Fifty States, Thirteen Circuits, and One "Clearly Established Federal Law"—Why the Supreme Court is the Only Relevant Arbiter of Federal Law for Qualified Immunity.

by

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Abstract[*]

Congress enacted 42 U.S.C. § 1983 (2012), to give plaintiffs an opportunity to civilly litigate their federal constitutional and statutory claims against state and local officials.[1] The Supreme Court has interpreted Congress's silence with respect to the availability of any immunities as indicating that Congress enacted § 1983 against the backdrop of common law absolute and qualified immunities for government officials. Qualified immunity protects government officials from liability for conduct that does not violate clearly established federal law. In its recent decisions in *Reichle v. Howards*[2] and *Carroll v. Carman*,[3] the Supreme Court has expressly reserved the question of whether precedent from lower federal courts, including the courts of appeals, can clearly establish federal constitutional or statutory rights.

[*] I would like to thank Professor Philip Pucillo for his help identifying the implications of the sometimes-messy policy considerations in qualified immunity. Any oversights are my own.

[1] Claims against federal officials can be brought under the federally created analog, the *Bivens* action. *See* Bivens v. Six Unknown Named Agents, 403 U.S. 388, 389 (1971).

[2] 132 S. Ct. 2088 (2012).

[3] 135 S. Ct. 348 (2014) (per curiam).

This article argues that the only relevant arbiter of federal law for clearly establishing federal rights is the Supreme Court of the United States. To say otherwise puts an onerous requirement on state and local officials by requiring them to be familiar with the law of their state and other states; the law of their circuit and other circuits; in addition to the law of the Supreme Court. No reasonable official could be expected to keep current on the developments of fifty states, thirteen circuits, and nine territories and associated states on top of the developments of the Supreme Court. If the Supreme Court cannot be the only arbiter of clearly established federal law, however, then only the official's home circuit should supplement the inquiry.

I. INTRODUCTION AND HISTORY OF 42 U.S.C. § 1983 (2012)

In 1871, the Forty-Second Congress enacted Section 1 of the Klu Klux Klan Act, "[a]n Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes."[4] Congress passed Section 1 of the Act pursuant to the authority vested in it by Section 5 of the Fourteenth Amendment.[5] In part, the Fourteenth Amendment prohibits states from "depriv[ing] any person of life, liberty, or property, without due process of law."[6] Although subsequently amended and codified at 42 U.S.C. § 1983 (2012),[7] the statute's

[4] Enforcement Act of 1871 (Klu Klux Klan Act), ch. 22, § 1, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1983 (2012).

[5] *See* Monroe v. Pape, 365 U.S. 167, 171 (1961), *overruled on other grounds by* Monell v. Dep't of Soc. Servs. of City of New York, 436 U.S. 658 (1978); U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

[6] U.S. CONST. amend. XIV, § 1. In full, § 1 of the Fourteenth Amendment states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id.

[7] SHELDON H NAHMOD ET AL., CONSTITUTIONAL TORTS 3 (LexisNexis 3d ed. 2009).

language has not materially changed.[8] It stands today much as it did when it was passed almost 150 years ago:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.[9]

Although the language of § 1983 has not materially changed, it has been extensively interpreted by the Supreme Court. What is a "person"?[10] How do you define "under color of" state law?[11] What is a "custom"?[12] The list of textual interpretations goes on. One of the most important interpretations of § 1983, however, has nothing to do with its text: whether a state official can avoid liability by invoking absolute or qualified immunity.[13]

The answer has been a resounding yes. In 1951, the Supreme Court recognized absolute immunity for legislators.[14] Within twenty-five years, it had also recognized absolute immunity

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[8] *See* Act of Dec. 29, 1979, Pub. L. No. 96-170, 93 Stat. 1284 (incorporating language concerning the District of Columbia); Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, 110 Stat. 3853 (protecting judicial officers from prospective injunctive relief "unless a declaratory decree was violated or declaratory relief was unavailable.").

[9] § 1983.

[10] *See, e.g.*, *Monell*, 436 U.S. at 701–02 (holding municipalities are persons under § 1983).

[11] *See, e.g.*, Lugar v. Edmonson Oil Co., 457 U.S. 922, 935 (holding in part that state action under the Fourteenth Amendment is action under color of state law under § 1983).

[12] *See, e.g.*, Adickes v. S.H. Kress & Co., 398 U.S. 144, 167–68 (1970) (interpreting custom to be a practice so permanent as to carry the force of law).

[13] The plain language of § 1983 "admits of no immunities." Imbler v. Pachtman, 424 U.S. 409, 417 (1976).

[14] Tenney v. Brandhove, 341 U.S. 367 (1951).

for judges[15] and prosecutors,[16] and *qualified immunity* for police officers.[17] Although some executive officials, like prosecutors, enjoy absolute immunity, the Court has recognized that "qualified immunity represents the norm" for the remainder,[18] with the exception of municipalities—they enjoy no immunity because no such protection existed at common law.[19]

While absolute immunity protects judges, legislators, prosecutors, and other recognized high-level officials in the exercise of their respective functions,[20] qualified immunity for the remainder of government officials was originally based on "good faith" adherence to the law.[21] In late 2014, the Supreme Court summarized the essentials of qualified immunity in *Carroll v. Carman*.[22] It stated, "[a] government official sued under § 1983 is entitled to qualified immunity unless the official violated a statutory or constitutional right that was clearly established at the time of the challenged conduct."[23]

This article addresses whether lower courts can clearly establish statutory or constitutional rights. In *Carroll*, the Court "[a]ssum[ed] for the sake of argument that a controlling circuit precedent could constitute clearly established federal law."[24] In doing so, it relied on *Reichle v. Howards*, decided in 2012, in which it "[a]ssum[ed] arguendo" the same.[25]

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[15] Pierson v. Ray, 386 U.S. 547, 554 (1967), *overruled on other grounds by* Harlow v. Fitzgerald, 457 U.S. 800 (1982).
[16] *Imbler*, 424 U.S. at 431.
[17] *Pierson*, 368 U.S. at 555.
[18] *Harlow*, 457 U.S. at 807.
[19] Owen v. City of Independence, 445 U.S. 622, 638 (1980).
[20] *See id.*
[21] *Id.* at 815.
[22] 135 S. Ct. 348, 350 (2014) (per curiam).
[23] *Id.*
[24] *Id.* (citing Reichle v. Howards, 132 S. Ct. 2088, 2094 (2012)).
[25] *Id.*

This article seeks to answer this question: clearly established rights under § 1983[26] can only be so established by the Supreme Court of the United States, or, perhaps, the official's home circuit.

This article begins in Section II with a history of qualified immunity. Section III discusses what constitutes clearly established federal law. Section IV contemplates the deference that is given to states, the limitations on redress of constitutional rights, and the role of the courts. Section V addresses the arguments against having the Court serve as the only, supreme arbiter of constitutional rights. Finally, Section VI explains why the Supreme Court of the United States is the only judicial body that can "clearly establish" federal law, with the possible exception of the official's home circuit.

II. HISTORY OF QUALIFIED IMMUNITY

Governmental immunity is deeply rooted in the common law. Legislative immunity dates back to the Sixteenth and Seventeenth Centuries.[27] Judicial immunity was recognized as early as 1608 in England.[28] And prosecutorial immunity, although not similarly found in the storied past of England, traces back to at least 1896 in Indiana.[29] Because of the extensive history and

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[26] This article does not specifically address qualified immunity with respect to *Bivens* actions, *see* Bivens v. Six Unknown Named Agents, 403 U.S. 388, 389 (1971), and instead consistently refers to § 1983 claims, 42 U.S.C. § 1983 (2012). Governmental immunity, however, is treated the same under both, as it would be "untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials." Butz v. Economou, 438 U.S. 478, 504 (1978). Accordingly, this article does rely on some cases arising out of a *Bivens* cause of action.

[27] Tenney v. Brandhove, 341 U.S. 367, 372 (1951). It arose out of the struggles of Parliament as it gained increasing independence from the Crown. *Id.* The Court recognized legislative immunity in § 1983 claims in *Tenney*, *id.* at 379.

[28] Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 347 (1872). The Court recognized judicial immunity in § 1983 actions in Pierson v. Ray, 386 U.S. 547, 554 (1967), *overruled on other grounds by* Harlow v. Fitzgerald, 457 U.S. 800 (1982).

[29] Griffith v. Slinkard, 44 N.E. 1001, 1002 (Ind. 1896). The Court recognized prosecutorial immunity in § 1983 actions in Imbler v. Pachtman, 424 U.S. 409, 431 (1976).

importance of governmental immunity, the Supreme Court held that § 1983 was enacted against their backdrop.[30] Qualified immunity, however, carries with it a different history.

