING QUALIFIED IMMUNITY AND FEDERALISM

Qualified immunity has always been a divisive issue[27]—yet it has become especially contentious in recent years. Here, we do not document the ins and outs of the longstanding debate, nor the details of the defense.[28] For purposes of this Essay, we assume familiarity with the basics. The key point is that Section 1983 has been broadly interpreted to allow civil-rights suits for damages against state and local officers in their personal capacities, but those officers also enjoy a qualified immunity defense to such suits: damages are not available unless the officers violated a right that was "clearly established" at the time of the alleged violation.[29]

To be clearly established, the right "must be clear enough that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply" as applied to "the particular circumstances" of the case.[30] This standard often, though not always,[31] requires precedent with a similar factual situation.[32] The upshot is that sometimes a constitutional violation will go without a Section 1983 monetary remedy, on the theory that the prospect of liability for making a mistake about what the law requires may dissuade officers from faithfully executing state and local laws and policies that do *not* violate the U.S. Constitution.[33]

Scholars debate whether qualified immunity is good law[34] and

27. *See, e.g.*, Comment, Harlow v. Fitzgerald: *The Lower Courts Implement the New Standard for Qualified Immunity Under Section 1983*, 132 U. PA. L. REV. 901, 905 (1984) ("Because *Harlow* has the potential to broaden dramatically the protection that the qualified immunity defense affords to public officials, it could undermine the significance of section 1983.").

28. We have done that elsewhere. *See, e.g.*, Nielson & Walker, *supra* note 6, at 238–50 (detailing the history of qualified immunity and recent criticisms).

29. *See, e.g.*, District of Columbia v. Wesby, 138 S. Ct. 577, 589–90 (2018) (explaining the doctrine that "[the] legal principle must have a sufficiently clear foundation in then-existing precedent" in addition to being clearly established).

30. *Id.* at 590.

31. *See* Hope v. Pelzer, 536 U.S. 730, 741 (2002) ("[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances."); *see also id.* at 745 ("Hope was treated in a way antithetical to human dignity—he was hitched to a post for an extended period of time in a position that was painful, and under circumstances that were both degrading and dangerous.").

32. *See* City & County of San Francisco v. Sheehan, 575 U.S. 600, 613 (2015) ("Qualified immunity is no immunity at all if 'clearly established' law can simply be defined as the right to be free from unreasonable searches and seizures."); *see also* Ashcroft v. al-Kidd, 563 U.S. 731, 742 (2011) ("We have repeatedly told courts . . . not to define clearly established law at a high level of generality.").

33. Nielson & Walker, *supra* note 6, at 291–92.

34. The leading criticism of qualified immunity's lawfulness is William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45 (2018). Since that article was published, several

whether it is good policy[35]—which is not the same question. Our most recent contribution to those debates is *Qualified Immunity and Federalism*.[36] There, we argue that federalism is highly relevant to the legal question of whether the Supreme Court should revisit qualified immunity, especially in light of statutory stare decisis and the significant amount of reliance the Supreme Court's decades of cases recognizing qualified immunity have encouraged.[37] But we also observe that federalism has a role to play in assessing qualified immunity's policy implications. After all, state governments can create liability for their own officers much higher than the federal floor. To do so, all a state must do is create a cause of action that mirrors Section 1983's substantive scope, but with different defenses.[38] In this way, state governments can raise the floor of federal qualified immunity by eliminating qualified immunity under state law for certain claims—or at least making it easier for officers to be held liable for monetary damages.[39] Indeed, "[h]istory is . . . replete with examples of states enacting laws to protect individual rights in response to federal inaction."[40]

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counterarguments have been offered. *See, e.g.*, Richard H. Fallon, Jr., *Bidding Farewell to Constitutional Torts*, 107 CALIF. L. REV. 933 (2019) (criticizing recent expansions of qualified immunity); Scott A. Keller, *Qualified and Absolute Immunity at Common Law*, 73 STAN. L. REV. 1337 (2021) (arguing in favor of restoring certain 19th-century features of qualified immunity to address modern issues).

35. The most comprehensive criticism of qualified immunity as policy comes from Joanna Schwartz in a series of articles. *See, e.g.*, Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2 (2017). Her views challenge the Supreme Court's claims about how qualified immunity works as empirically untrue. *But see* Nielson & Walker, *supra* note 8, at 1876 (arguing these empirical studies do not necessarily provide support for the Court's reconsideration of qualified immunity).

36. *See* Nielson & Walker, *supra* note 6, at 291–92 (arguing that the Constitution does not require Congress to create a cause of action against officers, particularly in cases where officers made good-faith mistakes).

37. *Id.* at 282–85.

38. *See id.* at 296 (arguing federal qualified immunity standards set a minimum standard that can be expanded by states).

39. *Id.*

40. Denise C. Morgan & Rebecca E. Zietlow, *The New Parity Debate: Congress and Rights of Belonging*, 73 U. CIN. L. REV. 1347, 1377 (2005). For example, although states are protected by sovereign immunity, they "are free to waive their immunity from suit under federal statutory law," as some have done. Nielson & Walker, *supra* note 6, at 296 *(*quoting Lauren K. Robel, *Sovereignty and Democracy: The States' Obligations to Their Citizens Under Federal Statutory Law*, 78 IND. L.J. 543, 543 (2003)). Likewise, although state and local governments are not generally required to protect individuals from the actions of third parties, they are free to impose such obligations on themselves, as some have done. *See* DeShaney v. Winnebago Cnty. Dept. of Soc. Servs., 489 U.S 189, 202 (1989) (holding that "the State had no constitutional duty to protect" the petitioner from an abusive parent)*; see also* Laura S. Harper, Note, *Battered Women Suing Police for Failure to Intervene: Viable Legal Avenues After* Deshaney v. Winnebago County Department of Social

