

The Supreme Court's Quiet Expansion of Qualified Immunity

Kit Kinports[†]

The qualified immunity defense available to most executive branch officials in § 1983 cases is a creature of policy constructed by the Supreme Court for the express purpose of “shield[ing] [government actors] from undue interference with their duties and from potentially disabling threats of liability.”¹ In contrast to the absolute immunity accorded to legislators, judges, and prosecutors, the Court no longer engages in any pretense that its qualified immunity rulings are interpreting the congressional intent underlying § 1983.²

In its 1982 decision in *Harlow v. Fitzgerald*, the Supreme Court openly refashioned the definition of qualified immunity in the interest of sparing public officials not only from liability, but also from the costs of litigation, “permit[ting] the resolution of many insubstantial claims on summary judgment.”³ *Harlow* eliminated the subjective prong of the Court’s prior two-part definition of qualified immunity and rewrote the objective prong to provide that executive-branch officials are safeguarded from liability so long as “their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”⁴ In the years since *Harlow*,

[†] Professor and Polisher Family Distinguished Faculty Scholar, Penn State Law. Copyright © 2016 by Kit Kinports.

1. *Harlow v. Fitzgerald*, 457 U.S. 800, 806 (1982).
2. *Compare* *Stump v. Sparkman*, 435 U.S. 349, 355–56 (1978) (reasoning, despite § 1983’s unqualified language, that Congress must have intended to incorporate common law immunities for judges), *with* *Anderson v. Creighton*, 483 U.S. 635, 645 (1987) (acknowledging that the Court has “completely reformulated qualified immunity along principles not at all embodied in the common law”).
3. *Harlow*, 457 U.S. at 818; *see also* *Ashcroft v. Iqbal*, 556 U.S. 662, 685 (2009) (“The basic thrust of the qualified-immunity doctrine is to free officials from the concerns of litigation, including ‘avoidance of disruptive discovery.’” (quoting *Siegert v. Gilley*, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring in the judgment))).
4. *Harlow*, 457 U.S. at 818 (overruling *Wood v. Strickland*, 420 U.S. 308, 322 (1975), which denied qualified immunity to government officials either if they “knew or reasonably should have known that the[ir] action . . . would vio-

the Court has continued to refine the defense and expand the protection it affords government officials.⁵

At the same time, the breadth of the defense has become apparent in the Supreme Court decisions applying the *Harlow* standard. During the past fifteen years, the Court has issued eighteen opinions addressing the question whether a particular constitutional right was clearly established. In sixteen of those eighteen cases, the Court found the governmental defendants were entitled to qualified immunity on the grounds that, whether or not they acted in contravention of the Constitution, they did not violate clearly established law.⁶ The Court has not ruled in favor of a § 1983 plaintiff on this question in more than a decade.⁷

Interestingly, more than one-third of these sixteen defendant-friendly rulings came in summary reversals, including at least one in each of the past four years. These cases represent about one of every seven opinions the Court issued without briefing and oral argument during that four-year period.⁸ Given

late” the Constitution, or if they acted “with the malicious intention to cause a deprivation of constitutional rights or other injury”).

5. See *Pearson v. Callahan*, 555 U.S. 223, 237 (2009) (justifying the decision to retreat from the requirement that courts ruling on qualified immunity motions first address the threshold issue whether the plaintiff alleged a constitutional violation, in part on the grounds that the “two-step protocol ‘disserve[d] the purpose of qualified immunity’” by “forc[ing] the parties to endure additional burdens of suit . . . when the suit otherwise could be disposed of more readily” (quoting Brief for National Association of Criminal Defense Lawyers as Amicus Curiae Supporting Respondent at 30, *Pearson v. Callahan*, 555 U.S. 223 (2009) (No. 07-751), 2008 WL 3831556)); *Anderson v. Creighton*, 483 U.S. 635, 639–41 (1987) (adopting a “particularized,” “fact-specific” approach to qualified immunity because a standard applied at a high “level of generality” would enable plaintiffs “to convert the rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights”).

6. See *Mullenix v. Luna*, 136 S. Ct. 305, 312 (2015) (per curiam); *Taylor v. Barkes*, 135 S. Ct. 2042, 2045 (2015) (per curiam); *City and Cty. of S.F. v. Sheehan*, 135 S. Ct. 1765, 1778 (2015); *Carroll v. Carman*, 135 S. Ct. 348, 352 (2014) (per curiam); *Lane v. Franks*, 134 S. Ct. 2369, 2383 (2014); *Wood v. Moss*, 134 S. Ct. 2056, 2068–69 (2014); *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2024 (2014); *Stanton v. Sims*, 134 S. Ct. 3, 7 (2013) (per curiam); *Reichle v. Howards*, 132 S. Ct. 2088, 2096–97 (2012); *Messerschmidt v. Millender*, 132 S. Ct. 1235, 1250 (2012); *Ryburn v. Huff*, 132 S. Ct. 987, 992 (2012) (per curiam); *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2085 (2011); *Safford Unified Sch. Dist. #1 v. Redding*, 557 U.S. 364, 378–79 (2009); *Pearson*, 555 U.S. at 243–44; *Brosseau v. Haugen*, 543 U.S. 194, 201 (2004) (per curiam); *Saucier v. Katz*, 533 U.S. 194, 209 (2001).

