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“Specializing” Section 1983

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Recent Supreme Court decisions eroding protections for race-class-gender subjugated rights claimants have drummed up alarm about the legitimacy of the Court. Much discussion focuses on the need to reform the Court, reflecting a widely shared belief that the institution is inclined to abjure checks on the coercive apparatus and punishment bureaucracy (e.g., police) while failing to vindicate the rights of disadvantaged groups. The lower federal courts, however, while not only implementing the Supreme Court’s rights-retrenching decisions but, in some cases, dipping below the floor of protection the Court itself has recognized, have received relatively scant attention. This vacuum persists despite the fact most of the content of federal law is developed in the lower courts. This Article attempts to fill this void by exploring the desirability of Congress establishing a specialized federal appellate court with exclusive jurisdiction over cases brought under 42 U.S.C. § 1983, which I refer to as “specializing” Section 1983.

Many court reform proposals face obstacles because they have a political valence that serves as an impediment to their implementation at a time when there is intense political polarization. To ignore the complexities of the political economy into which any court reform proposal would be air-dropped would plainly be shortsighted. I therefore suggest an alternative focused on lower federal courts that does not overtly favor either civil rights plaintiffs or governmental defendants; instead, the proposal is driven by neutral principles that will not only bring about neutral benefits but will also eliminate the unfair and one-sided aspects of current qualified immunity doctrine that disproportionately favors governmental defendants.

I suggest that specializing Section 1983 will develop subject-matter expertise in Section 1983 cases, which is (neutrally) good because expertise enhances the quality of judicial decision-making. This expertise will in turn lead to more efficient disposition of Section 1983 cases where qualified immunity is invoked—a neutral benefit. Most notably, the proposed court would establish uniform, nationwide law. Currently, splintered decisions from different regional courts of appeals create an artificial constraint on plaintiffs’ ability to overcome qualified immunity. The uniform, nationwide law would address such fragmentation and aid in generating clearly established law to bring some internal coherence to the qualified immunity doctrine.

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INTRODUCTION

Amidst a flurry of recent Supreme Court decisions eroding protections once thought anchored in the United States Constitution,¹ the Court has plunged itself into the depths of sociological illegitimacy.² With the legitimacy of the institution under siege,³ commentators have raised the temperature about the need to reimagine the Court’s institutional design.⁴ Reform ideas such as “court-packing”⁵ and stripping the Justices of life tenure⁶ are all the rage.⁷ The lower federal courts, however, while not only implementing the Supreme Court’s rights-retrenching decisions but, in some cases, dipping below the floor of protection the Court itself

1. See, e.g., *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022) (Thomas, J., concurring) (eliminating the Constitutional right to an abortion); *Vega v. Tekoh*, 597 U.S. 134 (2022) (holding that the right to be read Miranda warnings is not a right preserved by the Constitution for purposes of a Section 1983 suit).

2. Legal scholars distinguish between sociological, moral, and legal legitimacy. Sociological legitimacy concerns reactions to court decisions from outsiders. In this Article, I shall use the term “legitimacy” to refer to sociological legitimacy unless otherwise noted. For more on sociological legitimacy, see Tara Leigh Grove, *Sacrificing Legitimacy in a Hierarchical Judiciary*, 121 COLUM. L. REV. 1555, 1561, 1565.

3. See Peter Coy, Opinion, *The Politicization of the Supreme Court Is Eroding Its Legitimacy*, N.Y. TIMES (June 27, 2022), <https://www.nytimes.com/2022/06/27/opinion/dobbs-supreme-court-legitimacy.html> [<https://perma.cc/C2BK-KUEV>].

4. Even before the Supreme Court’s scorched-earth decisions as it recessed for the October 2021 term, calls to reform the Court had already been circulating. See Press Release, The White House, President Biden to Sign Executive Order Creating the Presidential Commission on the Supreme Court of the United States (Apr. 9, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/09/president-biden-to-sign-executive-order-creating-the-presidential-commission-on-the-supreme-court-of-the-united-states/> [<https://perma.cc/C4XK-WJJ9>]. For the idea that support for Court reform intensified as the Court approached recess, see Christopher Cadelago, *Biden Urged to Take a Blowtorch to the Court After Roe Ruling*, POLITICO (June 24, 2022, 5:47 PM EDT), <https://www.politico.com/news/2022/06/24/biden-supreme-court-roe-00042376> [<https://perma.cc/SW4V-LBBC>].

5. Court-packing is shorthand for increasing the number of Justices on the Court to tilt the institution’s ideological axis. See Giulia Carbonaro, *Joe Biden Clashes with Progressives Over Supreme Court Expansion*, NEWSWEEK (June 27, 2022, 7:18 AM EDT), <https://www.newsweek.com/joe-biden-clashes-progressives-over-supreme-court-expansion-1719358> [<https://perma.cc/WV79-GH2T>]; David A. Graham, *The Democrats Discover the Supreme Court*, ATLANTIC (June 4, 2019), <https://www.theatlantic.com/ideas/archive/2019/06/buttigieg-supreme-court-plan-and-democratic-party/590905/> [<https://perma.cc/V5GG-JVZ7>] (describing court-packing plan proposed by then-Mayor Pete Buttigieg); Amelia Thomson-DeVeaux and Michael Tabb, *Is It Time to Expand the Supreme Court?*, FIVETHIRTYEIGHT (April 22, 2022), <https://fivethirtyeight.com/videos/is-it-time-to-expand-the-supreme-court/> [<https://perma.cc/9ZT7-FTEC>] (explaining that Democrats might wish to resort to the “pull-the-fire-alarm solution” by adding more Justices to the Supreme Court).