As we document in *Qualified Immunity and Federalism,* this is not just a hypothetical power when it comes to qualified immunity; states already do this. California, for example, has decreed that qualified immunity "'does not extend to state tort claims against government employees'" or to certain "state civil rights claims."[41] Thus, the Ninth Circuit has held that for such claims, "qualified immunity is a doctrine of *federal* common law and, as such, has no application to . . . *state* claims, which are subject only to *state* statutory immunities."[42] Instead of mirroring federal law, California has created "*state* statutory immunities"[43] that are tailored to certain types of claims but not to others.[44] California is not alone in this. A recent study documents the diversity of state approaches to government official liability and qualified immunity—including statutory frameworks for civil rights actions against government employees, budgetary frameworks for indemnifying employees, compensating victims, state and local government litigation practices, and procedures for handling civil rights lawsuits.[45] There are clear examples of states, by statute or judicial decision, embracing a state qualified immunity doctrine that differs from the federal qualified immunity doctrine.[46]

This diversity of approaches is a good thing. Indeed, it is a real-world example of one of the central benefits of our federal system. Because states are not required to operate in lockstep, they have freedom to create "local policies 'more sensitive to the diverse needs of a heterogeneous society,'" which encourages "'innovation and experimentation,' enables greater citizen 'involvement in democratic processes,' and makes government 'more responsive by putting the States in competition for a mobile citizenry.'"[47] At the same time, states

Services, 75 CORNELL L. REV. 1393, 1422 (1990) ("*DeShaney* endorsed state tort law as a legal avenue for plaintiffs injured by state officers' failure to protect when under a state-imposed duty to do so.").

41. Cousins v. Lockyer, 568 F.3d 1063, 1072 (9th Cir. 2009) (quoting Venegas v. Cnty. of L.A., 153 Cal. App. 4th 1230 (2007)).

42. *Id.* (emphasis in original).

43. *Id.* (emphasis in original).

44. *See id.* at 1071 (citing Sullivan v. County of L.A., 527 P.2d 865, 867–72 (Cal. 1974)) (describing how no California immunity provisions "appl[y] to a false imprisonment claim brought pursuant to California Government Code § 821.6").

45. *See* Pfander et al., *supra* note 11, at 758–63 (summarizing findings on alternative approaches to Section 1983 claims at state and local levels).

46. *See* Nielson & Walker, *supra* note 6, at 296–300 (describing the various approaches to qualified immunity in several different states).

47. Bond v. United States, 564 U.S. 211, 221 (2011) (quoting Gregory v. Ashcroft, 501 U.S. 452, 458 (1991)).

cannot go too far in limiting compensation. If they attempt to allow officials to violate clearly established rights, plaintiffs may simply bring suit under Section 1983. In this way, Section 1983 operates as a floor, not a ceiling—meaning states are free to strike a different balance above the federal floor.[48] There is a significant difference between saying "this is *the* standard for damages in civil-rights cases" and, instead, saying "this is *the* floor for potential damages in civil-rights cases, but states can go above this floor."

II. LEGISLATING AWAY QUALIFIED IMMUNITY

In the summer of 2020, after the killing of George Floyd and subsequent public outcry, the 116th Congress considered various legislative proposals to reform qualified immunity.[49] None became law. This Part surveys some of the main federal proposals to demonstrate how they could in theory be implemented at the state level. In so doing, we rely on the recent work of James Pfander, Alex Reinert, and Joanna Schwartz, which advocates for states to "enact a state law analogue to Section 1983 that allows people to bring an action under state law for the violation of their state and/or federal constitutional rights."[50]

To be sure, their proposed state model statute would eliminate qualified immunity entirely, as well as impose vicarious liability on local governments for employees' actions, mandate indemnification of government employees (and prohibit indemnification caps), and codify an attorney fee-shifting regime similar to the federal statutory scheme.[51] In this short Essay we do not endeavor to assess this more comprehensive and sweeping reform. Nor do we offer recommendations about which reforms (if any) make the most sense generally or in particular cases. Instead, our goal is to illustrate how the federal proposals to date could be implemented at the state level should a state wish to do so. Part II.A focuses on the three main legislative proposals introduced in the 116th Congress. Part II.B then assesses three narrower alternatives that states could also consider.

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48. Nielson & Walker, *supra* note 6, at 299.

49. *See, e.g.*, George Floyd Justice in Policing Act, H.R. 7120, 116th Cong. (2020). Part II substantially draws from and builds on Christopher J. Walker, *Legislating Away Qualified Immunity in Section 1983*, YALE J. ON REG.: NOTICE & COMMENT (June 24, 2020), https://www.yalejreg.com/nc/legislating-away-qualified-immunity-in-section-1983/.

50. Pfander et al., *supra* note 11, at 769; *see also id.* at 769–75 (discussing the various features of the authors' proposed model state statute in greater detail).

51. *Id.* at 33–34.

We discuss them in the order of the magnitude of change the reform would make to existing doctrine.

A. Proposed Legislation in the 116th Congress

1. Amash–Pressley Ending Qualified Immunity Act

Representatives Justin Amash (L-Mich.) and Ayanna Pressley (D-Mass.) proposed the Ending Qualified Immunity Act.[52] This legislation would create a broad and unambiguous elimination of qualified immunity or any sort of related good faith defense under Section 1983, by adding the following to the end of Section 1983:

> It shall not be a defense or immunity to any action brought under this section that the defendant was acting in good faith, or that the defendant believed, reasonably or otherwise, that his or her conduct was lawful at the time when it was committed. Nor shall it be a defense or immunity that the rights, privileges, or immunities secured by the Constitution or laws were not clearly established at the time of their deprivation by the defendant, or that the state of the law was otherwise such that the defendant could not reasonably have been expected to know whether his or her conduct was lawful.[53]

Indeed, this proposed language seems broad enough to allow for monetary damages even when an officer follows binding circuit-court or Supreme Court precedent that is later overturned as well as for officers who follow state law that is later deemed unlawful under federal law.