A. Qualified Immunity Established as a Matter of "Good Faith"

The Court first recognized the existence of qualified immunity in § 1983 actions in *Pierson v. Ray*.[31] The case involved "a group of 15 white and Negro Episcopal clergymen who attempted to use segregated facilities at an interstate bus terminal in Jackson, Mississippi."[32] They were arrested by police officers under the guise of a breach-of-peace statute, arguably in violation of their equal protection rights.[33]

Although ultimately determining that police officers could present an immunity defense,[34] the Court first noted that there had never been an absolute immunity for officers.[35] But the Court recognized qualified, or "good faith," immunity because it was widely held that officers are not liable for false arrest even when a suspect is later found innocent—so long as the officers executed the arrest in good faith and with probable cause.[36] Similar to absolute immunities, the Court held that qualified immunity was part of the "backdrop" against which § 1983 was enacted.[37] As a matter of principle, an official "is not charged with predicting the

[30] *See Imbler*, 424 U.S. at 419 (stating "§ 1983 is to be read in harmony with general principles of tort immunities and defenses rather than in derogation of them").
[31] 386 U.S. at 557.
[32] *Id.* at 549.
[33] *Id.* The statute was later held unconstitutional, but it was unchallenged at the time of the arrests. *Id.* at 550.
[34] *Id.* at 557.
[35] *Id.* at 555.
[36] *Id.*
[37] *Id.* at 556–57 (citing Monroe v. Pape, 365 U.S. 167, 187 (1961), *overruled on other grounds by* Monell v. Dep't of Soc. Servs. of City of New York, 436 U.S. 658 (1978)).

future course of constitutional law," and cannot be liable for enforcing a statute later found unconstitutional.[38]

Within a decade, the Court recognized in *Scheuer v. Rhodes* that qualified immunity applies across the executive branch in varying degree, depending on the "scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action."[39] More importantly, however, was that the Court in *Wood v. Strickland* clarified what was perhaps not so clear in *Pierson*: there is a two-part test for qualified immunity, one subjective, and one objective.[40]

Subjectively, "[t]he official himself must be acting sincerely and with a belief that he is doing right."[41] Objectively, however, ignorance of "settled, indisputable" law is not an excuse.[42] Accordingly, qualified immunity fails if the official "knew or reasonably should have known" that he was violating a constitutional right, or if he maliciously or intentionally deprived an individual of that right.[43] Assuming no malice, the official "must be held to a standard of conduct based . . . on knowledge of the basic, unquestioned constitutional rights of his charges."[44]

B. Good Faith Rejected for Objective Reasonableness

The decision in *Wood* regarding subjective "good faith" did not long sit well with the Court. Just seven years later, in *Harlow v. Fitzgerald*, the Court rejected the two-pronged, subjective-objective approach in favor of a purely objective test: whether a "reasonable person

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[38] *Id.* at 557; *see also id.* at 555 ("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.").
[39] 416 U.S. 232, 247 (1974).
[40] 420 U.S. 308, 321 (1975).
[41] *Id.*
[42] *Id.*
[43] *Id.* at 322. The *Wood* Court limited this test to "specific context of school discipline." *Id.* Yet, the Court adopted it outside that context in later cases. *See* Harlow v. Fitzgerald, 457 U.S. 800, 815 n.25 (1982).
[44] *Wood*, 420 U.S. at 322.

would have known" that the conduct violated a "clearly established statutory or constitutional right."[45] The Court observed that qualified immunity avoids "distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service."[46] Accordingly, insubstantial claims against public officials should not proceed to trial.[47] Because decision makers often rely on their own "experiences, values, and emotions," a subjective prong would virtually always allow discovery to determine whether their motives were permissible.[48] In addition, the range of potentially relevant or permissible inquiry into these motives could cause substantial disruption regarding performance of the official's duties.[49] Thus, the goal of preventing frivolous litigation would fall victim to artful pleading by plaintiffs.[50]

C. Objective Reasonableness Defined

The Court refined the objective qualified-immunity inquiry in *Anderson v. Creighton* when it held that "clearly established rights" are not described at a high level of generality.[51] In *Anderson*, a police officer had ostensibly violated the plaintiffs' rights by entering their home with neither a warrant nor exigent circumstances.[52] The Eighth Circuit rejected qualified immunity for the officer because, if the plaintiffs' allegations were proved, the officer violated the clearly established right against a warrantless search without exigent circumstances.[53]

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[45] 457 U.S. at 818. Interestingly, however, the Court also created an escape hatch: if the official can show, as a result of "extraordinary circumstances," that he or she neither knew nor should have known of clearly established law, the official can assert qualified immunity. *Id.* at 819.
[46] *Id.* at 816.
[47] *Id.* at 815–16.
[48] *Id.* at 816.
[49] *See id.* at 817.
[50] *Id.* at 816–17.
[51] 483 U.S. 635, 638–40 (1987).
[52] *Id.* at 637.
[53] *Id.* at 638.

The Supreme Court reversed.[54] It held that the qualified-immunity analysis should turn on whether a "reasonable officer could have believed the search to be lawful"—not whether a general right was clearly established.[55] Noting that "qualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law,'"[56] the Court held that the promise of immunity would be stripped away if rights were defined at high levels of generality.[57] Officers must be allowed to make mistakes regarding clearly established *general* rights, so long as they are reasonable.[58] By contrast, officers are not given such latitude when the rights are established in a more "particularized" way, one where the "contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right."[59] "[T]he doctrine of qualified immunity reflects a balance that has been struck 'across the board.'"[60]

The Court announced the impact of an undeveloped state of the law on qualified immunity in *Wilson v. Layne*.[61] In *Wilson*, United States Marshals brought along a photographer and a reporter inside a home when they executed an arrest warrant as part of Operation Gunsmoke, a program geared towards apprehending dangerous felons.[62] The Court unanimously held that the "media ride along" violated the Fourth Amendment because the presence of the media was neither necessary to carry out, nor specified in, the warrant.[63] Still, the Court noted,

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[54] *Id.* at 646.
[55] *Id.* at 638, 640.
[56] *Id.* at 639 (quoting Malley v. Briggs, 475 U.S. 335, 341 (1986)).
[57] *Id.* at 640.
[58] *Id.* at 641 (stating "it is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present, and we have indicated that in such cases those officials . . . should not be held personally liable").
[59] *Id.* at 640.
[60] *Id.* at 642 (quoting Harlow v. Fitzgerald, 457 U.S. 800, 821 (1982) (Brennan, J., concurring)).
[61] 526 U.S. 603, 617 (1999).
[62] *Id.* at 605–07.
[63] *Id.* at 609–14.

"the constitutional question presented by this case is by no means open and shut."[64] This was partly because accurate reporting was a laudable goal not obviously antithetical to the values of the Fourth Amendment, and partly because there was a dearth of case law on point.[65]

Because the state of the law "was at best undeveloped," the Court was satisfied that the Marshals could have reasonably relied on the media ride-along policy developed in conjunction with Operation Gunsmoke.[66] Officials are not required to predict the course of the law, and the Court noted that a circuit split had arisen on the issue since the incident had occurred.[67] As a matter of pragmatism and policy, "[i]f judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy."[68]

D. "Materially Similar" Cases Are Not Required to Clearly Establish Law

In *Hope v. Pelzer*, the Court established that a prior case with either "materially similar" or "fundamentally similar" facts is not required to find that a right is clearly established.[69] The Court noted that the "clearly established" inquiry in § 1983 claims is no different from the "fair

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[64] *Id.* at 615.
[65] *Id.* at 615–17.
[66] *Id.* at 617.
[67] *Id.* at 617–18.
[68] *Id.* at 618. Justice Stevens dissented from the clearly-established-law part of the opinion because the Court did not "announce[] a new rule of constitutional law," but rather "refused to recognize an entirely unprecedented request for an exception to a well-established principle." *Id.* at 619 (Stevens, J., dissenting). In Justice Stevens's view, a unanimous Court holding the search violated the Fourth Amendment means the question was open and shut. *Id.* at 620. The dearth of case law is not dispositive because "'[t]he easiest cases don't even arise.'" *Id.* at 621 (quoting United States v. Lanier, 520 U.S. 259, 271 (1997)). Although defeated in this case, Justice Stevens successfully addressed this issue three years later as the author of the Court's opinion in Hope v. Pelzer, 536 U.S. 730, 733 (2002).
[69] 536 U.S. 730, 733, 741 (2002). Some commentators question the relevance of *Hope* because it has not been cited in later cases—even at times where the lower courts specifically relied on it—where the Court has held that the law was not clearly established. Karen Blum, Erwin Chemerisnky & Martin A. Schwartz, *Qualified Immunity Developments: Not Much Hope Left for Plaintiffs*, 29 TOURO L. REV. 633, 654–56 (2013). But to say that *Hope* was overruled goes too far, and thus it is still relevant, although how relevant it is can be debated. *Id.*at 656.

notice" standard in 18 U.S.C. § 242 (2012), actions,[70] the criminal counterpart to § 1983.[71] The egregious allegations in *Hope* were perhaps necessary to reiterate this point after *Wilson*.[72]

In *Hope*, the inmate plaintiff was twice handcuffed to a hitching post pursuant to Alabama law.[73] In the first instance, the plaintiff was handcuffed to a post after a scuffle with another inmate.[74] He was only handcuffed for a couple of hours before the guards determined that the other inmate started the fight.[75] During this time, the plaintiff was "offered drinking water and a bathroom break every 15 minutes."[76] In the second instance, the plaintiff "was punished more severely," likely because he got into a "wrestling match with a guard" after getting off too slowly from the prison bus carrying him to a work site.[77] He was handcuffed to the post for seven hours after being forced to remove his shirt.[78] He was shirtless for the entire ordeal, causing the sun to burn his skin.[79] "[H]e was given water only once or twice and was given no bathroom breaks."[80] In addition, the guard also allegedly taunted him about his thirst.[81]

The Eleventh Circuit held that the "practice of cuffing an inmate to a hitching post . . . for a period of time that surpasses that necessary to quell a threat or restore order is a violation of the Eighth Amendment."[82] Yet, it still afforded the guards qualified immunity because there was no

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[70] *Hope*, 536 U.S. at 740 & n.10.
[71] *See* Adickes v. S.H. Kress & Co., 398 U.S. 144, 166 & n.36 (1970).
[72] This proposition had already been firmly established in United States v. Lanier, 520 U.S. 259, 270–71 (1997). As previously noted, *see* discussion *supra* note 68, Justice Stevens lost on a similar argument in *Wilson*. He got his victory as the author of the majority opinion in *Hope*.
[73] 536 U.S. at 733–34.
[74] *Id.* at 734.
[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] *Id.* at 734–35.
[79] *Id.*
[80] *Id.* at 735.
[81] *Id.*
[82] *Id.* at 736 (citation and quotation marks omitted).

case "materially similar" to the case at bar.[83] The Supreme Court agreed there was an Eighth Amendment violation,[84] but it disagreed with the Eleventh Circuit's qualified-immunity analysis.[85] The Court suggested that the violation was so "obvious" that its own precedents gave the guards fair warning of the unconstitutional nature of their conduct.[86] Regardless, it "readily conclude[d]" that circuit precedent, prison regulations, and a Department of Justice report advising of the "constitutional infirmity" of the practice provided ample support that the violation was clearly established.[87] It also dismissed district court precedent raised by the guards because they were (1) distinguishable, and (2) "no match for the circuit precedents."[88] The Court therefore held the law was clearly established, despite there being no "materially similar" case.[89]

E. Can Circuit Court Precedent Clearly Establish Constitutional Law? The Twice-Dodged Question

The current state of affairs for qualified immunity is demonstrated by two of the Court's most recent cases on the matter, both of which dodged the question of whether lower-court precedent could clearly establish federal rights.