7. See *Groh v. Ramirez*, 540 U.S. 551, 565 (2004); see also *Hope v. Pelzer*, 536 U.S. 730, 745–46 (2002).

8. See KEDAR S. BHATIA, STAT PACK FOR OCTOBER TERM 2014, at 15 (2015), <http://www.scotusblog.com/2015/06/final-stat-pack-for-october-term>

that the only question discussed in these per curiam opinions was how *Harlow*'s clearly established law standard applied to a particular set of facts, these decisions arguably reflect the Court's willingness to overcome its usual reluctance to assume an error-correcting role in a fact-bound case in the interest of protecting government officials from § 1983 litigation.⁹ Ironically, Justices Alito and Scalia leveled an objection along those lines in the one summary reversal that favored a § 1983 plaintiff—which did not even go so far as to find that the defendant violated clearly established law, but merely that the lower court ignored “evidence that contradicted some of its key factual conclusions” and thereby failed to view the record on summary judgment in the light most favorable to the plaintiff.¹⁰

But my purpose here is not to criticize the Court for its selective use of summary reversals or for decisions like *Harlow* that transparently alter precedent. Instead, my focus is on the Supreme Court's qualified immunity opinions that have made a *sub silentio* assault on constitutional tort suits. In a number of recent rulings, the Court has engaged in a pattern of covertly broadening the defense, describing it in increasingly generous terms and inexplicably adding qualifiers to precedent that then take on a life of their own. This pattern began in 2011 with *Ashcroft v. al-Kidd* and continued with last Term's decisions in *City and County of San Francisco v. Sheehan* and *Heien v. North Carolina*. In making this claim, I explore three different issues: (1) how the Court characterizes the standard governing the qualified immunity defense; (2) whether lower court opin-

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9. See SUP. CT. R. 10 (admonishing that “[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law”); cf. Scott Michelman, Taylor v. Barkes: *Summary Reversal Is Part of a Qualified Immunity Trend*, SCOTUSBLOG (June 2, 2015, 11:17 AM), <http://www.scotusblog.com/2015/06/taylor-v-barkes-summary-reversal-is-part-of-a-qualified-immunity-trend/> (suggesting as an alternative “horse-trading” explanation that these summary reversals represent “a kind of compromise position” that “satisfies Justices who want to protect the government officials before them and mollifies others who might fear a broader ruling that could harm civil rights plaintiffs across a range of cases”).

10. *Tolan v. Cotton*, 134 S. Ct. 1861, 1866 (2014) (per curiam); see *id.* at 1868–69 (Alito, J., concurring in the judgment) (complaining that “[t]here is no confusion in the courts of appeals about the standard to be applied in ruling on a summary judgment motion” and therefore “the granting of review in this case sets a precedent that, if followed in other cases, will very substantially alter the Court's practice”). *But cf. Ryburn*, 132 S. Ct. at 991 (reasoning, in summarily reversing denial of qualified immunity, that the court of appeals' decision “rested on an account of the facts that differed markedly from the District Court's finding”).

ions can create clearly established law; and (3) how qualified immunity compares to Fourth Amendment principles. As detailed below, in each of these areas the Court has—without offering any explanation, and without even acknowledging it is doing so—broadened the protection qualified immunity offers government officials in § 1983 litigation.

I. DEFINING THE QUALIFIED IMMUNITY STANDARD

The *Harlow* formulation of the qualified immunity defense set out above focused on what “a reasonable person” would have known about the constitutional status of the right asserted by the plaintiff. The Court has adhered to that description of the standard in a long line of cases, noting in *Anderson v. Creighton*, for example, that the relevant question is whether the law is “sufficiently clear that a reasonable official would understand that what he is doing violates that right.”¹¹

In 2011, in *Ashcroft v. al-Kidd*, Justice Scalia’s majority opinion quoted this portion of *Anderson v. Creighton* in introducing the Court’s discussion of qualified immunity and laying out the rules governing the defense. But Justice Scalia’s quotation broke up the *Anderson* language, asserting that qualified immunity protects government officials unless the law is “sufficiently clear’ that every ‘reasonable official would have understood that what he is doing violates that right.’”¹² The Court did not explain, or even acknowledge, the substitution of “every” for “a,”¹³ but later opinions have picked up on *al-Kidd*’s modification of *Anderson*.¹⁴

11. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987); *see also, e.g., Moss*, 134 S. Ct. at 2067; *Messerschmidt*, 132 S. Ct. at 1244; *Pearson*, 555 U.S. at 231; *Groh*, 540 U.S. at 563; *Hope*, 536 U.S. at 739; *Saucier*, 533 U.S. at 202, 208.

12. *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2083 (2011) (emphasis added) (quoting *Anderson*, 483 U.S. at 640). *But cf. Malley v. Briggs*, 475 U.S. 335, 350 (1986) (Powell, J., concurring in part and dissenting in part) (observing, in arguing in favor of granting qualified immunity, that “[u]nder the *Harlow* standard, we need not consider whether this information would be viewed by every reasonable officer as sufficient evidence of probable cause for the issuance of a warrant”).

13. *See* Karen Blum, Erwin Chemerinsky & Martin A. Schwartz, *Qualified Immunity Developments: Not Much Hope Left for Plaintiffs*, 29 *TOURO L. REV.* 633, 656 (2013) (hypothesizing that this alteration may have gone unchallenged because “Justice Scalia did not call attention to the shift and the other Justices simply did not notice the change in the law”).

14. *See Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (per curiam); *Taylor v. Barkes*, 135 S. Ct. 2042, 2044 (2015) (per curiam); *Reichle v. Howards*, 132 S. Ct. 2088, 2093 (2012); *cf. id.* at 2095–96 (also using “a” reasonable official standard).