The Amash–Pressley proposal faces significant barriers to garnering bipartisan support at the federal level. Among other things, eliminating qualified immunity has the potential to impose substantial economic and other costs on state and local governments, which by state law, municipal ordinance, or employment contract defend and indemnify officers for monetary liability under Section 1983.[54] Many members of Congress may worry about the financial implications of such sweeping reform for their states and localities, and even more so in the COVID-19 era when state and local government budgets have been decimated. Likewise, the potential unfairness inherent in

52. H.R. 7085, 116th Cong. (2020).
53. *Id.* § 4 (to amend 42 U.S.C. § 1983).
54. For more on these concerns, see Nielson & Walker, *supra* note 6, at 263–93.

imposing liability even when an official has followed existing precedent may be a heavy lift politically. That said, not all states and localities are the same, and such experimentation at the state or local level of this breadth may be more possible.

2. The Braun Reforming Qualified Immunity Act

Senator Mike Braun (R-Ind.) introduced the Reforming Qualified Immunity Act.[55] Like the Amash–Pressley bill, the Braun proposal would broadly eliminate qualified immunity under Section 1983, but it would carve out two potentially important exceptions to address the concerns raised above. Jay Schweikert aptly summarizes these two exceptions:

> a. If the defendant could show that, at the time they were alleged to have violated someone's rights, (1) their challenged conduct was specifically authorized by a federal or state statute, or federal regulation, (2) no court had held that this statute or regulation was unconstitutional, and (3) they had a reasonable, good-faith belief that their actions were lawful.
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> b. If the defendant could show that, at the time they were alleged to have violated someone's rights, (1) their challenged conduct was specifically authorized by then-applicable judicial precedent, and (2) they had a reasonable, good-faith belief that their actions were lawful.[56]

These exceptions from monetary liability for state and local government officers will likely need to be included in any proposed legislation that has a chance of garnering bipartisan support at the federal level.[57] Particularly relevant to this Essay, these exceptions may also make qualified immunity reform at the state level more realistic because the law would not impose monetary liability when officers followed federal law or binding judicial precedent. One could imagine some state legislatures expanding the first exception to include both state statutes *and regulations* to mirror the federal law exception. Some may well also include local ordinances in that exception.

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55. S. 4036, 116th Cong. (2020).

56. Jay Schweikert, *Republican Senator Introduces Legislation To Reform Qualified Immunity*, CATO AT LIBERTY BLOG (June 23, 2020), https://www.cato.org/blog/republican-senator-introduces-legislation-reform-qualified-immunity.

57. *See* Part II.A.1 *supra*.

States may also expressly note that the second exception applies to both federal and state judicial precedents.

3. Democrats' Justice in Policing Act

Another qualified immunity reform legislation of the 116th Congress was included in the larger Justice in Policing Act, which was advanced by Democrats in the House and Senate.[58] In June 2020, the House passed this bill on a 236-181 vote, with all Democrats and three Republicans voting in favor.[59] This legislation would only eliminate qualified immunity for law enforcement officers, as opposed to every person acting under the color of state or local law.[60] In other words, it would not eliminate qualified immunity for other state and local officials, such as public school teachers, social workers, and other government employees who are not involved in "the prevention, detection, or investigation of any violation of criminal law."[61]

This legislative proposal responds to current calls for police reform. It is thus not surprising that at least two states have adopted this approach. In 2020, the Colorado legislature enacted a statute that created a state cause of action against a "peace officer" for state constitutional violations and expressly stated that "[q]ualified immunity is not a defense to liability."[62] In 2021, New Mexico passed a similar law.[63]

To be clear, even this proposal focused solely on law enforcement would still be a dramatic change to existing law, which could potentially impose significant costs on state and local governments that generally indemnify their employees in Section 1983 actions. Many states would

58. George Floyd Justice in Policing Act, H.R. 7120, 116th Cong. (2020); Justice in Policing Act, S. 3912, 116th Cong. (2020).

59. *Roll Call 119: Bill Number: H.R. 7120*, OFFICE OF THE CLERK, UNITED STATES HOUSE OF REPRESENTATIVES (June 25, 2020, 8:39 PM), https://clerk.house.gov/Votes/2020119.

60. H.R. 7120 § 102 ("It shall not be a defense or immunity in any action brought under [42 U.S.C. § 1983] against a local law enforcement officer (as such term is defined in section 2 of the George Floyd Justice in Policing Act of 2020), or in any action under any source of law against a Federal investigative or law enforcement officer . . . .").

61. *See id.* at § 2(6) (defining "local law enforcement officer" as "any officer, agent, or employee of a State or unit of local government authorized by law or by a government agency to engage in or supervise the prevention, detection, or investigation of any violation of criminal law").

62. COLO. REV. STAT. § 13-21-131(1), (2)(b). Colorado law defines "peace officer" to include "any person employed by a political subdivision of the state required to be certified by the P.O.S.T. board pursuant to section 16-2.5-102, a Colorado state patrol officer as described in section 16-2.5-114, and any noncertified deputy sheriff as described in section 16-2.5-103(2)." *Id.* § 24-31-901(3).

63. New Mexico Civil Rights Act of 2021, N.M. STAT. § 41-4A-1 *et seq.*

no doubt also want to consider including the Braun proposal's exceptions discussed in Part II.A.2. We do not intend to enter the policy debate of weighing the costs and benefits of this proposed reform. That said, now that Colorado and New Mexico have enacted a similar regime under state law, comparisons can more easily be drawn between different states to attempt to more fully understand the costs and benefits of a law-enforcement exception to qualified immunity.

B. Other Narrower Potential Legislative Reforms

States can also consider other options beyond what members of Congress have proposed. Here, we identify three alternatives. These options are illustrative, and we do not seek to weigh in on their merits. But they should help illustrate the types of reforms states can consider.

1. Exclude Qualified Immunity for Excessive Force

To begin, states could focus on the constitutional violation or conduct at issue, instead of the officer. Limiting the elimination of qualified immunity to a subset of conduct like excessive force—instead of all conduct by a particular set of state actors—would allow law enforcement officers to have qualified immunity for other difficult decisions they have to make in the line of duty. In so doing, it would also limit somewhat the potential liability state and local governments would assume through indemnification.