The first case, *Reichle v. Howards*, concerned a plaintiff who alleged that Secret Service agents arrested him in the absence of probable cause and in retaliation for protected First Amendment speech.[90] According to Tenth Circuit precedent, a retaliatory arrest violated the First Amendment.[91] The Tenth Circuit rejected the agents' argument that having probable cause for

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[83] *Id.*
[84] *Id.* at 738.
[85] *Id.* at 741–42.
[86] *Id.* at 741.
[87] *Id.* at 741–42.
[88] *Id.* at 747.
[89] *Id.* at 748.
[90] 132 S. Ct. 2088, 2092 (2012).
[91] *Id.*

the arrest precluded a finding of retaliatory arrest.[92] The agents had relied on the Supreme Court's decision in *Hartman v. Moore*,[93] which had established the same for retaliatory *prosecutions*. The Tenth Circuit held, however, that *Hartman* was not applicable to retaliatory *arrests*.[94]

The Supreme Court first noted that its own precedent did not clearly establish whether a retaliatory arrest violated the First Amendment when it was supported by probable cause, and so it turned to Tenth Circuit precedent.[95] The Court cautioned, however, that it was "[a]ssuming arguendo" that Tenth Circuit precedent "could be a dispositive source of clearly established law."[96] Regardless, the Court found that Tenth Circuit precedent did not clearly establish that an arrest supported by probable cause violated the plaintiff's free speech rights.[97] The lack of clarity stemmed from the impact of *Hartman* on the Tenth Circuit's retaliatory prosecution precedent, which "was far from clear" because the legal backdrop treated retaliatory arrests and prosecutions similarly.[98] The Court did not extend *Hartman* to retaliatory arrests, but simply noted that it could "arguably" do so, and so the plaintiff's alleged right was not clearly established.[99]

The second recent case, *Carroll v. Carman*, arose from a search of the Carmans' home by police officers who had been informed that a felon had fled there.[100] The dispute centered on whether the officers could knock on the Carmans's backdoor when the officers thought it was a

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[92] *Id.*
[93] 547 U.S. 250 (2006).
[94] *Reichle*, 132 S. Ct. at 2092.
[95] *Id.* at 2093–94.
[96] *Id.* at 2094.
[97] *Id.* at 2096–97.
[98] *Id.* at 2095.
[99] *Id.*
[100] 135 S. Ct. 348, 348–49 (2014) (per curiam).

"customary entryway."[101] The jury found for the officers, but the Third Circuit reversed, holding that a "knock and talk" must begin "at the front door, where [officers] have an implied invitation to go."[102] The Third Circuit also denied qualified immunity because the officers had violated the Carmans' clearly established rights under the Fourth Amendment.[103]

In reversing the Third Circuit's qualified-immunity analysis, the Supreme Court noted that the Third Circuit had relied only upon its own case to resolve the qualified-immunity issue.[104] The Court seems to have signaled its concern over whether circuit precedent could clearly establish rights because, as in *Reichle*, it again assumed "for the sake of argument" that circuit precedent could clearly establish rights before reversing the Third Circuit.[105]

Relying on its own case law, the Third Circuit reasoned that because "entry into the curtilage after not receiving an answer at the front door might be reasonable," a knock and talk must begin at the front door.[106] The Court rejected this interpretation as a *non sequitur* because Third Circuit precedent "simply did not answer the question whether a 'knock and talk' must begin at the front door when visitors may also go to the back door."[107] And, where the jury found the officers arguably went where the public could, Third Circuit precedent may actually have supported the officers' actions.[108]

Interestingly, the Court also surveyed the decisions of the Second, Seventh, and Ninth Circuits, and found they ran counter to the Third Circuit's interpretation of the Fourth

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[101] *Id.* at 349.
[102] *Id.* at 349–50.
[103] *Id.* at 350.
[104] *Id.* (citing Estate of Smith v. Marasco, 318 F.3d 497 (3d Cir. 2003)).
[105] *Id.* (citing Reichle v. Howards, 135 S. Ct. 2088, 2094 (2012)).
[106] *Id.* at 351.
[107] *Id.*
[108] *Id.*

Amendment for knock and talks.[109] The Court refused to call into question those decisions or provide a definitive answer regarding the legality of the officers' conduct in this case.[110] Instead, it simply held that the constitutional question was not "'beyond debate,'" and the Third Circuit erred in not affording the officers qualified immunity.[111]

III. CLEARLY ESTABLISHED FEDERAL LAW

This section will consider what, according to the Supreme Court, qualifies as "clearly established federal law." As explained in Sections I and II, § 1983 "admits of no immunities."[112] So, the relevant analysis is the common law. Unfortunately, the common law standard for whether law is clearly established is merely a jumble of word associations.

From its inception into the § 1983 context, qualified immunity has been based on the principle that an official "is not charged with predicting the future course of constitutional law."[113] And while qualified immunity originally included a subjective element, it has never been acceptable for an official to ignore "settled, indisputable" law.[114] So, although an official need not predict the evolution of law, he is "held to a standard of conduct based . . . on knowledge of the basic, unquestioned constitutional rights of his charges."[115] This duty is essentially whether a "reasonable person would have known" that the alleged conduct violated a "clearly established statutory or constitutional right."[116] But despite this rule, the Court has also

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[109] *Id.* at 351–52.
[110] *Id.* at 352.
[111] *Id.* (quoting Stanton v. Sims, 134 S. Ct. 3, 5 (2013)).
[112] Imbler v. Pachtman, 424 U.S. 409, 417 (1976).
[113] Pierson v. Ray, 386 U.S. 547, 557 (1967), *overruled on other grounds by* Harlow v. Fitzgerald, 457 U.S. 800 (1982).
[114] Wood v. Strickland, 420 U.S. 308, 321 (1975).
[115] *Id.* at 322.
[116] *Harlow*, 457 U.S. at 818.

recognized that officials may avoid liability for violating even a clearly established right if they can show that "extraordinary circumstances" prevented them from knowing the law.[117]

Whether a right is clearly established depends on the level of generality by which the right is defined. A "clearly established" right is not described at a macro level.[118] But a case directly on point is not necessary.[119] Nor is a case with "materially similar" or "fundamentally similar" facts.[120] What must be shown is a right that is described in a "particularized" way so that a reasonable official would know the right exists.[121] And it seems that a reasonable official encompasses "all but the plainly incompetent or those who knowingly violate the law."[122]

In any event, if the law is "at best undeveloped," no official could reasonably be held to have violated clearly established law,[123] unless such a violation was somehow obvious.[124] Even developed law, however, may not be enough if judges disagree on its contours.[125] Where the constitutional question is not "beyond debate," the law is not clearly established.[126]

But what law matters? In the past three years, the Court has twice avoided the question of whether circuit precedent can clearly establish constitutional rights.[127] Yet, in both cases, the Court heavily scrutinized circuit precedent to determine whether a right was clearly established when its own precedents failed to do so.[128] This avoidance, however, is not new. In 2002, the

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[117] *Id.* at 819.
[118] Anderson v. Creighton, 483 U.S. 635, 638, 640 (1987).
[119] *Id.* at 640.
[120] Hope v. Pelzer, 536 U.S. 730, 733, 741 (2002).
[121] *Anderson*, 483 U.S. at 640.
[122] Malley v. Briggs, 475 U.S. 335, 341 (1986).
[123] Wilson v. Layne, 526 U.S. 603, 617–18 (1999).
[124] *Hope*, 536 U.S. at 738.
[125] *Wilson*, 526 U.S. at 618 (noting there was a circuit split).
[126] Stanton v. Sims, 134 S. Ct. 3, 5 (2013).
[127] Carroll v. Carman, 135 S. Ct. 348, 350 (2014) (per curiam); Reichle v. Howards, 132 S. Ct. 2088, 2094 (2012).
[128] *Carroll*, 135 S. Ct. at 350–52; *Reichle*, 132 S. Ct. at 2093–94.

Court reviewed lower-court precedent in *Hope v. Pelzer* even though it signaled that it felt its own precedents clearly established the applicable law.[129] Yet, it did not declare whether circuit precedent could clearly establish a right.