In the following sentence in *al-Kidd*, the majority went on to say, “[w]e do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate.”¹⁵ The phrase “beyond debate,” which appeared for the first time in *al-Kidd*, has been used in eight of the eleven subsequent Supreme Court opinions that have concluded government officials did not act in violation of clearly established law.¹⁶ In support of this sentence, Justice Scalia cited *Malley v. Briggs* (presumably the Court’s observation there that, “[a]s the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law”)¹⁷ and *Anderson v. Creighton* (presumably language in that opinion requiring that “in the light of pre-existing law the unlawfulness [of the government official’s conduct] must be apparent”).¹⁸

Malley’s reference to “plain[] incompeten[ce]” and “knowing[] violat[ions]” has been an increasingly popular refrain in the Supreme Court opinions concluding that government actors did not violate clearly established law.¹⁹ But this language initially appeared as dictum in *Malley*—without supporting citation—in a discussion explaining why police officers who execute a warrant not predicated on probable cause are afforded adequate protection by the qualified immunity defense “[a]s [it] has evolved,” and therefore are not entitled to absolute immunity. Thus, the *Malley* language, while colorful, did not appear in a context suggesting any intent to effect a substantive change in the qualified immunity standard.

Similarly, the Court’s focus in *Anderson* was specifically directed at “the level of generality at which the relevant ‘legal rule’ is to be identified” and not the strength of the evidence

15. *al-Kidd*, 131 S. Ct. at 2083.

16. See *Mullenix*, 136 S. Ct. at 308, 309, 311, 312; *Taylor*, 135 S. Ct. at 2044; *City and Cty. of S.F. v. Sheehan*, 135 S. Ct. 1765, 1774 (2015); *Carroll v. Carman*, 135 S. Ct. 348, 350, 352 (2014) (per curiam); *Lane v. Franks*, 134 S. Ct. 2369, 2383 (2014); *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2023 (2014); *Stanton v. Sims*, 134 S. Ct. 3, 5, 7 (2013) (per curiam); *Reichle*, 132 S. Ct. at 2093.

17. See *Malley*, 475 U.S. at 341.

18. See *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

19. See *Mullenix*, 136 S. Ct. at 308, 310; *Taylor*, 135 S. Ct. at 2044; *Sheehan*, 135 S. Ct. at 1774; *Carroll*, 135 S. Ct. at 350; *Stanton*, 134 S. Ct. at 5–7; *Messerschmidt v. Millender*, 132 S. Ct. 1235, 1244, 1249–50 (2012); *al-Kidd*, 131 S. Ct. at 2085; *Groh v. Ramirez*, 540 U.S. 551, 571 (2004) (Thomas, J., dissenting); *Hope v. Pelzer*, 536 U.S. 730, 752, 758 (2002) (Thomas, J., dissenting); *Saucier v. Katz*, 533 U.S. 194, 202 (2001); *Hunter v. Bryant*, 502 U.S. 224, 229 (1991).

needed to defeat a claim of qualified immunity.²⁰ Moreover, although the *Anderson* Court cited three cases in support of the notion that “unlawfulness must be apparent,” none of them—save perhaps for *Malley*—suggested any deviation from *Harlow*’s objective reasonableness standard.²¹

Finally, other parts of the opinions in both *Malley* and *Anderson* described the qualified immunity standard in the more prosaic tones used in *Harlow*, with the *Malley* Court noting, for example, that the relevant inquiry is “whether a reasonably well-trained officer in petitioner’s position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant.”²² *Harlow* itself likewise identified the government actors qualified immunity was intended to protect in narrower and more neutral terms: those who “could not reasonably be expected to anticipate subsequent legal developments, nor . . . to ‘know’ that the law forbade conduct not previously identified as unlawful.”²³

The Court’s tendency in recent cases to use a different tenor in describing the qualified immunity standard—without explanation or acknowledgement—may seem to be just a subtle shift in tone, but it signals a potentially significant alteration in the Justices’ views of the relative weight owed to the interests of plaintiffs and defendants in § 1983 litigation. In *Mullenix v. Luna*, the most recent decision in this line of cases, the Court’s entire description of the controlling standard reads as follows:

The doctrine of qualified immunity shields officials from civil liability so long as their conduct “does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” A clearly established right is one that is “sufficiently clear that every reasonable official would have understood that what he is doing violates that right.” “We do not require a case directly on point, but existing

20. *Anderson*, 483 U.S. at 639.

21. *See id.* at 640 (citing *Malley*, 475 U.S. at 344–45; *Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985); *Davis v. Scherer*, 468 U.S. 183, 191, 195 (1984)).

22. *Malley*, 475 U.S. at 345. For comparable language in *Anderson*, see *supra* text accompanying note 11.

23. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *see also Saucier*, 533 U.S. at 206 (noting that qualified immunity “operates . . . to protect officers from the sometimes ‘hazy border between excessive and acceptable force,’ and to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful” (quoting *Priester v. Riviera Beach*, 208 F.3d 919, 926–27 (11th Cir. 2000) (citation omitted))).

precedent must have placed the statutory or constitutional question *beyond debate*.” “Put simply, qualified immunity protects all but the *plainly incompetent* or those who *knowingly violate* the law.”²⁴

Noticeably absent from this summary of the law—which borrowed extensively from the modifications described above—is any reference to the countervailing interests in vindicating constitutional rights and compensating victims of constitutional injury. The need to balance these competing goals in fashioning the qualified immunity defense was recognized in *Harlow v. Fitzgerald*, and at least received lip service in later Supreme Court opinions that ultimately sided with the defendant.²⁵ Even if just a shift in tone, these generous characterizations of the qualified immunity defense can act to place a thumb on the scales favoring public officials in constitutional tort litigation and to justify dismissing an even greater majority of § 1983 suits on qualified immunity grounds.²⁶

Perhaps of even greater practical import, however, is the Court’s recent suggestion that clearly established law can only be created by Supreme Court opinions. The Court’s quiet retreat from precedent on that issue is the subject of the following section.