At the same time, this revision would apply more broadly than the Justice in Policing Act to eliminate qualified immunity for any state actor who exercises excessive force, not just police officers. This sort of approach would seem more consistent with how absolute immunity works in the context of legislative and judicial actions, where the focus is not on the state actor's title or position (legislator or judge), but instead on the state action at issue (the exercise of legislative or judicial functions).[64]

Here's what that legislation could look like:

> a. State law is amended by adding the following provision: "It shall not be a defense or immunity to any action brought under this section for claims of

64. *See, e.g.*, Bogan v. Scott-Harris, 523 U.S. 44, 49, 54 (1998) (extending absolute immunity for "legislative activities" under Section 1983 beyond state legislators to local legislators); *see also* Stump v. Sparkman, 435 U.S. 349, 355–56 (1978) (reaffirming absolute immunity for judges under Section 1983 for "their judicial acts") and Imbler v. Pachtman, 424 U.S. 409, 422–23 (1976) ("The common-law immunity of a prosecutor is based upon the same considerations that underlie the common-law immunities of judges and grand jurors acting within the scope of their duties.").

> excessive force under the Fourth Amendment of the U.S. Constitution or the state-law equivalent that—the defendant was acting in good faith, or that the defendant believed, reasonably or otherwise, that his or her conduct was lawful at the time when the conduct was committed; or
>
> b. the rights, privileges, or immunities secured by the Constitution and laws were not clearly established at the time of their deprivation by the defendant, or that at that time, the state of the law was otherwise such that the defendant could not reasonably have been expected to know whether his or her conduct was lawful."

To broaden this exception to any Fourth Amendment claim—including both excessive force and unreasonable searches and seizures more generally—legislators could simply delete the words "of excessive force" from the first sentence. If a state legislature wanted to narrow the coverage to just deadly force, the language could read "any action brought under this section for wrongful death based on claims of excessive force . . . ." A legislature may wish to include the Braun exceptions, discussed in Part II.A.2.

Modifying Section 1983 to depart from the general rules for certain claims is not unprecedented. For example, in the federal system, the Prison Litigation Reform Act (PLRA) carves out claims "brought with respect to prison condition under section 1983" for special treatment—albeit in ways that make it harder for prisoner plaintiffs to prevail.[65] The California legislature has taken a related claim-specific approach to immunity, providing for immunity for some state actions but not for others.[66] And similarly, the Washington Supreme Court has held that state qualified immunity is not "available for claims of assault and battery arising out of the use of excessive force to effectuate an arrest."[67]

65. *See* 42 U.S.C. § 1997e(a) ("No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.").

66. *See, e.g.*, Venegas v. Cnty. of Los Angeles, 153 Cal. App. 4th 1230, 1246 (2007) (finding no immunity for unreasonable searches while noting other California statutory provisions, including CAL. PENAL CODE § 847(b)(1), that provide immunities for unlawful arrest).

67. Staats v. Brown, 991 P.2d 615, 627–28 (Wash. 2000).

2. Reestablish Subjective Intent Standard

The elimination of qualified immunity for excessive force claims may be too broad a reform to garner sufficient legislative support in most states, especially given such reform's potential effect on state and local government budgets and the fact that state and local officials would be liable for good-faith mistakes.[68] A narrower reform would be to strip officers of qualified immunity when they act in bad faith. In other words, state legislators could reject in their state liability scheme the Supreme Court's decision in *Harlow v. Fitzgerald*, which eliminated the "subjective intent" standard for qualified immunity.[69]

Such state-law reform legislation could be phrased in the following way:

> State law is amended by adding the following provision: "A person shall not be entitled to a qualified immunity from civil liability under this section if the person—
>
> a. knew or reasonably should have known that the conduct at issue would cause a deprivation of clearly established rights, privileges, or immunities secured by the Constitution and laws, or
>
> b. committed the conduct with the malicious intention to cause a deprivation of the rights, privileges, or immunities secured by the Constitution and laws."

The first provision captures the U.S. Supreme Court's current "objective intent" approach to qualified immunity. The second provision goes beyond the current approach to reinstate a more plaintiff-friendly "subjective intent" exception to qualified immunity, which the *Harlow* Court eliminated.[70]

The *Harlow* Court eliminated the "subjective intent" exception to qualified immunity because it was concerned that the ease of pleading subjective intent went against the immunity's purpose of shielding state actors from not just monetary liability but also from the costs of defending the lawsuit—i.e., that "insubstantial claims should not

68. *See generally* Nielson & Walker, *supra* note 6, at 263–93.

69. *See* Harlow v. Fitzgerald, 457 U.S. 800, 815–18 (1982) (analyzing the difficulties of having a subjective requirement and limiting liability to violations of "clearly established statutory or constitutional rights of which a reasonable person would have known").

70. *Id.* at 815–17 (rejecting the previously recognized "subjective intent" prong of qualified, which eliminated qualified immunity if the officer "took the action with the malicious intention to cause a deprivation of constitutional rights or other injury" even if the action was objectively reasonable (internal quotation marks omitted)).

proceed to trial."[71] In the years since *Harlow*, this concern may have been mitigated somewhat at the federal level by the Court's decisions in *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal*, which held that a plaintiff must not just plead specific factual details that establish that the alleged conduct is "conceivable"; the conduct must actually be "plausible."[72] We further discuss pleading standards in Part III.A, including how states can experiment there as well.