6. See Sophia Cai, *First Look: Ro Khanna to Push Biden to Back SCOTUS Term Limits*, AXIOS (June 25, 2022), <https://www.axios.com/2022/06/25/first-look-ro-khanna-to-push-biden-to-back-scotus-term-limits> [<https://perma.cc/LVP5-W4B6>]; ERWIN CHEREMINSKY, *THE CASE AGAINST THE SUPREME COURT* 310–12 (2014); James E. DiTullio & John B. Schochet, Note, *Saving This Honorable Court: A Proposal to Replace Life Tenure for the Supreme Court with Staggered, Nonrenewable Eighteen-Year Terms*, 90 VA. L. REV. 1093, 1094–98 (2004).

7. See Siladitya Ray, *Two-Thirds of Americans Want Term Limits for Supreme Court Justices, Poll Finds*, FORBES (July 24, 2022, 8:25 AM EDT), <https://www.forbes.com/sites/siladityaray/2022/07/25/more-than-two-thirds-of-americans-want-term-limits-for-supreme-court-justices-poll-finds/?sh=60e0b38f6d66> [<https://perma.cc/E7LU-5MKZ>].

has recognized, have received relatively scant attention.⁸ This vacuum persists despite the fact most of the content of federal law is developed in the lower courts.⁹ Recent decisions there also indicate growing hostility toward unpopular and disadvantaged rights claimants.¹⁰ This Article attempts to fill this void by exploring the desirability of Congress establishing a specialized federal appellate court with exclusive jurisdiction over cases brought under 42 U.S.C. § 1983, which I refer to as “specializing” Section 1983.

Here, I want to sketch the parameters of my argument along two dimensions: *First*, I bracket a broader, substantive analysis of the numerous issues that arise under Section 1983, such as absolute immunity,¹¹ abstention,¹² and exhaustion.¹³ I more modestly aim to operate on a narrower conceptual ground. I focus specifically on how “specializing” Section 1983 might impact the doctrine of qualified immunity in suits against state and local officials. While qualified immunity can also be invoked in suits against federal officials (or *Bivens* claims)¹⁴—indeed, the doctrine got its modern gloss in such a case¹⁵—local police have a monopoly in carrying out the state’s police power.¹⁶ So, it makes sense to limit the scope in this way.

8. Prior work on the need to focus on lower court reform includes Merritt E. McAlister, *Rebuilding the Federal Circuit Courts*, 116 NW. U. L. REV. 1133, 1137 (2022) (urging Congress “to engage in lower court reform by adding judges to the underresourced federal appellate courts”); Peter S. Menell & Ryan Vacca, *Revisiting and Confronting the Federal Judiciary Capacity “Crisis”: Charting a Path for Federal Judiciary Reform*, 108 CALIF. L. REV. 789, 790 (2020) (suggesting reform to lower federal courts to address “the growing caseload and congestion problems plaguing the federal judiciary”).

9. See e.g. Ilya Somin, *Qualified Immunity Reform Stalls in the States – and in the Supreme Court*, VOLOKH CONSPIRACY (Oct. 19, 2021, 4:16 PM), <https://reason.com/volokh/2021/10/19/qualified-immunity-reform-stalls-in-the-states-and-in-the-supreme-court/> [<https://perma.cc/BYH9-5392>].

10. See Perry Bacon, Jr., *The Most Dangerous Conservative Judges Aren’t on the Supreme Court*, WASH. POST (Dec. 21, 2021, 5:24 AM), <https://www.washingtonpost.com/opinions/2021/12/21/most-dangerous-conservative-judges-arent-supreme-court/> [<https://perma.cc/J3MT-LSZ6>].

11. See David H. Gans, *Repairing Our System of Constitutional Accountability: Reflections on the 150th Anniversary of Section 1983*, CARDOZO L. REV. DE-NOVO 90, 93 (2022) (“As sweeping as qualified immunity has become, the Supreme Court has held that for some government actors, most notably prosecutors, qualified immunity is not protective enough. Instead, in the Court’s view, prosecutors must be shielded by absolute immunity when acting as advocates, effectively negating the remedy Congress sought to create in enacting Section 1983.”).

12. Abstention refers to a series of judge-made rules regarding the circumstances under which federal courts abstain from adjudicating cases that would otherwise fall within their jurisdiction. The most notable rule is called the *Younger* doctrine, which says that federal courts cannot enjoin an ongoing state criminal prosecution. *Younger v. Harris*, 401 U.S. 37 (1971). This means that plaintiffs contemplating Section 1983 suits against a government official being prosecuted in state court must wait until the resolution of the state action before proceeding with their case.

13. Exhaustion is the rule that a plaintiff with several remedial options must pursue certain ones first (or “exhaust” those remedies). In *Patsy v. Board of Regents of State of Fla.*, the Supreme Court held that “[b]ased on the legislative histories of both § 1983 and § 1997e, we conclude that exhaustion of state administrative remedies should not be required as a prerequisite to bringing an action pursuant to § 1983.” *Patsy v. Board of Regents of State of Fla.*, 457 U.S. 496, 516 (1982).

14. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

15. See *infra* note 63 and accompanying text.

16. Peter H. Schuck, *Municipal Liability Under Section 1983: Some Lessons from Tort Law and Organization Theory*, 77 GEO. L.J. 1753, 1780 (1989).

Qualified immunity is a judge-made doctrine.¹⁷ It shields state (and federal) officials from damages in civil rights suits alleging misconduct of a constitutional dimension unless any objectively reasonable officer in their position would have recognized not only that their conduct was unlawful but that it violated clearly established law.¹⁸ Qualified immunity became a national flashpoint after Minneapolis cops killed George Floyd in 2020.¹⁹ It is the rare issue for which there is bipartisan agreement that it is untenable.²⁰ Commentators argue, for instance, that its two-part test requiring a plaintiff to show the defendant has breached a “clearly established” constitutional right²¹ to proceed with a suit often functions as an “absolute shield” for government officials.²² They also contend that it improperly immunizes defendants from responsibility for a host of grave misconduct, including homicide.²³ But widespread concerns about the doctrine have not resulted in meaningful action toward reforming or abolishing it.

By focusing on qualified immunity for this inquiry, I do not mean to suggest issues such as exhaustion, abstention, and absolute immunity are undeserving of sustained scholarly attention. Quite the opposite. Instead, as an initial matter, this broad range of issues implicates questions beyond the scope of a single law review article (or, at least, this one). Moreover, many commentators agree that of Section 1983’s accoutrements, qualified immunity is the most consequential to the widening rights-remedies gap that

17. See, e.g., Taylor Kordsiemon, *Challenging the Constitutionality of Qualified Immunity*, 25 U. PA. J. CONST. L. 576, 606 (2023) (“First, qualified immunity is a judge-made doctrine, and the available historical evidence indicates that it was not intended to include qualified immunity as a defense at all”) (citation omitted).

18. See Catherine Mims Crocker, *Qualified Immunity, Sovereign Immunity, and Systemic Reform*, 71 DUKE L.J. 1701, 1713 (2022) (explaining qualified immunity’s scope as limited to federal civil claims brought to vindicate rights under the U.S. Constitution). Qualified immunity shields *individual* government officials—excluding judges and prosecutors who are entitled to absolute immunity—from civil damages. Qualified immunity can also be invoked in suits against federal officials alleging constitutional violations, or what are known for as “*Bivens*” suits. See also Andrew Kent, *Lessons for Bivens and Qualified Immunity Debates from Nineteenth-Century Damages Litigation Against Federal Officers*, 96 NOTRE DAME L. REV. 1755 (2021).

19. See Crocker, *supra* note 18, at 1701 (“Qualified immunity has become a central target of the movement for police reform and racial justice since George Floyd’s murder.”); Madeleine Carlisle, *The Debate Over Qualified Immunity Is at the Heart of Police Reform. Here’s What to Know*, TIME (June 3, 2021, 6:35 PM), <https://time.com/6061624/what-is-qualified-immunity/> [<https://perma.cc/NXU9-AX8M>].

20. See Joanna C. Schwartz, *After Qualified Immunity*, 120 COLUM. L. REV. 309, 309 (2020) (“Courts, scholars, and advocacy organizations across the political spectrum are calling on the Supreme Court to limit qualified immunity or do away with the defense altogether.”).

21. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

22. In a recent Supreme Court case involving a Fourth Amendment claim of excessive force, Justice Sonia Sotomayor voiced her frustration with the qualified immunity doctrine explaining that the Court’s pattern of reversing denials of qualified immunity “transforms the doctrine into an absolute shield for law enforcement officers, gutting the deterrent effect of the Fourth Amendment.” *Kisela v. Hughes*, 584 U.S. 100, 121 (2018) (Sotomayor, J., dissenting).

23. The Editorial Board, *How the Supreme Court Lets Cops Get Away with Murder*, N.Y. TIMES (May 29, 2020), <https://www.nytimes.com/2020/05/29/opinion/Minneapolis-police-George-Floyd.html?action=click&module=RelatedLinks&pgtype=Article> [<https://perma.cc/D86N-MP6B>] (“In the five decades since the doctrine’s invention, qualified immunity has expanded in practice to excuse all manner of police misconduct, from assault to homicide.”).

has caused widespread skepticism that the judiciary is a nonpolitical actor serving to protect the disadvantaged from majoritarian oppression.²⁴

Amid the demonstrations that followed George Floyd's killing, heady optimism was in the air that courts or legislative bodies would reform or abolish qualified immunity.²⁵ But the current picture appears to be that direct elimination—or even a minor corrective to the unfairly one-sided doctrine in favor of governmental officials—will not occur.²⁶ Qualified immunity has instead strengthened at the steep cost of chipping away at the constitutional rights of disadvantaged groups. Though it has been little recognized, a significant amount of the widening of the rights-remedies gap through qualified immunity in Section 1983 cases takes place in the lower federal court trenches. Part of the reason is the Supreme Court's overall shrinking docket,²⁷ resulting not only in fewer decisions generally from that Court but fewer decisions that clearly establish the contours of constitutional rights in various factual contexts. And more specifically, the Court rarely reviews qualified immunity cases on the full merits.²⁸ On the rare occasion the Court exercises plenary review on a case concerning qualified immunity, it often complicates rather than clarifies the governing law.²⁹

A more common occurrence is that the Court issues summary reversals or lets perplexing lower court decisions in favor of the government stand without further review. This means that judgments entered by lower federal appellate courts dramatically reshaped by former President Donald J. Trump usually have the last say on qualified immunity issues.³⁰ And the outcome of the cases typically does not

24. See Hailey Fuchs, *Qualified Immunity Protection for Police Emerges as Flash Point Amid Protests*, N.Y. TIMES (June 23, 2020), <https://www.nytimes.com/2020/06/23/us/politics/qualified-immunity.html> [https://perma.cc/Y65D-SHMB].