24. *Mullenix*, 136 S. Ct. at 308 (emphasis added) (citations omitted) (internal quotation marks omitted) (quoting, in order, *Pearson v. Callahan*, 555 U.S. 223, 231 (2009); *Reichle v. Howards*, 132 S. Ct. 2088, 2093 (2012); *al-Kidd*, 131 S. Ct. at 2083; *Malley*, 475 U.S. at 341).

25. See *Harlow*, 457 U.S. at 813–14; see also *Wood v. Moss*, 134 S. Ct. 2056, 2067 (2014); *Reichle*, 132 S. Ct. at 2093; *Pearson*, 555 U.S. at 231. *But cf. Sheehan*, 135 S. Ct. at 1774 n.3 (“Because of the importance of qualified immunity ‘to society as a whole,’ the Court often corrects lower courts when they wrongly subject individual officers to liability.” (citation omitted) (quoting *Harlow*, 457 U.S. at 814)).

26. See Nancy Leong, *The Saucier Qualified Immunity Experiment: An Empirical Analysis*, 36 PEPP. L. REV. 667, 692 (2009) (finding, in a random sample of qualified immunity opinions issued by federal courts between 1988 and 2006, that immunity was denied in only about twenty to thirty percent of the cases); Greg Sobolski & Matt Steinberg, Note, *An Empirical Analysis of Section 1983 Qualified Immunity Actions and Implications of Pearson v. Callahan*, 62 STAN. L. REV. 523, 545 (2010) (reporting that qualified immunity was denied in about one-third of a random sample of nine hundred § 1983 cases decided by the federal appellate courts between 1976 and 2006). See generally John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 VA. L. REV. 207, 269 (2013) (concluding that “[t]he barriers raised by qualified immunity, as currently administered, far exceed the rationales that support limiting damages liability” and are “an inversion of sensible policy”).

II. DETERMINING WHICH COURTS CAN CREATE CLEARLY ESTABLISHED LAW

The *Harlow* Court did not attempt to apply its newly formulated qualified immunity standard to the facts of that case, and expressly left open the question whether rights can be “clearly established” by lower court case law.²⁷ In denying qualified immunity to Alabama state prison officials in *Hope v. Pelzer*, however, the Court cited “binding Eleventh Circuit precedent” as well as a State Department of Corrections regulation and a United States Department of Justice Report to support the conclusion that the officials acted in violation of clearly established law.²⁸ Two years ago, in *Lane v. Franks*, the Court likewise observed that, had two earlier Eleventh Circuit precedents still been “controlling” in that jurisdiction, the Court “would agree [the defendant] . . . could not reasonably have believed that it was lawful to fire [the plaintiff] in retaliation for his testimony.”²⁹ Given a later circuit court opinion, however, the Supreme Court explained that, “[a]t best,” the plaintiff could “demonstrate only a discrepancy in Eleventh Circuit precedent, which is insufficient to defeat the defense of qualified immunity.”³⁰ Moreover, in other cases concluding that government officials are entitled to qualified immunity, the Court has relied on binding state and federal precedent, finding it significant both that the defendants’ conduct was “lawful according to courts in the jurisdiction where [they] acted”³¹ and

27. See *Harlow*, 457 U.S. at 818 n.32.

28. *Hope v. Pelzer*, 536 U.S. 730, 741–42 (2002); cf. *Camreta v. Greene*, 131 S. Ct. 2020, 2033 n.7 (2011) (cautioning that “the considerations” leading the Court to grant a cert petition filed by government officials who were afforded qualified immunity and thus were the prevailing parties in the court of appeals might not “have the same force” for district court opinions because “district court decisions—unlike those from the courts of appeals—do not necessarily settle constitutional standards or prevent repeated claims of qualified immunity”); *United States v. Lanier*, 520 U.S. 259, 269 (1997) (refusing, in a case involving the reach of 18 U.S.C. § 242, the criminal counterpart to § 1983, to adopt “a categorical rule that decisions of the Courts of Appeals and other courts are inadequate as a matter of law” to provide fair warning to public officials).

29. *Lane v. Franks*, 134 S. Ct. 2369, 2382 (2014).

30. *Id.* at 2383.

31. *Stanton v. Sims*, 134 S. Ct. 3, 7 (2013) (per curiam); see also *City and Cty. of S.F. v. Sheehan*, 135 S. Ct. 1765, 1777 (2015) (concluding that “[n]o matter how carefully” the defendants “read [the relevant circuit court precedents] beforehand,” they “could not know” they were “violat[ing] the Ninth Circuit’s test”); *Lane*, 134 S. Ct. at 2382 (finding it significant that circuit “precedent did not provide clear notice” that the defendant was acting unconstitutionally).

that the plaintiffs were unable to identify “any cases of controlling authority in their jurisdiction.”³² Thus, the Court has repeatedly looked beyond its own case law in assessing whether a constitutional right is clearly established.