At least two states have already adopted this approach under state law. In 1988, the Minnesota Supreme Court interpreted "official immunity" under Minnesota law to be distinct from federal qualified immunity, holding that "subjective intent" still matters.[73] And more recently, in 2018, the Iowa Supreme Court issued an extensive opinion on state qualified immunity that rejected *Harlow*:

> As we have noted, a number of states allow *Harlow* immunity for direct constitutional claims. In those jurisdictions, there cannot be liability unless the defendant violated "clearly established . . . constitutional rights of which a reasonable person would have known." *Harlow* examines objective reasonableness; thus, in some ways it resembles an immunity for officials who act with due care. However, it is centered on, and in our view gives undue weight to, one factor: how clear the underlying constitutional law was. Normally we think of due care or objective good faith as more nuanced and reflecting several considerations. Factual good faith may compensate for a legal error, and factual bad faith may override some lack of clarity in the law.[74]

Relying on John Jeffries's critique of *Harlow*, the Iowa Supreme Court concluded that "to be entitled to [state] qualified immunity a defendant must plead and prove as an affirmative defense that she or

71. *See id.* at 815–16 (explaining that subjective intent "has proved incompatible with [the Court's] admonition" in Butz v. Economou, 438 U.S. 478, and that "it now is clear that substantial costs attend the litigation of the subjective good faith of government officials"); *see also id.* at 817 ("Judicial inquiry into subjective motivation therefore may entail broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues.").

72. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556, 570 (2007); Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

73. *See, e.g.*, Rico v. State, 472 N.W.2d 100, 108 (Minn. 1991) (refusing to incorporate federal qualified immunity's objective reasonableness standard as set forth in Harlow v. Fitzgerald, 457 U.S. 800, 816–18 (1982)); *see also* Elwood v. Cnty. of Rice, 423 N.W.2d 671, 677 (Minn. 1988) ("We have previously recognized the distinction between state and federal standards of official immunity.").

74. Baldwin v. City of Estherville, 915 N.W.2d 259, 279 (Iowa 2018) (alteration in original) (citations omitted).

he exercised all due care to comply with the law."[75]

Since then, former Texas Solicitor General Scott Keller has suggested that a return to the subjective intent standard for qualified immunity would be more consistent with first principles and the common law immunities that existed in the 1800s when Congress first enacted Section 1983.[76]

3. Codify *Hope v. Pelzer* Standard

A final, narrower reform could focus on how the U.S. Supreme Court has defined what is required for law to be "clearly established" under its current "objective intent" approach to qualified immunity. Much criticism has been raised against the Court's current approach, which requires binding judicial precedent that is directly on point in order create "clearly established" law.[77] Justice Stevens advanced this criticism in his opinion for the Court in *Hope v. Pelzer,* suggesting that it suffices if existing binding precedent articulates general principles which provide fair notice to state actors that their conduct would be unlawful.[78]

State legislatures could codify this *Hope* standard for qualified immunity under state law, perhaps along the following lines:

> State law is amended by adding the following provision: "A person shall not be entitled to a qualified immunity from civil liability under this section unless the person lacked fair notice that their conduct was unlawful at the time it was committed. Fair notice does not necessarily require a binding precedent by the Supreme Court or the relevant U.S. Court of Appeals that is based on fundamentally or materially similar facts. A general

75. *Id.* at 280–81 (citing John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 VA. L. REV. 207, 242, 258–60 (2013)).

76. Keller, *supra* note 34, at 1378 (identifying "*Harlow v. Fitzgerald*'s replacement of the subjective good-faith defense with the clearly-established-law test" as "the qualified immunity doctrine's largest divergence from the common law"). *Cf.* William Baude, *Is Quasi-Judicial Immunity Qualified Immunity?*, 73 STAN. L. REV. ONLINE (forthcoming 2022), https://ssrn.com/abstract=3746068 (agreeing that *Harlow* is inconsistent with backdrop common law yet criticizing Keller's article on other grounds).

77. *See, e.g.*, 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, 1246–48 (2015).

78. *See* Hope v. Pelzer, 536 U.S. 730, 739–42 (2002) (rejecting the Eleventh Circuit's holding that *Harlow v. Fitzgerald* required "the facts of previous cases be materially similar" to the facts in the case at hand and that "officials can still be on notice that their conduct violates established law even in novel factual circumstances" (internal citations omitted)).

> constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though the specific action in question has not previously been held unlawful."

This reform would codify Justice Stevens's approach to qualified immunity in *Hope*, which recognized that some conduct is so obviously unconstitutional that no earlier case on point is necessary. Indeed, much of this language is lifted directly from Stevens's opinion.[79]

It should be noted that the Supreme Court has recently expressed some willingness to more robustly enforce *Hope*'s more plaintiff-friendly approach to determine what is clearly established law for qualified immunity purposes. In *Taylor v. Riojas*, a per curiam opinion summarily reversing the Fifth Circuit, the Court cited *Hope*'s "fair warning" standard that "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question."[80] Several months later, the Court granted, vacated, and remanded another case to the Fifth Circuit in light of *Taylor v. Riojas*.[81] Accordingly, federal legislative reform may end up being unnecessary to codify *Hope*—time will tell—but codifying *Hope* remains an option for state legislatures to consider.

III. EXPLORING FURTHER STATE EXPERIMENTATION

Once one recognizes the role states can play in civil-rights litigation, other grounds for experimentation emerge. Part III addresses three areas of the law related to qualified immunity where a 51 imperfect solutions approach may be fruitful: (A) pleading standards; (B) anti-stagnation rules; and (C) appellate review. Similar to the legislative proposals detailed in Part II, this list is illustrative, not exhaustive. We also do not assess the policy implications of these changes, but simply identify them to illustrate that it can be myopic to focus only on federal law and federal courts.

A. Pleading Standards

Qualified immunity is not the only feature of federal law that critics say disadvantages civil-rights plaintiffs. Many commentators argue that the pleading standards used in federal court also make it unduly

79. *See id.* at 739–41.