25. See Somin, *supra* note 9 (“Nationwide protests against police abuses in the wake of the death of George Floyd raised hopes that the resulting backlash could lead to the abolition of qualified immunity . . .”).

26. See Jay Schweikert, *Supreme Court Reaffirms Unwillingness to Reconsider Qualified Immunity*, CATO INSTITUTE (October 22, 2021), <https://www.cato.org/blog/supreme-court-reaffirms-unwillingness-reconsider-qualified-immunity> [https://perma.cc/5HRD-XVM3]; Marianne Levine & Nicholas Wu, *Lawmakers Scrap Qualified Immunity Deal in Police Reform*, POLITICO (August 2021), <https://www.politico.com/news/2021/08/17/lawmakers-immunity-police-reform-talks-505671> [https://perma.cc/ZSC9-SMBP].

27. See STEPHEN VLADECK, *THE SHADOW DOCKET: HOW THE SUPREME COURT USES STEALTH RULINGS TO AMASS POWER AND UNDERMINE THE REPUBLIC* 18 (2023) (“[A]s the shadow docket has grown, the merits docket has shrunk, giving the Justices less time and fewer resources with which to conduct plenary review in cases not presenting real or conjured emergencies.”).

28. See David M. Greenwald, *Supreme Court Makes Qualified Immunity a Big Winner This Term*, DAVIS VANGUARD (July 6, 2022), <https://www.davisvanguard.org/2022/07/supreme-court-makes-qualified-immunity-a-big-winner-this-term/> [https://web.archive.org/web/20231211070617/https://www.davisvanguard.org/2022/07/supreme-court-makes-qualified-immunity-a-big-winner-this-term/].

29. John C. Jeffries, Jr., *What's Wrong with Qualified Immunity?*, 62 FLA. L. REV. 851, 852 (2010) (explaining that the Court's qualified immunity decisions send mixed signals); Karen M. Blum, *Section 1983 Litigation: The Maze, the Mud, and the Madness*, 23 WM. & MARY BILL RTS. J. 913, 946 (2015) (describing the Court's review of Ninth and Eleventh Circuit cases as sending “mixed signals”).

30. Rebecca R. Ruiz, Robert Gebeloff, Steve Elder & Ben Protess, *A Conservative Agenda Unleashed on the Federal Courts*, N.Y. TIMES (March 14, 2020), <https://www.nytimes.com/2020/03/14/us/trump-appeals-court-judges.html> [https://perma.cc/5HRV-F3N8].

augur well for disadvantaged groups.³¹ Based on all this evidence, exploring whether a specialized federal court of appeals with exclusive jurisdiction over Section 1983 suits might play a meaningful mitigation function to rein in qualified immunity’s worst excesses provides fertile territory for this inquiry.

Second, my inquiry is necessarily provisional. I do not intend to draw watertight conclusions. An *ex-post* empirical analysis is usually required to evaluate more determinatively whether court specialization is beneficial.³² Assume for a moment that the proposed specialized court was to be established. It could be compared to how its generalist counterpart operated prior to specialization to determine whether the specialized court is institutionally superior. Alternatively, it could be compared to how its generalist counterpart operates if the specialized tribunal has not been vested with exclusive jurisdiction over a particular area of law. But without the benefit of hindsight, any analysis of whether the specialized court is institutionally superior to its generalist counterpart is necessarily speculative and contingent.³³

Despite the dearth of concrete *ex-ante* support for founding specialized courts, these courts exist, and courts are trending toward specialization.³⁴ My primary aim is thus to provide hypotheses that might inform the choice between the status quo regime in which Section 1983 appeals at the federal appellate level are heard by the regional courts of appeals and one in which a specialized court has exclusive jurisdiction over those cases. The hope is that the proposal might open a conceptual space for efforts to reimagine the institutional design of the federal judiciary amidst the growing calls for court reform.

My inquiry proceeds by exploring whether, in the adjudication of qualified immunity cases, specialization offers the potential of enhancing efficiency, quality, and uniformity or what political scientist Laurence Baum refers to as the neutral virtues of court specialization.³⁵ Many court reform proposals are overtly political and, unfortunately, at least at the moment, seem unlikely to prevail.³⁶ To ignore the complexities of the political economy into which any court reform proposal would be air-dropped would plainly be shortsighted.³⁷ I therefore suggest an alternative

31. See, e.g., *Ramirez v. Guadarrama*, 2 F.4th 506 (5th Cir. 2021); *Cope v. Cogdill*, 3 F.4th 198 (5th Cir. 2021).

32. See Chad M. Oldfather, *Judging, Expertise, and the Rule of Law*, 89 WASH. U. L. REV. 847, 849 (2012) (“Many of the questions involved in” an analysis of specialized courts “are ultimately empirical in nature . . .”).

33. *Id.* at 867 (“Predicting the relative impacts of specialization versus generalism . . . necessarily a speculative and contingent matter.”).