Beginning with Justice Thomas’ 2012 majority opinion in *Reichle v. Howards*, however, the Court began to equivocate on this issue, introducing its discussion of the Tenth Circuit’s prior case law with a caveat, “[a]ssuming arguendo that controlling Court of Appeals’ authority could be a dispositive source of clearly established law in the circumstances of this case.”³³ The Court did not identify what “circumstances” in *Reichle* might have justified this reservation, nor did it provide any other explanation for the statement and its deviation from past practice.³⁴ But the Court has gone on to repeat the caveat on several occasions,³⁵ most recently adding a potentially limiting qualifier—“[a]ssuming for the sake of argument that a right can be ‘clearly established’ by circuit precedent *despite disagreement in the courts of appeals.*”³⁶

The Court has also started to back pedal from earlier precedent suggesting that “a consensus of cases of persuasive authority” from lower courts outside the defendants’ jurisdiction can create clearly established law.³⁷ Justice Scalia’s majority opinion in *al-Kidd* described “a robust ‘consensus of cases of persuasive authority’” as “what is necessary” to support a deni-

32. *Wilson v. Layne*, 526 U.S. 603, 617 (1999).

33. *Reichle v. Howards*, 132 S. Ct. 2088, 2094 (2012).

34. See Karen M. Blum, *Section 1983 Litigation: The Maze, the Mud, and the Madness*, 23 WM. & MARY BILL RTS. J. 913, 955 n.283 (2015) (suggesting that the Court’s “tentativeness . . . made some sense in *Reichle*, where the defendants were federal law enforcement agents who operate nationally,” but was “not so justified” in other cases).

35. See *Taylor v. Barkes*, 135 S. Ct. 2042, 2045 (2015) (per curiam); *Sheehan*, 135 S. Ct. at 1776; *Carroll v. Carman*, 135 S. Ct. 348, 350 (2014) (per curiam).

36. *Taylor*, 135 S. Ct. at 2045 (emphasis added). This Term’s decision in *Mullenix v. Luna*, 136 S. Ct. 305, 310–12 (2015) (per curiam), mentioned at several points that none of the Court’s precedents supported a denial of qualified immunity, but then went on to discuss lower court case law from both the court below and other circuits.

37. *Wilson*, 526 U.S. at 617; cf. *Pearson v. Callahan*, 555 U.S. 223, 244 (2009) (reasoning, in granting qualified immunity, that defendant police officers were “entitled to rely” on decisions from other courts “even though their own Federal Circuit had not yet ruled” on the issue). For other cases relying on a split in the courts of appeals to support granting qualified immunity, see, e.g., *Lane v. Franks*, 134 S. Ct. 2369, 2383 (2014); *Stanton v. Sims*, 134 S. Ct. 3, 5–7 (2013) (per curiam); *Reichle*, 132 S. Ct. at 2096–97; *Safford Unified Sch. Dist. #1 v. Redding*, 557 U.S. 364, 378 (2009).

al of qualified immunity “absent controlling authority.”³⁸ Despite *al-Kidd*’s addition of the qualifier “robust,” the Court as of 2011 therefore seemed to acknowledge that Supreme Court precedent is not required to clearly establish a constitutional right.

The retreat from *al-Kidd* on this front began three years later. In *Plumhoff v. Rickard*, Justice Alito’s majority opinion gratuitously recharacterized *al-Kidd*’s statement as a description of what a § 1983 plaintiff “at a minimum” must show.³⁹ Writing again for the Court last Term in *City and County of San Francisco v. Sheehan*, Justice Alito quoted *al-Kidd*’s “robust consensus” language, but did so in a way that suggested—contrary to *al-Kidd*—that whether such a consensus suffices to overcome a claim of qualified immunity is an open question. Joined by the five other Justices who took a position on qualified immunity, Justice Alito’s opinion in *Sheehan* branded qualified immunity an “exacting standard” and then said: “[f]inally, to the extent that a ‘robust consensus of cases of persuasive authority’ could itself clearly establish the federal right respondent alleges, no such consensus exists here.”⁴⁰ The Court went on to repeat *Sheehan*’s equivocal “consensus” statement in its per curiam ruling in *Taylor v. Barkes*.⁴¹ In none of these three opinions did the Court offer a rationale for its caveats or even recognize that it was departing from precedent.

As a matter of substance, the Court’s recent hints that § 1983 plaintiffs may need controlling Supreme Court precedent to defeat a claim of qualified immunity are troubling because the Court is much less likely to grant review in the absence of a conflict among the lower courts.⁴² As the majority pointed out in *Safford Unified School District #1 v. Redding*, “[t]he unconstitutionality of outrageous conduct obviously will be unconstitutional, this being the reason, as Judge Posner has

38. *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2084 (2011) (quoting *Wilson*, 526 U.S. at 617).

39. *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2023 (2014).

40. *Sheehan*, 135 S. Ct. at 1774, 1778 (citation omitted) (quoting *al-Kidd*, 131 S. Ct. at 2084).

41. See *Taylor*, 135 S. Ct. at 2044.

42. See SUP. CT. R. 10 (noting that the Court grants cert “only for compelling reasons” and listing conflicts in the lower courts among “the character of the reasons the Court considers”); see also David R. Stras, *The Supreme Court’s Gatekeepers: The Role of Law Clerks in the Certiorari Process*, 85 TEX. L. REV. 947, 981–82 (2007) (book review) (reporting that almost seventy percent of the Court’s merits docket during the 2003–2005 Terms was devoted to conflict cases).

said, that “[t]he easiest cases don’t even arise.”⁴³ As a matter of process, the Court’s retreat on this issue is subject to criticism as another example of its tendency to qualify and depart from its precedents without explanation or acknowledgement, and thereby to covertly extend the reach of the qualified immunity defense.