80. Taylor v. Riojas, 141 S. Ct. 52, 53–54 (2020) (per curiam) (internal quotation marks omitted).

81. McCoy v. Alamu, 141 S. Ct. 1364, 1364 (2021).

difficult for plaintiffs to prevail generally—a dynamic that may compound the effects of qualified immunity. Indeed, the late-Judge Stephen Reinhardt lamented that the Supreme Court was "rolling back individual rights and limiting access to the courts" by "imposing pleading standards that essentially require plaintiffs to prove major elements of their cases without the benefit of discovery."[82]

Before the Supreme Court's 2007 decision in *Bell Atlantic Corp. v. Twombly*,[83] federal courts used a form of "notice" pleading known as the "*Conley* standard" from a 1957 decision, in which courts were generally required to accept as true any facts alleged in the complaint.[84] In *Twombly*, however, the Court reversed course, holding in the context of price-fixing that the *Conley* standard should give way to a "plausibility" standard, under which a plaintiff must file "a complaint with enough factual matter (taken as true) to suggest that an agreement was made" by offering "plausible grounds to infer an agreement."[85] Shortly thereafter, the Supreme Court in *Ashcroft v. Iqbal* extended the plausibility standard to civil-rights litigation.[86] Now, to withstand a motion to dismiss and obtain discovery, a civil-rights plaintiff must meet a higher standard: "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[87]

The result of this shift away from *Conley*, some fear, is that meritorious claims now more often go without remedy.[88] Others

82. Reinhardt, *supra* note 77, at 1222 n.10.

83. 550 U.S. 544 (2007).

84. *See* Conley v. Gibson, 355 U.S. 41, 45–46 (1957) ("In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.").

85. *Twombly*, 550 U.S. at 556.

86. *See* Ashcroft v. Iqbal, 556 U.S. 662, 684 (2009) ("Though *Twombly* determined the sufficiency of a complaint sounding in antitrust, the decision was based on our interpretation and application of Rule 8. . . . That Rule in turn governs the pleading standard 'in all civil actions and proceedings in the United States district courts.'"); *see also id.* at 666 (explaining that the case concerned allegedly discriminatory detention practices).

87. *Id.* at 678.

88. *See, e.g.*, Alexander A. Reinert, *Measuring the Impact of Plausibility Pleading*, 101 VA. L. REV. 2117, 2122 (2015) (arguing that "individuals have fared poorly under the plausibility regime, at least when compared to corporate and governmental agents and entities"); *see also* John M. Greabe, Iqbal, Al-Kidd *and Pleading Past Qualified Immunity: What the Cases Mean and How They Demonstrate a Need to Eliminate the Immunity Doctrines from Constitutional Tort Law*, 20 WM. & MARY BILL RTS. J. 1, 1(2011) ("For, if qualified immunity is to remain an affirmative defense, the only way to accomplish the pleadings-based dismissals that the Court desires is to require plaintiffs to plead facts establishing the inapplicability of qualified immunity. And this is heightened pleading."); Goutam U. Jois, Pearson, Iqbal, *and Procedural Judicial*

disagree.[89] And still others argue that the law should adopt more targeted approaches to pleading that focuses on discovery-cost asymmetries.[90]

We do not know which position is correct, if any of them are. Even leaving aside the fog of uncertainty about how litigation works in the real world, the optimal pleading standard must balance the risk that meritorious claims will be incorrectly dismissed against the risk that unmeritorious claims will succeed, for instance, by generating a settlement. This balance also has no perfect solution; any rule will produce unfairness. And how we think about that unfairness may depend on what type of claim is before the court.

Thus, this is another area where a 51 imperfect solutions approach is worth considering. States, after all, are free to reject the *Iqbal* pleading standard—as many have done.[91] But states are also free to reject *Iqbal* on a less categorical basis. The federal approach is generally transsubstantive—the same procedural rules and pleading standards apply to all types of claims.[92] But the states can strike a different balance. For civil-rights claims, a state could very well decide to use

Activism, 37 FLA. ST. U.L. REV. 901, 920–21 (2010) (arguing that *Iqbal* and *Pearson*'s version of qualified immunity harm civil rights plaintiffs).

89. *See, e.g.*, JOE S. CECIL ET AL., FED. JUDICIAL CTR., MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM AFTER IQBAL vii (2011) (finding "no increase in the rate of grants of motions to dismiss without leave to amend in civil rights cases and employment discrimination cases"); *see* David L. Noll, *The Indeterminacy of* Iqbal, 99 GEO. L.J. 117, 136–37 (2010) (arguing that some courts overread *Iqbal* because the Supreme "Court neither overturned its prior precedent nor decided *Iqbal* in a manner that properly may be understood to mandate an additional burden on plaintiffs at the pleadings").

90. *See, e.g.*, Paul Stancil, *Substantive Equality and Procedural Justice*, 102 IOWA L. REV. 1633, 1679 (2017) ("Commentators do not tend to stay on the fence when it comes to the Supreme Court's jurisprudence on civil pleading standards. An overwhelming majority seem to prefer the Court's old 'no set of facts' standard as articulated in *Conley v. Gibson*, while a much smaller minority prefers the new 'plausibility pleading' approach articulated in *Bell Atlantic v. Twombly* and *Ashcroft v. Iqbal*. Both groups are wrong." (footnotes omitted)).

91. *See, e.g.*, Joseph W. Owen, Note, *A 'Plausible' Future: Some State Courts Embrace Heightened Pleading After* Twombly *and* Iqbal, 36 N.C. CENT. L. REV. 104, 104 (2013) (explaining that some but not all states have followed the U.S. Supreme Court's lead); Mark W. Payne, *The Post-*Iqbal *State of Pleading: An Argument Opposing a Uniform National Pleading Regime*, 20 U. MIAMI BUS. L. REV. 245, 262–63 (2012) (describing how although certain states have adopted Iqbal, other states have denied to adopt the standard); *see also, e.g.*, Colby v. Umbrella, Inc., 955 A.2d 1082, 1086 n.1 (Vt. 2008) (explaining that state courts "are in no way bound by federal jurisprudence in interpreting our state pleading rules").

92. *See, e.g.*, Ashcroft v. Iqbal, 556 U.S. 662, 684 (2009) ("Our decision in *Twombly* expounded the pleading standard for 'all civil actions,' and it applies to antitrust and discrimination suits alike.") (citations omitted); Stancil, *supra* note 90, at 1680 ("[T]he real problem with pleading law is not *Twombly*, *Iqbal*, or *Conley*. Instead, it is the transsubstantive application of whichever pleading standard the Supreme Court adopts.").

notice pleading or change the burden of proof necessary for an affirmative defense like qualified immunity. To be clear, these such reforms may have downsides. This Essay does not consider the substantive merits of these ideas. But for those concerned about pleading standards, there are paths to reform other than through the federal system.