It appears the Court is wary about affording lower-court precedent the status of "clearly established law." But to be clear, the Court was equally as wary of declaring that only its own precedent can clearly establish law in *United States v. Lanier*.[130] In the Court's words, "contrary to the Court of Appeals, we think it unsound to read [*Screws v. United States*[131]] as reasoning that only this Court's decisions could provide the required warning."[132]

To support its statement, the *Lanier* Court cited three of its prior § 1983 decisions[133] in which it considered lower-court precedent to determine whether a right was clearly established.[134] As explained below, however, these cases do not fully support the statement that lower-court precedents can *independently* clearly establish federal law. They cannot, then, be used to establish the authority for looking to lower courts for clearly established precedent.

In *Mitchell v. Forsyth*, the first case cited by the *Lanier* Court, the Court was determining whether "a warrantless wiretap aimed at gathering intelligence regarding a domestic threat to national security" was a violation of clearly established law in 1970.[135] The Court first showed that there was significant ambiguity in the contours of its own precedent at the time of the

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[129] 536 U.S. at 741–46.
[130] 520 U.S. 259, 268 (1997).
[131] 325 U.S. 91 (1945).
[132] *Lanier*, 520 U.S. at 268. The decision in *Lanier* dealt with 18 U.S.C. § 242 (2012), the criminal counterpart to 42 U.S.C. § 1983 (2012). *See* Adickes v. S.H. Kress & Co., 398 U.S. 144, 166 & n.36 (1970). But the *Lanier* Court held that the clearly established inquiry under § 1983 is the same inquiry as the fair warning inquiry under § 242. 520 U.S. at 270–71.
[133] Mitchell v. Forsyth, 472 U.S. 511, 533 (1985); Davis v. Scherer, 468 U.S. 183, 191–92 (1984); *id.* at 203–05 (Brennan, J., dissenting); Elder v. Holloway, 510 U.S. 510, 516 (1994).
[134] *Lanier*, 520 U.S. at 269.
[135] 472 U.S. at 530. The Court had held that it was a violation, but not until 1972. *See id.*

conduct,[136] and then used lower-court precedent to bolster its analysis that the right was not clearly established.[137] The Court accordingly did not rely on lower-court precedent to affirmatively hold that a right was clearly established.

The second case cited by the *Lanier* Court, *Davis v. Scherer*, also fails to support the proposition that lower-court precedent suffices to clearly establish federal law.[138] The Court simply found that no law was clearly established by the Fifth Circuit.[139] It therefore never addressed the question of whether Fifth Circuit precedent could clearly establish law in the first place. Even Justice Brennan's dissent—upon which the *Lanier* Court relies—failed to conclusively state that lower-court precedent can be used to clearly establish federal rights. Justice Brennan quoted language from the majority opinion regarding whether the law was "well established in the Fifth Circuit at the time of the conduct in question."[140] But this language originated from the appellee's brief.[141] Justice Brennan's disagreement with the majority does not mean the Court will consider circuit precedent to resolve a qualified-immunity analysis because the Court only concluded that the law was not clearly established.[142]

Finally, the *Lanier* Court relied on *Elder v. Holloway* to show that it had considered circuit precedent in the past.[143] Of the three, *Elder* most directly supports the Court's proposition that lower-court precedent can clearly establish federal law. Quoting with modification from *Davis*, the Court stated that a reviewing court should "use its 'full knowledge of its own [and

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[136] *Id.* at 531–32.
[137] *Id.* at 533.
[138] 468 U.S. at 191–92.
[139] *Id.* at 191–93, 197.
[140] *Id.* at 204–05 (Brennan, J., dissenting).
[141] *See id.* at 192 (majority opinion).
[142] *Id.* at 191–93, 197.
[143] 510 U.S. 510, 516 (1994).

other relevant] precedents.'"[144] It accordingly remanded the case to the Ninth Circuit for consideration of all relevant precedent, including one of its own decisions.[145]

Yet, the *Elder* Court quoted *Davis* after it had just clarified for the Ninth Circuit that *Davis* did not concern "the authorities a court may consider in determining qualified immunity, but [instead an] entirely discrete question."[146] So, relying on *Davis* for the proposition that a lower court could use its own precedent to clearly establish rights is questionable, particularly given the discussion of *Davis* above. Indeed, it is perhaps as likely that the Court did not give this statement much thought[147] as that the Court intended to conclude that lower courts could rely on their own precedents.[148] But, given the qualifying statements in *Reichle* and *Carroll*,[149] it seems that the rational reading of these cases is that the Court has danced around the issue, but has never properly resolved it one way or the other.

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[144] *Id.* (alteration in original) (quoting *Davis*, 468 U.S. at 192 n.9).
[145] *Id.*
[146] *Id.* at 515. The full context of this statement is helpful:

> In thinking its rule compelled by this Court's instruction, the Ninth Circuit misconstrued *Davis v. Scherer*. The Court held in *Davis* that an official's clear violation of a state administrative regulation does not allow a § 1983 plaintiff to overcome the official's qualified immunity. Only in this context is the Court's statement comprehensible: "A plaintiff who seeks damages for violation of constitutional or statutory rights may overcome the defendant official's qualified immunity only by showing that *those* rights were clearly established . . . ." *Davis*, in short, concerned not the authorities a court may consider in determining qualified immunity, but this entirely discrete question: Is qualified immunity defeated where a defendant violates any clearly established duty, including one under state law, or must the clearly established right be the federal right on which the claim for relief is based? The Court held the latter.

Id. (alteration and emphasis in original) (internal citations omitted).
[147] The case did not revolve around this inquiry. The question was whether the Ninth Circuit could consider legal precedents not addressed by or briefed to the district court. *Id.* at 511–12.
[148] The case was decided in only four paragraphs of analysis in which it also considered whether the Ninth Circuit could consider precedent not considered by the district court. *See id.* at 514–16.
[149] Carroll v. Carman, 135 S. Ct. 348, 350 (2014) (per curiam); Reichle v. Howards, 132 S. Ct. 2088, 2094 (2012).

The Court has not yet answered whether lower-court—or state-court—precedent can clearly establish federal law. Arguably, it has operated under that assumption, but it has not definitively stated so.[150] And, given the recent reluctance of the Court to turn this assumption into a legal holding,[151] it is fair to say the Court is no longer operating under that assumption, if it ever was. With this muddled state of affairs, it is appropriate to turn to the deference owed in the court system, the limitations of certain judicial bodies, and the roles of the courts to determine whether lower-court precedent should be surveyed in a qualified-immunity analysis.

IV. DEFERENCE, LIMITATIONS, AND ROLES

To determine which court—or courts—is relevant to the clearly-established-law inquiry, the limitations and roles of the courts must be analyzed, including the deference due to judicial bodies and government officials. But, before delving into the nuts and bolts of the judicial system to understand how plaintiffs might gain from it, one principle cannot be emphasized enough: not every constitutional violation is afforded a remedy.[152] This should be clear from the fact that there is any sort of immunity at all, but it bears repeating. Qualified immunity is not about avoiding trial only when the claims are meritless. It is about "the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably."[153]

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[150] When the Court rejected the subjective viewpoint for qualified immunity analyses in Harlow v. Fitzgerald, it refused to determine "the circumstances under which 'the state of the law' should be 'evaluated by reference to the opinions of this Court, of the Courts of Appeals, or of the local District Court.'" 457 U.S. 800, 818 n.32 (1982) (quoting Procunier v. Navarette, 434 U.S. 555, 565 (1978)). Arguably, this could be read as reserving the question of when to look to which court instead of reserving the question of whether to look to lower courts at all—the focus of this article.

[151] *Carroll*, 135 S. Ct. at 350; *Reichle*, 132 S. Ct. at 2094.

[152] *See, e.g.*, Texas v. Lesage, 528 U.S. 18, 21 (1999) ("Simply put, where a plaintiff challenges a discrete governmental decision as being based on an impermissible criterion and it is undisputed that the government would have made the same decision regardless, there is no cognizable injury warranting relief under § 1983.").

[153] Pierson v. Callahan, 555 U.S. 223, 231 (2009).

A. Deference to Lower Courts and Officials

Deference plays an important role in qualified immunity. There is no question that courts determine whether law is clearly established.[154] It is also beyond debate that the question of whether constitutional and federal law is clearly established is a question of law subject to *de novo* review on appeal.[155] And "[c]ourts cannot, of course, abdicate their constitutional responsibility to delineate and protect fundamental liberties."[156] In doing so, the Supreme Court and the circuit courts of appeals owe no deference to the interpretations of constitutional law by district courts[157] and state courts.[158]

But deference also comes into play for qualified-immunity purposes in a different, perhaps more important, way than the standard of appellate review for questions of law. In the Fourth Amendment context, the standard of reasonableness reflects the deference given to officials.[159] Qualified immunity is much the same.[160] Despite the supremacy of federal law,[161] the

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[154] Under Article III of the Constitution, "[t]he judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1. And in 1803, Justice Marshall famously reserved to the judiciary the power to "say what the law is." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

[155] Elder v. Holloway, 510 U.S. 510, 516 (1994).

[156] Pell v. Procunier, 417 U.S. 817, 827 (1974); *see also* Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez, 561 U.S. 661, 686 (2010) (citing *Pell*, 417 U.S. at 827) ("This Court is the final arbiter of the question whether a public university has exceeded constitutional constraints, and we owe no deference to universities when we consider that question.").

[157] *See, e.g.*, Leavitt v. Lane, 518 U.S. 137, 146 & n.* (Steven, J., dissenting).

[158] *See* Cunningham v. California, 549 U.S. 270, 293 & n.16 (2007). Arguably, the courts must give deference to state decisions of constitutional law in *habeas* proceedings. *See* 28 U.S.C. § 2254(d)(1) (2012). But in the *habeas* context, the courts are merely determining whether the state court's decisions are in clear violation of federal law. This is a different inquiry than whether the state court answered the federal constitutional question correctly.