III. COMPARING QUALIFIED IMMUNITY AND THE FOURTH AMENDMENT

A final illustration of the Court’s pattern of silently expanding the qualified immunity defense can be found in last Term’s brief description in *Heien v. North Carolina* of the relationship between qualified immunity and Fourth Amendment standards. Although *Heien* is a criminal case and not a § 1983 suit, the Justices’ opinions describe qualified immunity in very generous terms reminiscent of the qualified immunity decisions analyzed above in Part I.

In prior cases that have addressed the relationship between the Fourth Amendment and qualified immunity, the Court has long equated the qualified immunity inquiry with the analysis used in applying the good-faith exception to the exclusionary rule recognized in *United States v. Leon* and its progeny.⁴⁴ Since its 1986 ruling in *Malley v. Briggs*, the Court has taken the position that “the same standard of objective reasonableness that we applied in the context of a suppression hearing in *Leon* . . . defines the qualified immunity accorded an officer whose request for a warrant allegedly caused an unconstitutional arrest.”⁴⁵ Adopting different standards of reasonableness in these two contexts “would be incongruous,” the *Malley* Court explained, given that the exclusionary rule imposes “a considerable cost to society” by suppressing relevant evidence, whereas a § 1983 suit “imposes a cost directly on the officer responsible . . . without the side effect of hampering a

43. *Safford Unified Sch. Dist. #1 v. Redding*, 557 U.S. 364, 377 (2009) (quoting *K.H. v. Morgan*, 914 F.2d 846, 851 (7th Cir. 1990)).

44. *United States v. Leon*, 468 U.S. 897, 922–23 (1984) (refusing to apply the exclusionary rule where police reasonably rely on a defective warrant); *see also* *Davis v. United States*, 131 S. Ct. 2419, 2424, 2429 (2011) (applying good-faith exception where police reasonably rely on “binding appellate precedent” that is later overturned); *Arizona v. Evans*, 514 U.S. 1, 15–16 (1995) (extending good-faith exception to police reliance on court clerk’s out-of-date computer records); *Illinois v. Krull*, 480 U.S. 340, 349–50 (1987) (applying good-faith exception where police reasonably rely on an unconstitutional statute authorizing warrantless searches).

45. *Malley v. Briggs*, 475 U.S. 335, 344 (1986).

criminal prosecution,” and is therefore more likely to aid individuals “who in fact ha[ve] done no wrong.”⁴⁶ The Court has reiterated the analogy on several occasions, most recently in 2012 in *Messerschmidt v. Millender*.⁴⁷

In *Heien v. North Carolina*, the Court concluded that the reasonable suspicion necessary to justify a stop may be based on a police officer’s reasonable mistake of law.⁴⁸ In response to the concern that the Court’s holding would create an incentive for police to remain ignorant about the law, Chief Justice Roberts’ opinion for the majority remarked that “[t]he Fourth Amendment tolerates only *reasonable* mistakes, and those mistakes—whether of fact or of law—must be *objectively* reasonable.”⁴⁹ On its face, this standard of objective reasonableness seems to resemble *Harlow*’s definition of qualified immunity, but the Chief Justice went on to add that the Fourth Amendment “inquiry is not as forgiving” as the one used in “the distinct context” of qualified immunity and “[t]hus, an officer can gain no Fourth Amendment advantage through a sloppy study of the laws.”⁵⁰

Although the Court’s warning may seem in tension with *Malley*’s description of the relationship between the Fourth Amendment and qualified immunity, the majority opinion in *Heien* distinguished both its qualified immunity precedents and the good-faith exception cases on the ground that in those contexts the Court “had already found or assumed a Fourth Amendment violation” and was “considering the appropriate remedy.”⁵¹ By contrast, *Heien* involved “the antecedent question” whether “there was a violation of the Fourth Amendment

46. *Id. But cf. Krull*, 480 U.S. at 368 (O’Connor, J., dissenting) (questioning the comparison between the good-faith exception and qualified immunity because “suppression of illegally obtained evidence does not implicate [*Harlow*’s] concern” that “individual government officers ought not be subjected to damages suits for arguable constitutional violations”); Orin S. Kerr, *Good Faith, New Law, and the Scope of the Exclusionary Rule*, 99 GEO. L.J. 1077, 1110 (2011) (arguing that the two contexts are “conceptually different” because qualified immunity focuses on the reasonableness of “one institutional player” whereas the good-faith exception focuses on the police “considered as a collective entity”).

47. See *Messerschmidt v. Millender*, 132 S. Ct. 1235, 1245 n.1 (2012); *Groh v. Ramirez*, 540 U.S. 551, 565 n.8 (2004); *id.* at 566 (Kennedy, J., dissenting).

48. *Heien v. North Carolina*, 135 S. Ct. 530, 540 (2014).

49. *Id.* at 539.

50. *Id.* at 539–40.

51. *Id.* at 539.

in the first place.”⁵² Even accepting the Court’s distinction between constitutional rights and remedies, the substantive Fourth Amendment question at issue in *Heien*—whether a police officer had the requisite reasonable suspicion to stop Heien’s car—did not turn on the officer’s understanding of Fourth Amendment principles. Rather, the mistake of law there involved a matter of state criminal law: whether North Carolina required vehicles to have two functioning brake lights. In fact, all nine Justices seemed to agree in *Heien* that a mistake about Fourth Amendment doctrine would have been irrelevant in that case “no matter how reasonable.”⁵³ But if the government actor’s understanding of federal constitutional principles, which forms the core of the inquiry in cases involving qualified immunity and the good-faith exception, was inconsequential in *Heien*, it is not apparent that the *Heien* dictum has much to say about the scope of the qualified immunity defense.