34. *Id.* at 848 (explaining that there is a “larger trend toward specialization” but “the Iconic American judge remains a generalist. She sits on a court of general jurisdiction and adjudicates whatever disputes happen to come before her.”).

35. LAURENCE BAUM, *SPECIALIZING THE COURTS* 218 (2011).

36. Jeffrey L. Fisher, *The Supreme Court Reform that Could Actually Win Bipartisan Support*, POLITICO (July 21, 2022), <https://www.politico.com/news/magazine/2022/07/21/supreme-court-reform-term-limits-00046883> [<https://perma.cc/HS29-SJLN>] (“Many proposals have an overt, or at least implicit, partisan slant.”).

37. JAMAL GREENE, *HOW RIGHTS WENT WRONG: WHY OUR OBSESSION WITH RIGHTS IS*

focused on lower federal courts that does not overtly favor either civil rights plaintiffs or governmental defendants; instead, the proposal is driven by neutral principles that will not only bring about neutral benefits but will also eliminate the unfair and one-sided aspects of current qualified immunity doctrine that disproportionately favors governmental defendants.

Why might uniformity, for instance, be desirable in Section 1983 suits, a context in which qualified immunity is almost inevitably raised and frequently serves to preclude relief? Because defendants in Section 1983 suits are *intrastate* actors, operating within a single state and thus within a single regional federal circuit, it is not initially clear that resolving disagreements between the circuits in such cases is an unusually pressing need.³⁸ But under the current arrangement, whenever the law is not clearly established within a particular circuit, it is unlikely that the court of appeals will recognize the law as clearly established (or clearly establish the law). The reason is that the Supreme Court has said in qualified immunity cases that the constitutionality of the alleged violation must be “beyond debate.”³⁹ And because there are likely to be divergent opinions from the eleven other courts of appeal, disagreement among the circuits is thus often treated as evidence that there is an ongoing debate on the constitutional question and that “it is unfair to subject police to money damages for picking the losing side of the controversy.”⁴⁰

This means a particularly conservative circuit or panel can wield outsized influence. It can do so by muddying what might otherwise be clear if any kind of out-of-circuit conflict can be used as evidence that the law is not actually clearly established. The qualified immunity standard thus gives disproportionate power to courts that are skeptical of civil rights plaintiffs and inclined to shield governmental defendants, given that the standard is not the preponderance of judicial views but the absence of any dispute.

To better appreciate this point, assume that John Doe has been employed in New Jersey for twenty-five years as a police officer and is sued under Section 1983. Assume further that Third Circuit law, which governs New Jersey, is replete with cases that make clear the alleged violation is unconstitutional and that any reasonable officer within the circuit would have had fair notice that their conduct violated that clearly established law. Even so, a federal court of appeal may nevertheless conclude that the unlawfulness of conduct such as John Doe’s is not clearly established because an Eleventh Circuit panel, for example, had adopted a different legal interpretation. But it is not obvious why interpretations of the law in

TEARING AMERICA APART 164 (2021) (“We should fully expect partisan concerns to dominate judicial nominations in a system that takes the American approach to rights.”).

38. See Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1597 (2008) (“Uniformity is claimed to be especially important to multi-state actors, who will be forced to comply with multiple, possibly even conflicting, legal rules when courts differ over the meaning of federal law.”).

39. *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011).

40. *Reichle v. Howards*, 566 U.S. 658, 669–70 (2012) (quoting *Wilson v. Layne*, 526 U.S. 603, 618 (1999)).

distant circuits should bear on whether intrastate actors are fully apprised of the legality of their conduct within the circuit in which their conduct will be measured, assuming the law governing their conduct in the circuit where they act is clear. Accordingly, a potential benefit of “specializing” Section 1983 suits is that consolidating appellate cases into a single circuit could aid in curtailing the problematic reliance on circuit rifts to circumscribe remedies for civil rights claimants.⁴¹

The Article is organized in three Parts. Part I contains the load-bearing pieces. Part I.A briefly outlines the events that have seeded the perception that the Court is illegitimate and overdue for reform. Part I.B suggests that reform efforts focusing narrowly on the Supreme Court miss the full scope of the problem for two reasons: First, the Court is exercising plenary review over a small number of cases, fewer each year, which means that lower federal courts have increasing say on the content of federal law. The Court addresses too few Section 1983 cases to create much in the way of clearly established law at a national level—and when it does address Section 1983 cases, it is overwhelmingly to hold that qualified immunity should have been granted rather than to establish the contours of viable constitutional claims.⁴² Second, the content of federal law has increasingly become more hostile to disempowered groups since former President Trump reshaped the lower federal courts in a dramatic way toward those less inclined to recognize constitutional violations, let alone clearly established violations.

Part II provides background on court specialization. With this foundation in place, the succeeding part directly addresses court specialization in the form of a federal appellate circuit specifically tasked with resolving all appeals of cases in which a claim is asserted under Section 1983 by way of a certified question procedure.⁴³ That is, any general-jurisdiction court tasked with hearing an appeal involving Section 1983 and other issues would hold the case in abeyance pending an answer from the specialized court on how to dispose of the Section 1983 claim. Part III offers preliminary hypotheses about the desirability of establishing a specialized federal appellate court with exclusive jurisdiction over Section 1983 suits. It then considers and responds to potential objections, including a general resistance to specialization in the lower federal courts.⁴⁴ Lastly, I suggest that a specialized Section 1983 court might plausibly be situated within the tradition of

41. See Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L. J. 2, 58 (2017) (“Many have argued, and I agree, that the Court’s qualified immunity doctrine puts a heavy thumb on the scale in favor of government interests, and disregards the interests of individuals whose rights have been violated.”) (internal citation omitted).