[159] Florida v. Jimeno, 500 U.S. 248, 250–51.

[160] Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (stating the objective reasonableness standard "should avoid excessive disruption of government").

[161] U.S. CONST. art. VI, cl. 2.

federal courts are typically uneasy about interjecting themselves into state-law matters,[162] other branches of government,[163] and the actions of agencies.[164]

The job of police officers is to enforce the law, and their job would be hindered—to the detriment of society—if they were expected to interpret the law.[165] As such, they are "not charged with predicting the future course of constitutional law."[166] Nor are they required to be legal scholars.[167] Because of this, the Supreme Court gives deference to the officers so long as their actions are objectively reasonable and do not violate clearly established law.[168]

Reviewing courts owe no deference to a lower court's interpretation of the law. The ultimate resolution of what constitutes clearly established law, however, must consider the deference due to the state and local officials performing their jobs to the best of their abilities. School principals are not constitutional scholars. Detectives are not soothsayers. And municipalities are not omniscient. The clearly-established-law standard must reflect this reality.

B. Limitations of the Courts

The structure of the court system places certain limitations on each judicial body. When interpreting federal law, how much authority should each court have in its interpretation? Should federal courts be considered superior to state courts because they encounter it more often and are considered the vanguard of interpreting federal rights?[169] Should appellate courts be considered

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[162] *See, e.g.*, Matthews v. Rodgers, 284 U.S. 521, 525 (1932).
[163] *See, e.g.*, Dames & Moore v. Regan, 453 U.S. 654, 668 (1981) (executive action is entitled to deference).
[164] *See, e.g.*, Chevron, USA, Inc. v. NRDC, Inc., 467 U.S. 837, 865 (1984).
[165] Michigan v. DeFillippo, 443 U.S. 31, 38 (1979).
[166] Pierson v. Ray, 386 U.S. 547, 557 (1967), *overruled on other grounds by* Harlow v. Fitzgerald, 457 U.S. 800 (1982).
[167] *Cf.* Heien v. North Carolina, 135 S. Ct. 530, 540 (2014) (holding that an officer's reasonable mistake of law can justify an investigatory stop).
[168] *Harlow*, 457 U.S. at 818–19.
[169] *Cf.* Bush v. Gore, 531 U.S. 98, 142 (Ginsburg, J., dissenting) ("Federal courts defer to state high courts' interpretations of their state's own law.").

superior to trial courts because they consider legal questions more often? These questions are considered in this section.

The difference between state judges and federal judges is important. While federal judges are appointed for life,[170] state judges might only be appointed for a specified number of years, or they may have to seek election (and then reelection) to the position.[171] This means that federal judges, unlike many state judges, are insulated from the negative effects that an unpopular decision might have on their continued judicial tenure. Otherwise, state and federal courts operate similarly enough, although generally state courts focus on state-law questions and federal courts focus on federal-law questions.[172] But it is up to the federal, not the state, judiciary to determine what federal law "is."[173] Accordingly, there is a limit on how much a state court can influence federal law. Their decisions are generally confined to their respective state jurisdictions.

Jurisdiction is an important consideration. In the federal system, there are ninety-four district courts, thirteen circuit courts of appeal, and one Supreme Court of the United States.[174] The district courts have jurisdiction within their district, the circuit courts within their circuit, and the Supreme Court has jurisdiction over the entire United States. In the state and territory system, there are fifty states, and nine territories and associated states, each with varying levels, tiers, and

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[170] U.S. CONST. art. III, § 1 ("The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.").
[171] *The Difference Between Federal and State Courts*, USCOURTS.GOV, http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/Jurisdiction/DifferencebetweenFederalAndStateCourts.aspx (last visited April 1, 2015).
[172] *Id.*
[173] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).
[174] *Introduction to The Federal Court System*, JUSTICE.GOV, http://www.justice.gov/usao/justice-101/federal-courts (last visited April 1, 2015).

numbers of courts.[175] In total, there are 167 jurisdictions in the federal-state court system. The limits of each court are obvious: they cannot ordinarily assert their jurisdiction outside of their geographic area. Only the Supreme Court has authority to interpret federal law for the nation.

Caseload and administrative structure is also important. In 2014, the district courts disposed of 345,000 cases, leaving a balance of 439,000 cases pending.[176] With 677 authorized judgeships, each district judge decided an average of 556 cases.[177] In many of these cases, there is only one judge deciding the case, and he or she is pressed for time. By comparison, the twelve regional circuit courts confronted 55,000 filings,[178] or about 14.6% of the district court caseload in 2014.[179] Unlike district courts, circuit courts generally decide cases in panels of three judges.[180] The average appellate panel in 2014 disposed of 992 cases.[181] While judges may rotate authorship of opinions, each judge must at least be familiar enough with each case to either subscribe to an opinion or write a dissenting opinion.

The Supreme Court of the United States carries a much different caseload. The docket of the 2013 October Term consisted of 8,850 cases.[182] Of these, the Court disposed of 7,547, leaving a balance of 1,033 cases.[183] These numbers are misleading, however, as the Court grants

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[175] *State Government*, USA.GOV, http://www.usa.gov/Agencies/State-and-Territories.shtml (last visited April 1, 2015).
[176] *U.S. District Courts*, USCOURTS.GOV, http://www.uscourts.gov/Statistics/JudicialBusiness/2014/us-district-courts.aspx (last visited April 1, 2015).
[177] *Id.*
[178] *U.S. Courts of Appeals*, USCOURTS.GOV, http://www.uscourts.gov/Statistics/JudicialBusiness/2014/us-courts-of-appeals.aspx (last visited April 1, 2015).
[179] 55,000 / 376,000 = 14.63%
[180] *Introduction to The Federal Court System*, *supra* note 174.
[181] *U.S. Courts of Appeals*, *supra* note 178.
[182] *Supreme Court of the United States—Cases on Docket, Disposed of, and Remaining on Docket*, USCOURTS.GOV, http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2014/appendices/A01Sep14.pdf (last visited April 1, 2015).
[183] *Id.*

a writ of certiorari to hear and decide a case only about 1% of the time.[184] So, in 2013, the Court heard and decided 79 cases, and decided 72 cases without oral argument.[185]

This means the Supreme Court decided only 151 cases in a year, as compared to 992 cases for the average circuit court panel. Given this marked difference, it seems that the Supreme Court is in the best position to consider cases in depth and to declare federal law for the entire United States. In addition, the Supreme Court owes no deference to either district or circuit courts in considering questions of law.[186] Given that a "principal purpose" of exercising the Court's jurisdiction is to resolve circuit splits,[187] the additional time per case is crucial to the establishment of settled law. This settled law can readily form the basis for qualified-immunity inquiries for § 1983 claims.

C. Roles of the Courts

Related to the limitations of the courts are their roles. Trial courts typically preside over trials and make findings of fact.[188] They accordingly have an "institutional advantage" over appellate courts with regard to many factual and discretionary matters.[189] This is in part because they see cases first hand, many of which are never appealed,[190] and in part because they have the

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[184] *See Frequently Asked Questions*, SUPREMECOURT.GOV, http://www.supremecourt.gov/faq.aspx (last visited April 1, 2015); Kedar S. Bhatia, *Likelihood of a Petition Being Granted*, DAILYWRIT.COM (Jan. 10, 2013), http://dailywrit.com/2013/01/likelihood-of-a-petition-being-granted/.

[185] *Supreme Court of the United States—Cases on Docket, Disposed of, and Remaining on Docket*, *supra* note 182.

[186] Elder v. Holloway, 510 U.S. 510, 516 (1994).

[187] Braxton v. United States, 500 U.S. 344, 347 (1991).

[188] *See* Anderson v. Bessemer City, 470 U.S. 564, 574 (1985).

[189] Koon v. United States, 518 U.S. 81, 98 (1996).

[190] *See* discussion *supra* Part IV.B (circuit courts only handle about 14.6% of the cases district courts do, and do not have a disproportionate amount of pending cases; a necessary corollary is that many district court cases are never appealed).

judicial competence and experience to make rulings that are not easily reviewed on appeal through the examination of a "cold and distant record."[191]

The role of appellate courts, on the other hand, is to review and correct legal error.[192] Regarding questions of law, the appellate court gives no deference to the trial court.[193] Accordingly, the courts of appeals are likely to develop an institutional advantage in deciding legal matters because of their significant experience issuing legal opinions.

The Supreme Court's roles differ even more.[194] On writs of certiorari, the Justices generally resolve circuit (or state) splits on federal questions,[195] or definitely state the law even if there is no circuit (or state) split on a federal question.[196] Otherwise, the Court will hear original claims filed based on its Article III jurisdiction,[197] special appeals from district courts,[198] arguments on certified questions,[199] and extraordinary writs.[200] The various roles ensure that the Court considers only pressing cases of national importance.

V. ARGUMENTS IN OPPOSITION

It is not the prevailing view that the Supreme Court is the only relevant arbiter of federal law. Many commentators have argued that limitation of § 1983 claims is not in the best interests of plaintiffs, and it is hard to argue against that notion. This section considers their arguments, which are refuted in the following section.

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[191] B.H. ex rel. Hawk v. Easton Area Sch. Dist., 725 F.3d 293, 308 (3d Cir. 2013) (en banc).
[192] *See* Zenith Radio Corp. v. Hazeltine Research, 395 U.S. 100, 123 (1969).
[193] Elder v. Holloway, 510 U.S. 510, 516 (1994).
[194] *See* SUP. CT. R. 10–11, 17–20.
[195] SUP. CT. R. 10(a)–(b).
[196] SUP. CT. R. 10(c).
[197] SUP. CT. R. 17.
[198] SUP. CT. R. 18.
[199] SUP. CT. R. 19.
[200] SUP. CT. R. 20.