In any event, the *Heien* majority offered no justification for its suggestion that different standards of objective reasonableness govern the Fourth Amendment and qualified immunity, and did not explain in what ways qualified immunity is more “forgiving.” But Justice Kagan, joined by Justice Ginsburg, wrote a concurring opinion that expanded on this point. Quoting *Malley*’s reference to plain incompetence and knowing violations, the two concurring Justices agreed with the majority that the Fourth Amendment’s definition of a reasonable mistake is “more demanding” than the qualified immunity inquiry and then went on to elaborate that the former requires a law that is “genuinely ambiguous,” “so doubtful in construction” that a reasonable judge could agree with the officer’s view.⁵⁴ In

52. *Id.* The Court was presumably referring here to the part of the qualified immunity inquiry that evaluates whether the constitutional right was clearly established and not the question whether the plaintiff suffered any constitutional injury. See *Pearson v. Callahan*, 555 U.S. 223, 232, 236 (2009) (recognizing that the qualified immunity standard encompasses both prongs, but declining to mandate which step courts analyze first).

53. *Heien*, 135 S. Ct. at 539 (“An officer’s mistaken view that the conduct at issue did *not* give rise to [a Fourth Amendment] violation—no matter how reasonable—could not change that ultimate conclusion.”); see also *id.* at 541 n.1 (Kagan, J., concurring) (agreeing with the majority that “an error about the contours of the Fourth Amendment itself . . . can never support a search or seizure”); *id.* at 546 (Sotomayor, J., dissenting) (likewise noting the Court’s “prior assumption” that police have no “leeway” when making mistakes about the Fourth Amendment).

54. *Id.* at 541 (Kagan, J., concurring) (quoting *The Friendship*, 9 F. Cas. 825, 826 (No. 5,125) (C.C. Mass. 1812)).

support of this assertion, Justice Kagan cited the Solicitor General's observation at oral argument that the two standards "require essentially the opposite showings" as well as "a similar point" made in the State of North Carolina's brief.⁵⁵

Starting with the brief filed on behalf of the State, the pages pinpointed by Justice Kagan observed that "what is objectively reasonable for Fourth Amendment purposes is not the same as what is objectively reasonable for qualified immunity purposes."⁵⁶ In support, the State cited the Court's qualified immunity precedents in excessive force cases, which have rejected the argument that qualified immunity and the merits of a Fourth Amendment excessive force claim are "merely duplicative" . . . because both issues "concern the objective reasonableness of the officer's conduct."⁵⁷ Rather, the Court held in *Saucier v. Katz*, law enforcement officials are entitled to qualified immunity if they make a reasonable mistake "as to whether a particular amount of force is legal" in the circumstances confronting them,⁵⁸ explaining further in *Brosseau v. Haugen* that the law governing the permissible use of force is "one in which the result depends very much on the facts of each case."⁵⁹ The Court made a similar point in discussing the Fourth Amendment concept of probable cause in *Anderson v. Creighton*, concluding that qualified immunity protects police officers who "reasonably but mistakenly" believe they have the probable cause needed to search or arrest.⁶⁰ Although the reasoning in these cases can be criticized for "[d]ouble counting 'objective reasonableness,'"⁶¹ if they represent the Justices' views of the difference between Fourth Amendment standards and qualified immunity, *Heien's* impact is limited to a subset of § 1983 cases and the opinion breaks no new ground.

Justice Kagan's concurrence in *Heien* also cited, however, the Solicitor General's statements at oral argument, which

55. *Id.* (quoting Transcript of Oral Argument at 51, *Heien v. North Carolina*, 135 S. Ct. 530 (2014) (No. 13-604), 2014 WL 7661632).

56. Brief for the Respondent at 31, *Heien v. North Carolina*, 135 S. Ct. 530 (2014) (No. 13-604), 2014 WL 3660500.

57. *Id.* at 31–32 (quoting *Saucier v. Katz*, 533 U.S. 194, 200, 203 (2001)).

58. *Saucier*, 533 U.S. at 205.

59. *Brosseau v. Haugen*, 543 U.S. 194, 201 (2004) (per curiam); see also *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (per curiam) (noting that it can be "difficult for an officer to determine" how the standards governing excessive force "apply to the factual situation the officer confronts" (quoting *Saucier*, 533 U.S. at 205)).

60. *Anderson v. Creighton*, 483 U.S. 635, 641 (1987).

61. *Saucier*, 533 U.S. at 214 (Ginsburg, J., concurring in the judgment).

made a different point. In describing how qualified immunity and the Fourth Amendment are “opposite,” the Solicitor General, quoting *Malley*’s familiar refrain, maintained that the Fourth Amendment would not deem an officer’s mistake of law reasonable absent some “affirmative[] support[]” for the error “in the statute,” whereas law enforcement officials are entitled to qualified immunity unless “a precedent . . . forecloses” their actions.⁶² This proposition is potentially more troubling and may open the door to a more general expansion of the qualified immunity defense. If the Solicitor General was merely pointing out that the reasonable belief inquiry in cases like *Heien* focuses on officers’ understanding of state criminal statutes, as opposed to their understanding of federal constitutional case law, that is undeniably correct. But that unremarkable observation does not justify the Justices’ view that, in evaluating the reasonableness of an officer’s beliefs, one standard is more “forgiving” or “demanding” than the other.