42. See generally, Scott A. Keller, *Qualified Immunity and Absolute Immunity at Common Law*, 73 STAN. L. REV. 1337 (2021).

43. For a thorough discussion on certified question procedure, see, e.g., Kevin G. Crennan, *The Viability of Certification in Federal Appellate Procedure*, 52 WM. & MARY L. REV. 2025 (2011).

44. BAUM, *supra* note 35, at 216 (“Conversion of the federal district courts or courts of appeals into courts that are specialized by subject matter would constitute a major alteration in the structure of government, an alteration that would conflict sharply with many people’s conceptions of what the courts should be like. Any attempt to enact such a change would be saddled with a very strong burden of proof.”).

antislavery courts. These courts operated in the early to mid-nineteenth century to end the international slave trade.⁴⁵ Policymakers have historically drawn heavily upon the model of prior or existing specialized courts to establish new ones.⁴⁶ The historical precedent of antislavery courts therefore suggests that specializing Section 1983 is less experimental than it might first appear.

I. THE SUPREME COURT IS NOT ALONE: HOW LOWER FEDERAL COURTS HAVE FURTHERED RIGHTS RETRENCHMENT

A. Requiem for the Court

During the heyday of the civil rights revolution of the 1950s and 1960s,⁴⁷ the Supreme Court played a large role in recognizing protections for politically and socially marginalized groups. It recognized the right to marry interracial,⁴⁸ the right to contraception,⁴⁹ the right to welfare benefits,⁵⁰ the right to remain silent,⁵¹ the right to a government lawyer for indigent criminal defendants,⁵² and more. The Court also devised a robust system of constitutional remedies to “bind police officers, prison officials, prosecutors, state trial court judges, and frontline bureaucrats” when those rights were threatened or breached.⁵³ Since 1969 when the Court’s ideological axis shifted to a conservative majority,⁵⁴ those gains have

45. See Jenny S. Martinez, *Antislavery Courts and the Dawn of International Human Rights Law*, 117 YALE L.J. 550 (2008) (discussing the near-forgotten history of the antislavery courts as an example of the earliest form of international human rights advocacy in action).

46. See *infra* note 230.

47. I distinguish the civil rights movement of the 1950s and 1960s from that which followed the end of the Civil War during Reconstruction.

48. *Loving v. Virginia*, 388 U.S. 1 (1967) (invalidating laws banning interracial marriage as a violation of the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the Constitution).

49. *Griswold v. Connecticut*, 381 U.S. 479 (1965) (invalidating state restrictions prohibiting married couples’ access to contraception).

50. *Goldberg v. Kelly*, 397 U.S. 254 (1974) (ruling that the Due Process Clause of the Fourteenth Amendment requires recipients of welfare benefits to be afforded an evidentiary hearing before such benefits are terminated).

51. *Miranda v. Arizona*, 384 U.S. 436 (1966) (holding that the Fifth Amendment’s protection against self-incrimination requires, among other things, police officers to inform people subject to custodial interrogation of their right to remain silent).

52. *Gideon v. Wainwright*, 372 U.S. 335 (1963) (holding that the Sixth Amendment requires that indigent criminal defendants be provided an attorney if they cannot afford one).

53. Aziz Huq, *Judicial Independence and the Rationing of Constitutional Remedies*, 65 DUKE L.J. 1, 3 (2015) (citing MORTON J. HOROWITZ, *THE WARREN COURT AND THE PURSUIT OF JUSTICE* (1998)). A growing body of literature recognizes that “what to do about a completed or threatened violation of law” is “distinct from the question of whether there has been or is about to be a violation.” Douglas Laycock, *How Remedies Became a Field: A History*, 27 REV. LITIG. 161, 164–65 (2008). Thus, the Article concerns the Court’s remedial function as well as its rights-defining function.

54. See ERWIN CHERMERINSKY, *PRESUMED GUILTY: HOW THE SUPREME COURT EMPOWERED THE POLICE AND SUBVERTED CIVIL RIGHTS* at 162–63 (2021) (explaining that the Warren Court’s progressive orientation was an outlier in the U.S. Supreme Court’s history. Moreover, after Justice Warren Burger replaced Justice Earl Warren as Chief, the Court’s ideological axis shifted to the right and paved the way for even more conservative Courts.).

crumbled beneath the weight of an increasingly conservative Court.⁵⁵

Powering the machinery of the Court’s retrenchment across a large swath of cases is a purported commitment to the judicial philosophy of originalism. The recent Court has overtly (and controversially⁵⁶) implemented its own views through the guise of dubious and manipulable historical claims⁵⁷ and justified these views on the ground that they comport with how those who convened in the summer of 1787 in Philadelphia to draft the Constitution would have understood the meaning of the founding charter.⁵⁸ These drafters were, of course, white men who in significant numbers held other human beings as property and denied equality to women and racialized people.⁵⁹ The Court has purportedly centered its views (or, more obscurely but not more justifiably, how its words would have been understood at the time) over evolving standards of justice and morality to decide who lives and moves freely in the United States today. This backward-facing crusade, locking into place the worldview of a prior, plainly unjust era, has fast-tracked the Court’s legitimacy crisis.