In a thorough critique against converging constitutional remedies, Thomas K.S. Fu argues that "none of the rationales for limiting 'clearly established' law to Supreme Court precedent in the post-conviction habeas context apply in the qualified immunity context."[201] Although not strictly the focus of his note, the interplay between *habeas* and § 1983 clearly-established-law is a major illustration of his argument against converging constitutional doctrines.[202] Accordingly, it is considered even though this article does not rely on the *habeas* standard.[203]

In his analysis of who can clearly establish rights, Fu observes that courts are statutorily required for *habeas* petitions to consider the Supreme Court's precedent, but that no such statutory mandate exists in § 1983 proceedings.[204] Although Congress acquiesced to the qualified-immunity rule, Congress did not acquiesce to a rule requiring review of only Supreme Court precedent because no court had so held.[205] In addition, such a restrictive rule would have been included in the statute.[206] This is particularly salient where many federalism concerns inherent in *habeas* petitions do not exist in § 1983 actions.[207] In Fu's view, restricting review to

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[201] Thomas K.S. Fu, Note, *Against Doctrinal Convergence in Constitutional Remedies*, 10 STAN. J.C.R. & C.L. 293, 317 (2014).
[202] *Id.* at 326.
[203] A comparison can be drawn between the clearly-established-law inquiry in qualified immunity determinations and federal *habeas corpus* petitions filed under 28 U.S.C. § 2254 (2012), as both deal with the deference, limitations, and roles of the courts. The differences in statutory language and purpose, however, greatly limit the relevance of this comparison.
[204] Fu, *supra* note 201, at 317.
[205] *Id.*
[206] *Id.* at 317–18 (quoting Whitman v. Am. Trucking Ass'n, 531 U.S. 437, 468 (2001)) ("As the Court (per Justice Scalia) has explained, Congress does not 'hide elephants in mouseholes.'").
[207] *Id.* at 318 (explaining that *habeas* proceedings directly question state court judgments, whereas § 1983 claims only implicate the conduct of state officials). *But see* Heck v. Humphrey, 512 U.S. 477, 487 (1994) (holding that a plaintiff cannot seek relief under § 1983 if such relief would call into doubt the credibility of the state court's criminal conviction).

Supreme Court precedent would actually exacerbate any federalism concerns because it reduces the ability of state and federal courts to respond to local, geographic concerns.[208]

Fu argues that the purposes behind the clearly-established inquiries in *habeas* and § 1983 claims are fundamentally different.[209] The purpose of the *habeas* inquiry is to "protect federalism concerns," whereas the purpose of the § 1983 inquiry is to "ensure that an officer has sufficient notice of the legality of her actions before she is subject to liability for them."[210] Restricting the inquiry to Supreme Court precedent does not further the purpose of § 1983 qualified immunity.[211] While apparently conceding that officials are less likely to know all the relevant law in their local jurisdictions, Fu suggests that using circuit or state-court precedent incentivizes officials to learn the relevant law.[212] He also questions whether officials would really be more cognizant of Supreme Court developments over those in state court.[213] He therefore cautions against restricting the § 1983 clearly-established-law inquiry to the Supreme Court.[214]

In an exhaustive analysis of qualified-immunity doctrine at the time, David Rudovsky[215] detailed the "fundamental questions concerning the appropriate balance among several competing interests."[216] From the plaintiff's perspective, there is the need for "compensation for persons whose rights are violated," "deterrence of unconstitutional actions by government

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[208] Fu, *supra* note 201, at 319 & n.133. His argument takes two major tacks, one state, and one federal. First, ignoring state court decisions imposes a federalism burden on state courts by effectively nullifying their judgments. *Id.* at 319. Second, the circuit courts will be unable to react to the needs of their respective geographic jurisdiction. *Id.* at 319 n.133.
[209] *Id.* at 319.
[210] *Id.*
[211] *Id.*
[212] *Id.* at 320.
[213] *Id.* at 320–21.
[214] *Id.* at 325.
[215] Rudovsky argued before the Court in City of Canton v. Harris, 109 S. Ct. 1197 (1989), and Mitchell v. Forsyth, 472 U.S. 511 (1985).
[216] David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. PA. L. REV. 23, 73 (1989).

officials," and "vindication of constitutional rights."[217] From the official's perspective, there is the need to protect officials from "frivolous suits" and liability where they "acted in good faith and in accordance with established standards," and to promote "vigorous and effective enforcement of legal and government policies."[218] The enforcement goal is related to and supported by the protection goal: officials can focus on their duties when they are not distracted by lawsuits.[219] Where these competing interests meet is a difficult question.[220]

Another difficulty raised by the qualified-immunity analysis was noted by Alan K. Chen: many constitutional standards are stated in the form of a balancing test.[221] "[B]alancing tests identify general criteria for constitutional decisionmaking, but leave great discretion to the decisionmaker to apply these criteria to the individual circumstances of each case."[222] When constitutional rights are subject to balancing tests, the right may be established, but "it will be subject to infinite factual variations."[223] Accordingly, qualified immunity will often turn on the lack of a sufficiently related case, even though the right is clearly established.[224] This is because rights are declared as broad principles requiring factual analysis to determine whether an

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[217] *Id.* at 73.
[218] *Id.*
[219] *See* Harlow v. Fitzgerald, 457 U.S. 800, 816 (1982).
[220] Although Rudovsky describes the competing concerns, he questions whether the Court—as opposed to Congress—should engage in the balancing of these interests. Rudovsky, *supra* note 216, at 74. He also suggests that a civil retroactivity doctrine would be a better tool to balance these interests than an immunity doctrine, and would vindicate constitutional rights and protect government interests. *Id.* at 79–81; *see also id.* at 36 (stating that the Court has tailored the immunity analysis by ad hoc decisionmaking and its "own policy judgment[s]").
[221] Alan K. Chen, *The Burdens of Qualified Immunity: Summary Judgment and the Role of Facts in Constitutional Tort Law*, 47 AM. U.L. REV. 1, 44 (1997).
[222] *Id.* at 45.
[223] *Id.* at 49.
[224] *Id.* at 49–50.

exception should apply,[225] but they are not being treated as such by the courts.[226] If no exception is found, the court should arguably conclude that the official violated clearly established law.

The question of what court decisions can constitute clearly established law invokes strong jurisprudential and emotional arguments.[227] Caryn J. Ackerman emphatically argues that excluding "extracircuit precedent alters the delicate balance between the goals of § 1983 and the policy concerns motivating qualified immunity."[228] In doing so, she observed how the circuits resolve the clearly-established inquiry. Some, like the Ninth Circuit, take a relatively broad approach by considering decisions outside their Circuit.[229] Others, like the Eleventh Circuit, restrict their review to their own decisions, as well as those of the Supreme Court.[230] Regardless, each circuit reviewed had determined that its own precedent could constitute clearly established law.[231]

Ackerman primarily focuses on the preservation of the ability of plaintiffs to vindicate their rights by looking outside a circuit's own precedent.[232] With more cases to consider,

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[225] *Id.* at 50.
[226] *See* Wilson v. Layne, 526 U.S. 603, 619 (1999) (Stevens, J., dissenting) (disagreeing with the majority that the law was not clearly established because the Court did not announce a new principle, but rather refused to recognize "an exception to a well-established principle").
[227] *See* Caryn J. Ackerman, *Fairness or Fiction: Striking a Balance Between the Goals of § 1983 and the Policy Concerns Motivating Qualified Immunity*, 85 OR. L. REV. 1027, 1027 (2006) ("Qualified immunity inspires an assortment of metaphors as scholars and judges strive to capture its effect on civil rights in the United States. Some commentators envision qualified immunity as a necessary evil, while others identify the doctrine as a vice suffocating the protection of civil rights. Regardless of how one views qualified immunity, it can hardly be denied that if left unfettered, the doctrine persistently threatens the promise of 42 U.S.C. § 1983 - that all persons have a remedy by law when public officials deprive them of rights secured by the Constitution and laws of this country.").
[228] *Id.* at 1027–28.
[229] *Id.* at 1035–36.
[230] *Id.* at 1036.
[231] *Id.* at 1035–37.
[232] *Id.* at 1058–60.

plaintiffs can more likely demonstrate that the law is clearly established.[233] Of course, officials may gain under extracircuit precedent as well if they can find conflicting case law, which would demonstrate the law is not settled.[234] Ackerman recognizes that it might be unfair to expect officials to know the law throughout the country, but argues that "notions of fairness and practicality compete under §1983."[235] In her view, "the balance is still tilted strongly in favor of defendants," and needs correction.[236]

In engaging in the clearly-established-law inquiry, each circuit considers precedent beyond the Supreme Court, even if just its own.[237] Of course, even though the circuits consider precedent other than the Court's to find clearly established law, their approaches are subject to critique.[238] It may be that most commentators are upset about qualified immunity generally, rather than any specific ideation of it.[239] One circuit's recent approach, however, has received praise.[240]

The Fourth Circuit in *Bellotte v. Edwards*[241] found a violation of clearly established law based on its own precedents, even though they were factually distinguishable.[242] It explained that