B. Anti-Stagnation Rules

The debate over constitutional stagnation is another fertile ground for state-by-state experimentation.[93] If states dislike the U.S. Supreme Court's current approach to the procedural sequence in which qualified immunity cases are resolved, legislatures can create their own anti-stagnation rules.

Some background may be helpful. At its core, qualified immunity is substantively controversial because it prevents plaintiffs from recovering damages. But it is also procedurally controversial. In particular, qualified immunity's two-part test (whether the right was violated, and if so, whether the right was clearly established) may exacerbate legal uncertainty. Rather than deciding whether the constitutional right actually exists, a judge can simply dismiss a claim by observing that whether or not the right exists, that right was not clearly established at the time of the alleged violation. In fact, judges often resolve claims without ever deciding whether the alleged right was violated.[94]

The fear is that if judges rely on this method often enough, some rights may never be clearly established, especially for new technologies or rights that cannot be recognized through other judicial channels.[95] To address this risk, the Supreme Court in *Saucier v. Katz* required federal courts to always first address whether the right exists, and if so,

93. *See, e.g.,* Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1, 35–36 (2015) (describing how the risk of constitutional stagnation has been studied empirically).

94. *See, e.g.*, *id.* at 37 ("The overall rate of reaching constitutional questions accordingly has decreased after *Pearson*; it would be shocking if it were otherwise.").

95. *See, e.g., id.* at 11 ("Qualified immunity, however, is more than just substantively contested; it also is procedurally problematic. Because a plaintiff must satisfy both parts of the test, a court often could dismiss a civil rights suit without reaching the merits of the constitutional claim. This is particularly true for situations involving new technologies, like Tasers, or new factual or political settings. After all, it is difficult to find 'clearly established' law in cases of first impression."). As explained above, there are limits to this; an earlier case is not always required where it is obvious that conduct is unconstitutional. *See* Part II.C.3 *supra* (discussing Hope v. Pelzer, 536 U.S. 730, 741 (2002)).

only then consider whether that right was clearly established.[96] This rigid order-of-operations requirement, however, was short lived. Following widespread discontent from judges who chafed at being told how to resolve cases (including poorly briefed ones), the Court unanimously overruled *Saucier* in *Pearson v. Callahan*.[97] Now, judges have discretion whether to address the constitutional question first or, if the right is not clearly established, to simply dismiss the claim.[98]

Pearson is controversial.[99] Some commentators believe that *Pearson* should be rejected because it causes too much stagnation.[100] Is that right? Unfortunately, it is hard to say. Although stagnation fears may be overstated,[101] it is difficult to make definitive conclusions—especially because the "right" answer is not entirely empirical. The threat of constitutional stagnation thus presents another situation where a 51 imperfect solutions approach makes sense. As a matter of state law, a state could re-impose a procedural rule like *Saucier*, at least for certain types of claims—for example, claims involving new

96. *See* Saucier v. Katz, 533 U.S. 194, 201 (2001) ("A court required to rule upon the qualified immunity issue must consider, then, this threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right? This must be the initial inquiry. . . . [I]f a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established." (citations omitted)).

97. *See* Pearson v. Callahan, 555 U.S. 223, 236 (2009) ("On reconsidering the procedure required in *Saucier*, we conclude that, while the sequence set forth there is often appropriate, it should no longer be regarded as mandatory.").

98. *See id.* at 236 ("The judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand.").

99. *See, e.g.*, James E. Pfander, *Resolving the Qualified Immunity Dilemma: Constitutional Tort Claims for Nominal Damages*, 111 COLUM. L. REV. 1601, 1613 (2011) ("The decisional sequencing mandated in *Saucier v. Katz* and moderated in *Pearson v. Callahan* remains controversial among scholars who continue to debate how well it has achieved its goal."). We have explored elsewhere how *Pearson* has also increased incentives for strategic judicial decisionmaking in the federal courts of appeals. *See generally* Aaron Nielson & Christopher J. Walker, *Strategic Immunity*, 66 EMORY L.J. 55 (2016).

100. *See, e.g.*, Hannah Beard, Note, *How* Ziglar v. Abbasi *Sheds Light on Qualified-Immunity Doctrine*, 96 WASH. U. L. REV. 883, 890 (2019) (arguing that "[t]he risk of constitutional stagnation is more significant than the *Pearson* Court anticipated"); Karen M. Blum, *Qualified Immunity: Time to Change the Message*, 93 NOTRE DAME L. REV. 1887, 1893 (2018) ("Since the Supreme Court in *Pearson v. Callahan* released lower federal courts from the 'rigid order of battle' demanded by *Saucier v. Katz* . . . , most courts have been happy to forgo diving into tough constitutional questions when prong two has presented an obvious escape route." (footnotes omitted)).

101. *See, e.g.*, Lawrence Rosenthal, *Defending Qualified Immunity*, 72 S.C. L. REV. 547, 610 (2020) (suggesting data indicates that "*Pearson* has hardly prevented the courts from articulating constitutional doctrine" (citing Nielson & Walker, *supra* note 93, at 34–38)).

technologies or situations where the constitutional question is unlikely to arise often through other means (like the exclusionary rule).[102] Or, at the very least, as we have argued elsewhere, judges could be required to provide reasons for exercising (or not) their *Pearson* decision to reach constitutional questions that are not clearly established by existing precedent.[103]

Some of these reforms could be complete disasters; some could work across the board; and still others could prove to be disasters for some states but effective solutions for others. Our point again is simply that state-led reform is possible. If states can create their own causes of action that mirror Section 1983, with their own potential defenses, then there is no reason why they cannot also create their own anti-stagnation rules.[104]

C. Appellate Review

Appellate review is also a place for potential experimentation. In the federal system, when a court rejects a qualified immunity defense, the official can often seek interlocutory appeal rather than having to wait for a final judgment.[105] According to the U.S. Supreme Court, because qualified immunity is "an immunity from suit rather than a mere defense to liability," there is immediate appellate jurisdiction under the collateral order doctrine.[106] Indeed, the Justices have "repeatedly . . . stressed the importance of resolving immunity

102. From the other direction, a state could decide that other ways to establish rights are adequate, such that where an alleged right is not clearly established, a court should *never* decide whether the right exists—an approach suggested by Justice Kennedy to prevent anomalous appellate situations. *See* Camreta v. Greene, 563 U.S. 692, 727 (2011) (Kennedy, J., dissenting) (arguing that "the Court might find it necessary to reconsider its special permission that the courts of appeals may issue unnecessary merits determinations in qualified immunity cases with binding precedential effect").