The Court is now more conservative than at any point during the last 75 years.⁶⁰ This swing does not mirror recent public opinion. One week before *Dobbs*,⁶¹ eliminated the constitutional right to an abortion to much public consternation,⁶² an important study reported that the Supreme Court is “sharply to the right of public opinion.”⁶³ The researchers conducted three surveys in 2010, 2020, and

55. See generally ADAM COHEN: THE SUPREME COURT’S FIFTY-YEAR BATTLE FOR A MORE UNJUST AMERICA (2020).

56. See David Cole, *The Supreme Court Embraces Originalism – and All Its Flaws*, WASH. POST (June 30, 2022, 7:00 AM EDT) <https://www.washingtonpost.com/opinions/2022/06/30/supreme-court-originalism-constitution/> [https://perma.cc/MAK4-3E2N] (noting that originalism “has been an outlier throughout most of the nation’s history but suddenly has five votes, enough to garner a majority”).

57. See, e.g., Saul Cornell, *Cherry-Picked History and Ideology-Driven Outcomes: Bruen’s Originalist Distortions*, SCOTUSBLOG (June 2022, 5:05 PM), <https://www.scotusblog.com/2022/06/cherry-picked-history-and-ideology-driven-outcomes-bruens-originalist-distortions/> [https://perma.cc/TJ6S-WKSM].

58. GREENE, *supra* note 37, at xix (describing originalism by explaining that “[f]or many conservatives, the rights to be protected are those the Framers or those in their generation would have thought encompassed within the Constitution”).

59. See Annie Gowen, *As Statues of Founding Fathers Topple, Debate Rages Over Where Protesters Should Draw the Line*, WASH. POST (July 7, 2020), https://www.washingtonpost.com/national/as-statues-of-founding-fathers-topple-debate-rages-over-where-protesters-should-draw-the-line/2020/07/07/5de7c956-bfb7-11ea-b4f6-cb39cd8940fb_story.html [https://perma.cc/LFF6-W8R2]; Candace McDuffie, *The Constitution Was Literally Written By Slaveowners. Why Is America Obsessed With Upholding It?*, ROOT (June 27, 2022), <https://www.theroot.com/the-constitution-was-literally-written-by-slaveowners-1849114564> [https://perma.cc/F79J-EJS5].

60. See Nina Totenberg, *The Supreme Court is at Its Most Conservative Now From the Last 75 Years*, NPR (June 25, 2022), <https://www.npr.org/2022/06/25/1107628715/the-supreme-court-is-at-its-most-conservative-now-from-the-last-75-years> [https://perma.cc/VTR3-JT8R].

61. *Dobbs v. Jackson Women’s Health Organization*, 597 U.S. 215 (2022).

62. Pew Research Center, *Majority of Public Disapproves of Supreme Court Decision to Overturn *Roe v. Wade**, PEW RSCH. CTR. (July 6, 2022), <https://www.pewresearch.org/politics/2022/07/06/majority-of-public-disapproves-of-supreme-courts-decision-to-overturn-roe-v-wade/> [https://perma.cc/NT8R-U86B].

63. See Stephen Jesse, Neil Malhorta & Maya Sen, *A Decade-Long Longitudinal Survey Shows that the Supreme Court Is Now Much More Conservative than the Public*, PROC. NAT’L ACAD. SCI. (June 6, 2022), <https://www.pnas.org/doi/10.1073/pnas.2120284119> [https://perma.cc/V59K-P5GR].

2021.⁶⁴ Respondents were asked about their opinions on policy questions that the Court had decided or was slated to review. One involved “*Bostock v. Clayton County*, which questioned whether employers could fire workers based on their sexual orientation—a case of significant public salience that appeared on many ‘cases to watch’ lists.”⁶⁵

The authors reported that “83% of respondents (and 75% of Republican respondents)” said discrimination in the workplace based on sexual orientation should be illegal.⁶⁶ They “then compared responses to the court’s eventual ruling holding that firing workers for being gay was indeed illegal under the Civil Rights Act.”⁶⁷ Other cases in the study included

- *Jones v. Mississippi*,⁶⁸ deciding whether life without parole sentences may be imposed for juvenile offenders without a finding of incorrigibility (2021 study);⁶⁹
- *Department of Homeland Security v. Regents of the University of California*,⁷⁰ concerning the Deferred Action for Childhood Arrivals program created under President Barack Obama to protect undocumented immigrants who had lived in the U.S. since childhood from deportation (2020 study);⁷¹
- *McDonald v. Chicago*,⁷² deciding whether state and local governments should be permitted to ban the possession of handguns (2010 study).⁷³

The study revealed the following: in 2010, when Justice Anthony Kennedy occupied the powerful role of swing vote on the Supreme Court, “the [C]ourt’s ruling[s] put it in an ideological middle ground roughly halfway between Republicans and Democrats.”⁷⁴ The authors further estimate that during that period, the Court’s rulings reflected “almost exactly” the preferences of the average American.⁷⁵ To the surprise of many,⁷⁶ this arrangement remained the same when Chief Justice John Roberts replaced Justice Kennedy as the median upon the latter’s retirement.⁷⁷ The authors concluded that “the [C]ourt’s position was quite close to the average American[‘s] despite the median justice being appointed by a Republican president in both years.”⁷⁸ Moreover, there was no meaningful divergence in the

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Jones v. Mississippi*, 593 U.S. 98 (2021).

69. *See* Jesse et al., *supra* note 63 app.