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[233] *Id.* at 1055.
[234] *Id.*
[235] *Id.* at 1055–56.
[236] *Id.* at 1029.
[237] *Id.* at 1035–37.
[238] *See, e.g.*, Kate Seabright, *Arriving at Clearly Established: The* Taser *Problem and Reforming Qualified Immunity Analysis in the Ninth Circuit*, 89 WASH. L. REV. 491 (2014); Amelia A. Friedman, *Qualified Immunity in the Fifth Circuit: Identifying the "Obvious" Hole in Clearly Established Law*, 90 TEX. L. REV. 1283 (2012).
[239] Justice Thomas has opined that 42 U.S.C. § 1983 (2012), has been expanded far beyond its originally intended limited scope. Heck v. Humphrey, 512 U.S. 477, 491 (Thomas, concurring) (1994). Arguably, the Court is using qualified immunity as a blunt instrument to quell the beast and satisfy the competing policy concerns it has unraveled. *Cf.* Ruvosky, *supra* note 216, at 79–81 (suggesting qualified immunity is not well suited to balancing § 1983 policy interests).
[240] *See generally* Daniel K. Siegel, *Clearly Established Enough: The Fourth Circuit's New Approach to Qualified Immunity in* Bellotte v. Edwards, 90 N.C.L. REV. 1241 (2012).
[241] 629 F.3d 415 (4th Cir. 2011).

qualified immunity "protect[s] against liability [only] for 'bad guesses in gray areas.'"[243] The officers, who engaged in a no-knock entry of the plaintiff's home, argued that the circumstances of the case were "so infrequent, so uncommon that it's a gray area," and thus they should be entitled to qualified immunity.[244] The Fourth Circuit returned, "The absence of 'a prior case directly on all fours' here speaks not to the unsettledness of the law, but to the brashness of the conduct."[245] The Fourth Circuit noted that it was faced with "an unfortunate exception to the truism that '[t]he easiest cases don't even arise,'"[246] and it found a clearly established right even though there were no cases on point, similar to the Supreme Court in *Hope*.[247]

Bellotte indicates two things, one direct and one indirect. First, it directly indicates that the *Hope* Court's concept of obvious rights is still relevant. Second, it indirectly indicates that limiting the clearly-established inquiry to Supreme Court cases will not prevent plaintiffs from obtaining recovery simply because there is not a prior case directly on all fours with the case at bar. With this in mind, this article will now address why the Supreme Court is the only relevant arbiter for clearly establishing federal law, with the only possible exception being the official's home circuit.

VI. WHY ONLY THE SUPREME COURT CAN CLEARLY ESTABLISH FEDERAL LAW

Having already surveyed the history and policies of qualified immunity, and the roles and limitations of the respective courts, this article contends that the Supreme Court is the only relevant arbiter of clearly established federal constitutional and statutory law for qualified-immunity purposes under § 1983. To say otherwise creates an onerous burden that no reasonable

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[242] Siegel*, supra* note 240, at 1242–43 (citing *Bellotte*, 629 F.3d at 431–32 (Wynn, J., dissenting in part).
[243] *Bellotte*, 629 F.3d at 424 (quoting Maciariello v. Sumner, 973 F.2d 295, 298 (4th Cir. 1992)).
[244] *Id.*
[245] *Id.* (quoting Pinder v. Johnson, 54 F.3d 1169, 1173 (4th Cir. 1995) (en banc)).
[246] *Id.* (alteration in original) (quoting United States v. Lanier, 520 U.S. 259, 271 (1997)).
[247] Hope v. Pelzer, 536 U.S. 730, 733, 741 (2002).

official should be expected to carry, and it does not comport with a proper balancing of the principles underlying qualified immunity. If officials simply must consider any other precedent, it is that of their home circuit—and only that circuit.

Whether the Supreme Court should be the only relevant arbiter of federal law for qualified-immunity purposes, it is clear that it is the ultimate arbiter.[248] It reviews federal issues decided by both state and federal courts, and one of its primary purposes is to settle conflicting interpretations of federal law among the lower courts.[249] Where every other court's decisions are subject to review, it raises the question of whether their decisions are anything but guesswork.

Guesswork or not, the fact remains that circuit decisions are subject to reversal, and there can be splits in circuit authority. Finding such turbulent, precarious law to be the source of clearly established law paralyzes the official by requiring her to consider not only the Supreme Court, but her home circuit, neighboring circuits, and perhaps all of them. The typical official is not a legal scholar, and agencies have finite budgets for in-house counsel. The law that can reasonably be considered by the official is necessarily limited, and should be limited to Supreme Court precedent.

One could argue that the Supreme Court is itself only ever involved in guesswork, considering the Court can and does overrule its earlier pronouncements of law.[250] The Court's law seems settled because of *stare decisis*, but the Court could overrule its prior precedent at any time, making it questionable and open to debate. This recalcitrance is but a scratch against the

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[248] Pell v. Procunier, 417 U.S. 817, 827 (1974); *see also* Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez, 561 U.S. 661, 686 (2010) (citing *Pell*, 417 U.S. at 827).
[249] SUP. CT. R. 10.
[250] *See, e.g.*, Monroe v. Pape, 365 U.S. 167, 171 (1961), *overruled by* Monell v. Dep't of Soc. Servs. of City of New York, 436 U.S. 658 (1978).

Court's establishment of federal law, however, and does not seriously countenance against reliance on the Court's opinions as the definitive interpretation of federal law.

One might also argue that the Court cannot be the only relevant arbiter of federal rights because it refuses to recognize new rights.[251] But rights can be established in at least three ways. First, they can be established in criminal cases.[252] Second, they can be established by the Court at its discretion.[253] And third, they can be established in cases against municipalities, which do not have qualified immunity.[254] Where the constitutional question warrants, the Court may provide an answer even in the absence of a circuit split.[255]

In any event, the concern over the establishment of rights is mitigated by the fact that a right need not be clearly established by a prior precedent on all fours. Certainly, a highly generalized right cannot be successfully invoked in qualified-immunity claims.[256] But a factually identical case is not required either.[257] There is room to argue about the proper level of similarity required to find that an officer had fair warning that the conduct at issue infringed upon a constitutional right.[258]

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[251] *Cf.* Pearson v. Callahan, 555 U.S. 223, 236 (2009) (rejecting the rule requiring consideration of the substantive constitutional merits of a qualified immunity claim).
[252] Notably, this does not protect against constitutional injuries that rarely, if ever, become an issue in criminal cases.
[253] The lower courts can try to force the Court's hand by deciding the merits of the constitutional question, strong-arming the Court to correct any errors, or explaining the right for the Court to affirm. *See* Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2080 (2011).
[254] *See* Owen v. City of Independence, 445 U.S. 622, 638 (1980). Attributing the conduct of a government official to the municipality can be difficult, but if there is widespread abuse, a litigant could successfully find that the municipality acquiesced and supported a custom carrying the force of law. This will be returned to later.
[255] SUP. CT. R. 10(c).
[256] Anderson v. Creighton, 483 U.S. 635, 638–40 (1987).
[257] Hope v. Pelzer, 536 U.S. 730, 733, 741 (2002).
[258] *See, e.g.*, Bellotte v. Edwards, 629 F.3d 415, 424 (4th Cir. 2011).

The proper focus ought to be on what a reasonable official would think the right is, not what a savvy lawyer might argue. This is particularly relevant given the Court's move toward establishing rights in a more general way subject to balancing tests.[259] It may be prudent to shift the focus from establishing whether an exception to the general rule existed in a narrow sense to establishing whether an exception to the general rule could have reasonably been expected to exist.[260] This would realign the burden from the plaintiff (to show that the right existed) to the official (to show that the right reasonably did not exist given the general nature of the right). And while qualified immunity is meant to protect officials from the distraction of lawsuits,[261] it would be disingenuous for officials to claim immunity when they have violated clearly established, arguably general, rights to which no exception can reasonably be found. If this issue is resolved in favor of the plaintiff, there is less of a need to consider lower-court precedent, and the official may reasonably consider only Supreme Court precedent without being distracted by excessive legal research.

Distraction from the official's duties is an important consideration, and plays into the proper level of deterrence against officials engaging in unconstitutional conduct. On one hand, society wants officials to be deterred from inflicting constitutional injuries. On the other hand, society wants officials to do their jobs effectively. Officials cannot be reasonably expected to survey the law of every state and federal jurisdiction while also serving the public. Even ignoring state and federal trial courts, there are still thirteen circuit courts and fifty states, each of which

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[259] *See* Chen, *supra* note 221, at 44.
[260] *See, e.g.*, *id.* at 50; Wilson v. Layne, 526 U.S. 603, 619 (1999) (Stevens, J., dissenting).
[261] Harlow v. Fitzgerald, 457 U.S. 800, 816 (1982).

may have both a court of appeals and supreme court.[262] The courts that a reasonable official should be expected to review must be limited, and should be limited to the Supreme Court.

Too much deterrence creates a perverse result. If an official is on the hook for a constitutional injury as defined by a majority of the courts (but notably not his or her home circuit), the official could become paralyzed by fear: Could this conduct be considered unconstitutional in any one of the states or circuits? Now an exhaustive analysis must be conducted before the official performs his or her duties. Police response may be delayed to determine the rights of the parties involved in a 9-1-1 call, and school administration may be stagnated to determine the rights of unruly students. The question is exemplified by whether a school principal is an administrator or a legal scholar. Too much of the latter distracts officials from performing the functions with which they are tasked, to the detriment of the public whom they serve. And whether the official is actually subject to liability, the threat of suit alone is deterrence.[263] To give the reasonable official breathing room to serve the public, only Supreme Court precedent should be considered relevant.

One may argue that the delay in or denial of access to justice is a price too high for effective administration of government.[264] This is a valid concern, but ultimately it does not prescribe the review of every appellate court in the land before the official acts. Even if we limit the official to considering the Supreme Court, the official's home circuit, and the official's home state, the official is now required to review the precedents of up to four courts. This cannot be.