103. Nielson & Walker, *supra* note 93, at 52 (arguing for the "middle path" of qualified immunity procedural reform that "the [Supreme] Court should require lower courts—both trial and appellate courts—to give reasons for exercising (or not) their *Pearson* discretion to reach constitutional questions"); *accord* Jack M. Beermann, *Qualified Immunity and Constitutional Avoidance*, 2009 SUP. CT. REV. 139, 175 ("At a minimum, in light of the strong reasons for reaching the constitutional merits, courts should be required to give reasons for not doing so.").

104. Such reforms may require amending state constitutions—a question beyond the scope of this Essay.

105. *See, e.g.*, Michael E. Solimine, *Are Interlocutory Qualified Immunity Appeals Lawful?*, 94 NOTRE DAME L. REV. ONLINE 169 (2019) ("[F]or over thirty . . . years, the Court has made clear that denials by district courts of . . . [a qualified immunity] defense are subject to an immediate appeal by the defendant under the 'collateral order doctrine,' despite the interlocutory nature of that trial court decision.").

106. Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) (emphasis removed).

questions at the earliest possible stage in litigation."[107] Some commentators fear that interlocutory appeals may unduly delay resolution of civil-rights cases[108] and give defendants unfair leverage in settlement discussions.[109]

Once again, accordingly, this is a place where a 51 imperfect solutions approach may be worthwhile. The U.S. Supreme Court has already held that state courts are not required to allow interlocutory appeals in civil-rights cases involving qualified immunity in Section 1983 litigation.[110] *A fortiori*, states could do the same when it comes to their own causes of action. Like the other potential legislative reforms discussed above, this appellate review reform illustrates how states in a laboratories-of-democracy fashion are free to experiment with new approaches if they believe the federal approach is suboptimal.

V. CONCLUSION

The Supreme Court has explained that "[q]ualified immunity strikes a balance between compensating those who have been injured by official conduct and protecting government's ability to perform its traditional functions."[111] The doctrine thus attempts to balance the "vindicat[ion]" of "citizens' constitutional rights" against the goal of

107. Scott v. Harris, 550 U.S. 372, 376, n. 2 (2007) (quoting Hunter v. Bryant, 502 U.S. 224, 227 (1991)).

108. *See, e.g.*, Blum, *supra* note 100, at 1916–17 ("Interlocutory appeals are inefficient, expensive, and often without merit."); Joanna C. Schwartz, *Qualified Immunity's Selection Effects*, 114 NW. U. L. REV. 1101, 1105–06 (2020) ("Qualified immunity motions and interlocutory appeals of qualified immunity denials also result in delays—of months or years—while the motions are pending. These delays can increase the cost of preparing for trial, and can weaken a plaintiff's case if witnesses' recollections of the underlying facts get hazier over time." (footnotes omitted)); Solimine, *supra* note 105, at 175 ("[A]n interlocutory appeal can disrupt trial proceedings and cause delay and increased costs for the litigants.").

109. *See, e.g.*, Eric K. Yamamoto, *Critical Procedure: ADR and the Justices' "Second Wave" Constriction of Court Access and Claim Development*, 70 SMU L. REV. 765, 779 (2017) (asserting the Supreme Court has "also orchestrated a radical transformation of summary judgment standards in qualified immunity civil rights damage cases and significantly expanded interlocutory appellate jurisdiction—markedly expanding defendants' summary adjudication prospects and litigation leverage while eroding plaintiffs' path to trial on the merits (or settlement)" (footnotes omitted)).

110. *See* Johnson v. Fanknell, 520 U.S. 911, 922–23 (1997) ("This respect [for the States] is at its apex when we confront a claim that federal law requires a State to undertake something as fundamental as restructuring the operation of its courts. We therefore cannot agree . . . that § 1983's recognition of the defense of qualified immunity pre-empts a State's consistent application of its neutral procedural rules, even when those rules deny an interlocutory appeal in this context." (footnotes omitted)).

111. Wyatt v. Cole, 504 U.S. 158, 167 (1992).

protecting "public officials' effective performance of their duties."[112] Given the difficulty of that task, no one should be surprised that qualified immunity is controversial. Unfortunately, there is no perfect solution. Even if the public knew how often rights are violated and how much chill legal uncertainty creates (and the resulting harm for third parties), individuals still would not agree on the optimal policy solution. The public, moreover, does not have such perfect knowledge. One-size-fits-all solutions rarely satisfy where deep philosophical differences collide with immense empirical uncertainty.

So what can be done? We urge federalism as part of the path forward. Federalism enables experimentation, which over time reduces empirical uncertainty. And federalism also enables policy tailoring, which allows balances that more closely match a polity's convictions. Of course, there should be limits on experimentation and tailoring. Indeed, consistent with the purpose of the Fourteenth Amendment, we support a high federal floor.[113] At the very least, state officials who violate clearly established law should be liable for damages.[114] But with that federal floor in place, we submit that 51 imperfect solutions are better than a single imperfect solution.

112. Davis v. Scherer, 468 U.S. 183, 195 (1984).

113. Nielson & Walker, *supra* note 6, at 300 (explaining "many of the most important federal rights are clearly established and, as time passes, more rights are becoming so," meaning that "the federal floor [beneath which states cannot experiment] can be quite high").

114. *See id.* at 303 ("We do not believe that qualified immunity is perfect. It is not. Nor, frankly, is federalism.").