Alternatively, then, the Solicitor General may have been implying that the tie goes to the police officer in qualified immunity cases but not in Fourth Amendment cases like *Heien*—which is consistent with Justice Kagan’s observation that the ruling in *Heien* would deem police officers’ erroneous understanding of state law to be reasonable only in “exceedingly rare” cases involving a “genuinely ambiguous” statute, whereas their mistakes about federal constitutional law are considered reasonable for qualified immunity purposes except in the presumably unusual circumstances of plain incompetence or knowing violations of Fourth Amendment norms.⁶³ But it is not obvious why law enforcement officials should enjoy a presumption in some contexts but not others. After all, the Court has never decided which party in a § 1983 suit shoulders the burden of proof on qualified immunity,⁶⁴ and in fact described the defense in *Elder v. Holloway* as raising “a question of law, not one of legal facts.”⁶⁵ And if the argument is that the Court has explic-

62. Transcript of Oral Argument, *supra* note 55, at 51.

63. *Heien v. North Carolina*, 135 S. Ct. 530, 541 (2014) (Kagan, J., concurring) (quoting Brief for the Respondent, *supra* note 56, at 17; Transcript of Oral Argument, *supra* note 55, at 48).

64. *See Harlow v. Fitzgerald*, 457 U.S. 800, 815 n.24 (1982) (expressly leaving this question open).

65. *Elder v. Holloway*, 510 U.S. 510, 516 (1994). Although *Elder* arguably should have “finally put to rest” descriptions of qualified immunity in language “implicating evidentiary and related burden of proof considerations,” 2 SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 § 8.96, at 8-614 (4th ed. 2015), lower courts continue to talk in terms of burden of proof, generally requiring plaintiffs to establish that

itly applied a balancing test in defining the qualified immunity defense and good-faith exception,⁶⁶ some Supreme Court opinions have also described substantive Fourth Amendment analysis in balancing-test terms—in fact, on the express grounds that “[t]he touchstone of the Fourth Amendment is reasonableness.”⁶⁷ Accordingly, the Court has provided no justification for using varying standards to measure the “objective reasonableness” of a police officer’s beliefs.⁶⁸

Given the Court’s distinction between Fourth Amendment rights and remedies, *Heien* may not signal a retreat from the precedents analogizing qualified immunity and the good-faith exception to the exclusionary rule. Nevertheless, the Justices’ amorphous suggestion that qualified immunity is a “forgiving” rather than “demanding” standard—and the implication that public officials who make “sloppy” errors may nevertheless satisfy qualified immunity’s objective reasonableness inquiry—mirror the change in the tone used to characterize the qualified immunity defense that is discussed in Part I. Justice Sotomayor, dissenting in *Heien*, criticized the majority’s insistence on leaving “undefined” the objective reasonableness standard it was endorsing in that case as well as the failure to “elaborat[e]” on the distinction between that Fourth Amendment standard and the qualified immunity inquiry, predicting that the difference “will prove murky in application.”⁶⁹ Given the Court’s tendency to qualify its precedents and thereby covertly expand the qualified immunity defense, it would not be at all surprising to find future § 1983 decisions citing *Heien* in referring to qualified immunity as a “forgiving” defense and in dismissing a government actor’s misunderstanding of constitutional doctrine as merely “sloppy” rather than “plainly incom-

the constitutional right in question was clearly established. See 2 RODNEY A. SMOLLA, FEDERAL CIVIL RIGHTS ACTS § 14:54 (3d ed. 2010).

66. See *United States v. Leon*, 468 U.S. 897, 906–07 (1984); *Harlow*, 457 U.S. at 813–14.

67. *Samson v. California*, 547 U.S. 843, 855 n.4 (2006); see also *Maryland v. King*, 133 S. Ct. 1958, 1969 (2013); *United States v. Knights*, 534 U.S. 112, 118–19 (2001).

68. Cf. John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 89 (1999) (“Generally speaking, the kind of fault required [in constitutional tort suits] is negligence with respect to illegality.”). But cf. Jennifer E. Laurin, *Trawling for Herring: Lessons in Doctrinal Borrowing and Convergence*, 111 COLUM. L. REV. 670, 726 & n.283 (2011) (taking the contrary view that the Court’s qualified immunity cases “approach[] a standard sounding more in gross negligence or recklessness”).

69. *Heien v. North Carolina*, 135 S. Ct. 530, 547 (2014) (Sotomayor, J., dissenting).

petent.”

CONCLUSION

In recent years, the Supreme Court opinions applying the qualified immunity defense have engaged in a pattern of describing the defense in increasingly generous terms and qualifying and deviating from past precedent—without offering any justification or even acknowledgement of the Court’s departure from prior case law. These gratuitous, seemingly off-the-cuff remarks have then taken on a life of their own and have been reiterated in later opinions, often issued summarily without the benefit of briefing and oral argument. The clandestine manner in which this retreat has been accomplished is especially troubling because, despite the fact that constitutional tort suits against state officials are based on federal statute, qualified immunity is a doctrine—and a limitation on that statute—that is entirely the Court’s creation, devoid of support in § 1983’s legislative history.

Perhaps most problematic are the caveats in recent decisions that could conceivably set the stage for a ruling that § 1983 plaintiffs can avoid qualified immunity only if they can point to Supreme Court precedent supporting the constitutional right they are asserting. An outright holding that only the Supreme Court can create clearly established law would obviously be binding on lower courts and would prove fatal to many constitutional tort suits. But terminology and tone matter as well, and the increasingly broad brush the Supreme Court uses in characterizing the qualified immunity defense is not likely to escape the attention of government actors seeking immunity or the lower courts tasked with resolving their claims.