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[262] *See Introduction to the Federal Court System*, *supra* note 174; *State Government*, *supra* note 175.
[263] *See Harlow*, 457 U.S. at 816.
[264] *Cf.* Ackerman, *supra* note 227, at 1029 (stating the scales are tilted too far in the official's favor).

Most state supreme courts operate in the same manner as the Supreme Court of the United States, settling jurisprudential questions of major significance. The same arguments that countenance against reliance upon only the Supreme Court[265] would dictate that a state supreme court cannot be the only state court that officials consider. Officials must, therefore, consider the state court of appeals, state supreme court, circuit court of appeals, and the Supreme Court of the United States. The typical official and government agency does not have that much time or resources. In addition, state courts have expertise in state-law matters, and federal courts have expertise in federal-law matters.[266] State-court precedent simply does not carry the same weight that federal-court precedent does for federal-law questions, and their substantive constitutional law should not dictate the official's conduct.[267] Even if officials must consider federal circuit precedents, they should not be required to consider state court precedents.

Deterrence is as much a shield for the government as it is a sword for the plaintiff in this battle of policy. Officials must be given deference to fulfill their responsibilities, and should not be overly deterred from doing so. In a society increasingly regulated by legislatively created agencies and legislatively enacted statutes, officials are tasked with balancing the dictates of sometimes-competing laws and policies, and the rights of the individual. This is not an easy task, and the official will inevitably err. Where that error is reasonable in light of their task, they should not be held liable for the reasonable discharge of their duty. Not every constitutional violation has a remedy.[268] The obvious violations, however, are always protected.[269] Where it is

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[265] *See* discussion *supra* Part V.

[266] *Cf.* Bush v. Gore, 531 U.S. 98, 142 (Ginsburg, J., dissenting) ("Federal courts defer to state high courts' interpretations of their state's own law.").

[267] State precedent can dictate the official's conduct in other ways, however, such as finding that a right is clearly established in Supreme Court precedent even if the relevant Circuit has not so held.

[268] Texas v. Lesage, 528 U.S. 18, 21 (1999).

not clear that the official's actions are in violation of federal law, the federal courts should limit their involvement in the official's affairs.

This limited involvement, however, does not give officials *carte blanche* authority to engage in questionable constitutional conduct *in infinitum*. If one official engages in conduct that is arguably, but not clearly, unconstitutional, the official should not be held liable for infliction of any constitutional injury. This reflects the policy balance and deference we give to officials. But the tables turn when this becomes systemic. If one or more officials repeatedly engage in the same conduct that is arguably unconstitutional, the circuit court can declare that it is so.[270] But what good is it if the circuit court still holds the right was not clearly established?

Even assuming that the Court does not consider the issue on appeal,[271] the official would be put on notice that he or she is engaging in unconstitutional conduct. More importantly, the *municipality* would be on notice that its agents are engaging in unconstitutional conduct. If the agency does nothing to stop the conduct, it would arguably become a custom—a practice so permanent and well-settled as to have the force of law of the municipality.[272] If there is a custom, the plaintiff can sue the municipality, and skip the qualified-immunity quagmire.[273] Accordingly,

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[269] *See* United States v. Lanier, 520 U.S. 259, 271 (1997).

[270] Pearson v. Callahan, 555 U.S. 223, 242 (2009) (stating courts can still declare constitutional rights even though they are not required to do so).

[271] It can be expected that government officials would seek to appeal a ruling that their conduct was unconstitutional, even if they were shielded by qualified immunity. The officials would be concerned about their public appearance, and would also argue that the circuit erred.

[272] Adickes v. S.H. Kress & Co., 398 U.S. 144, 167–68 (1970).

[273] Owen v. City of Independence, 445 U.S. 622, 638 (1980) (holding municipalities do not have qualified immunity). Admittedly, it is a long road to haul to sue a municipality for a custom and obtain monetary redress. But this demonstrates the unlikelihood of systemic constitutional injury, not the subjugation of plaintiffs to the omnipotent official. This concern presumes several things. First, the official engaged in unconstitutional conduct. Second, the Supreme Court has not already established a right. Third, the Circuit will refuse to hold that the conduct is unconstitutional. Fourth, the official will not be deterred by litigation. Fifth, the agency will not pressure the official to cease the conduct. Sixth, the legislature will not enact state law to avoid

there is no need to rely on lower-court precedent to overcome qualified immunity, and yet again the reasonable official need only consider Supreme Court precedent in the first instance of engaging in questionable constitutional conduct in the performance of his or her duties.

If a court were to consider any precedent other than that of the Supreme Court, it should be limited to the home circuit of the official. Although the Supreme Court *can* resolve issues on appeal that are not subject to an interpretive split of authority in the circuits,[274] the fact is that it still rejects about 99% of the appeals filed by plaintiffs.[275] The Court is more likely to resolve issues based on either jurisprudential significance or the presence of a split of authority.

This causes a problem if there are constitutional rights subject to infringement by officials that are unanimously recognized by the circuits but not the Supreme Court. Such a predicament could insulate the official from liability for infringing upon nationally recognized rights that have no reason to be clarified or reviewed by the Supreme Court. Requiring officials to consider their home-circuit precedent would combat this hypothetical phenomenon, at least where their home circuit has addressed the issue.

Looking to the official's home circuit also allows the federal law to develop locally to the benefit of plaintiffs, and without undue disruption to officials. Plaintiffs can show that a right is clearly established in the circuit, and officials could likely still perform their duties effectively and efficiently despite the additional court to review. Since circuits require the official to consider their precedent anyway,[276] officials probably already budget the resources to do so.

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future violations. Seventh, the public will not vote out the public official or otherwise pressure systemic change. And eighth, the official or agency will not settle with the plaintiff, thereby providing compensation for the injury even if the right violated is not clearly established.

[274] SUP. CT. R. 10(c).

[275] *Frequently Asked Questions*, *supra* note 184.

[276] Ackerman, *supra* note 227, at 1037–37.

Requiring review of home-circuit precedent would not tilt the scales dramatically one way or the other, since both sides gain from the inclusion of only home-circuit precedent.

The scales stay in relative balance until officials are required to consider extracircuit precedent. It might seem that if we ask the official can look to home-circuit precedent, then we can ask the official to review extracircuit precedent as well. But the same considerations elucidated at the beginning of this section for limiting review to the Supreme Court also caution against requiring officials to consider extracircuit precedent. While consideration of the precedents of two courts might be acceptable, consideration of the Supreme Court and every circuit court requires too much time and too many resources for the typical official.

It is readily apparent that consideration of extracircuit precedent will stagnate the official in his duties, and create uncertainty for the official *and* the plaintiff. From the official's perspective, what if the official's home circuit does not recognize a right, but every other circuit does? What if the official's home circuit does not recognize a right, and there is a split in the other circuits? And from the plaintiff's perspective, what if the official's home circuit recognizes a right, but other circuits disagree, or every circuit disagrees? What if the official's home circuit recognizes a right, but no other circuit has addressed the question? Uncertainty looms.

There is no end to the iterations of the basic question of whether officials should pay more attention to the precedent of their own or their neighboring circuits. Finding an answer to the myriad of questions potentially posed is a formidable task, and would probably turn on the specific circumstances of each case. The real problem for officials, however, is even getting to the point where they can answer the question, which requires them to first determine what the right question to ask is.

In order to ask the right question, officials must first survey every other circuit to determine the scope of their established rights. Requiring officials to review every other circuit's precedent is untenable. If officials must look to lower-court precedent at all, then their home circuit's precedent should be the only inquiry. If the home circuit recognizes the right, then that is the end of the inquiry to the benefit of plaintiffs. If the home circuit does not recognize the right, then that is the end of the inquiry to the benefit of officials. This permits no additional iterations, and alleviates guesswork.

Notably, these issues are not raised if the scope of relevant precedent is limited to the Supreme Court. It is not much of a concession to say that trial courts should be excluded from the analysis because the official is still confronted by the precedent of fifty states and thirteen circuits. And it does little to help find the line where the reasonable official's inquiry should end. This article has presented the reasons for limiting the inquiry to the Supreme Court, or perhaps the official's home circuit. Anything further magnifies the amount of continual research the official must do to an unattainable level. Unless Congress is willing to step in and conduct the balancing of policies,[277] the proper scope of review for officials should be the Supreme Court of the United States, with the possible inclusion of the official's home circuit.

VII. CONCLUSION

The competing interests at stake in qualified immunity are varied and significant. The scales largely tilt in favor of requiring officials to only review Supreme Court precedent. This result is troubling, because it is tension with the purpose of § 1983: providing plaintiffs with a means of redress for constitutional injuries that might not otherwise exist. Yet, when the Court has held that Congress enacted § 1983 against the backdrop of immunities, which Congress has

[277] *See* discussion *supra* note 220.

not questioned, the bitter pill must be swallowed: Not every constitutional injury has a remedy. Government officials are protected so long as their conduct is reasonable, even if it is injurious.

In finding that no reasonable official should be expected to know the multi-jurisdictional interplay of constitutional law, the conclusion must be that the official is shielded from liability in a way perhaps distasteful. But officials should be focused on performing their duties, not studying law. It may be that we expect too much from our officials, and the only way to limit constitutional injury is to reduce the intersection between government and private individuals. But this remedy will be found in the legislatures, not the courts. Similarly, if the Court's qualified-immunity analysis is contrary to widely accepted policy, Congress can always correct the problem. Members of Congress are accountable to their constituency—the Court has none.