70. *Dep’t of Homeland Sec. v. Regents of Univ. of Cal.*, 140 S. Ct. 1891 (2020).

71. *See* Jesse et al., *supra* note 63 app.

72. *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

73. *See* Jesse et al., *supra* note 63 app.

74. *See* Jesse et al., *supra* note 63, at 3.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

Court’s ideological position relative to the general public’s at that time.

All this changed, however, when Justice Ruth Bader Ginsburg was replaced by Justice Amy Coney Barrett very shortly before the 2020 presidential election:

[W]ith Amy Coney Barrett having replaced the liberal justice Ginsburg and the corresponding shift in the court’s median justice from Roberts to Kavanaugh, the court moved from a 5-4 conservative majority to a 6-3 conservative supermajority. This resulted in the court taking a sharp ideological shift to the right. Indeed, by the time of [the third of the three studies conducted in 2021], the court is estimated to be *significantly* more conservative than the average American, falling close to the position of the average Republican.⁷⁹

Since Justice Barrett’s appointment to the Court, the right-leaning bloc that controls the Court (and the five conservative justices to the right of Roberts) have moved at a blistering pace to impose—or superimpose—their ideological preferences across a broad array of issues. The Court has protected police officers from suit when they fail to advise custodial suspects of their rights against self-incrimination,⁸⁰ handicapped the federal government’s ability to respond to the planet’s climate crisis,⁸¹ smashed the wall that separates church and state,⁸² blocked regulations that kept weapons of war off the streets,⁸³ and stripped pregnant people of control over their own bodies.⁸⁴ In some cases, the Court has done so unrestrained by the Chief Justice’s entreaties for temperance and at least temporary forbearance.⁸⁵ These decisions run headlong into the ideological preferences of a country that is becoming increasingly socially and geopolitically diverse.⁸⁶ As professor Barry Freidman put the point, “[t]he Supreme Court has not been this out of step with public opinion since the New Deal Court-packing fight in 1937.”⁸⁷

79. Jesse et al., *supra* note 63, at 1 (explaining that the general public “currently underestimate[s] how conservative the court is,” and with full awareness of its ideological tilt, “support for proposed changes to the court” would be more widespread).

80. Vega v. Tekoh, 597 U.S. 134, 152 (2022).

81. W. Virginia v. Env’t Prot. Agency, 597 U.S. 697, 735 (2022).

82. Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 543–44 (2022).

83. N.Y. State Rifle & Pistol Ass’n, Inc. v. Bruen, Superintendent of N.Y. State Police, 597 U.S. 1, 71 (2022).

84. Dobbs v. Jackson Women’s Health Org., 597 U.S. 215, 300 (2022).

85. *Id.* at 348 (2022) (Roberts, C. J., concurring) (slip. op. 1) (pleading with his Republican colleagues to exercise judicial restraint in overruling *Roe* on the theory that “if it is not necessary to decide more to dispose of a case (the question presented in *Dobbs*), then it is necessary *not* to decide more”); Joan Biskupic, *The Inside Story of How John Roberts Failed to Save Abortion Rights*, CNN (July 26, 2022, 7:53 AM EDT), <https://www.cnn.com/2022/07/26/politics/supreme-court-john-roberts-abortion-dobbs/index.html> [<https://perma.cc/45DS-RVWE>].

86. See Tara Bahrapour, *U.S. Continues to Get Older and More Diverse, New Estimates Show*, WASH. POST (June 30, 2022, 12:05 AM EDT), <https://www.washingtonpost.com/dc-md-va/2022/06/30/census-us-population-older-more-diverse/> [<https://perma.cc/2FUP-QYU9>].

87. See Jonathan Cohn, *It Took the Supreme Court Just 10 Days to Change America as We Know It*, HUFFPOST (June 29, 2022, 5:36 PM EDT), <https://www.huffpost.com/entry/abortion-guns-scho>

B. Narrowly Focusing Reform Efforts on the Supreme Court is a Half Measure

In light of the self-inflicted blows to the Court's legitimacy, proposals to reform the Court are cresting with a surge of attention.⁸⁸ The lower courts, however, have been relatively sidelined in the deep reservoir of court reform proposals.⁸⁹ This notwithstanding that those courts are also failing to vindicate the rights of disadvantaged groups and, in some cases involving qualified immunity, withholding their remedial powers more aggressively than the Supreme Court itself has authorized.⁹⁰ I thus propose that it might well be desirable to reform the lower federal courts by establishing a specialized appellate tribunal with exclusive jurisdiction over Section 1983 suits. To better appreciate why a specialized Section 1983 court might be desirable, we must (1) focus attention on the Court's shrinking docket⁹¹ and (2) take more seriously the threat that lower federal courts pose to the rights of vulnerable groups as a general matter and the burdens imposed by unrestrained policing in particular.

1. The Supreme Court's Shrinking Docket

In 1988, Congress granted the Court nearly plenary power over its docket to select almost all the cases it reviews.⁹² Since that year, the Court's docket has been evaporating.⁹³ Some years ago, Justices Stephen Breyer and David Souter noted the downward trend in the number of cases on the Court's docket each. They independently speculated that the reduction in the Court's caseload could be attributed to the circuit courts of appeal increasingly becoming less divided in their

ol-prayer-supreme-court_n_62bcab8ae4b014f50a2d3e54 [https://perma.cc/6JB3-6D2R].

88. See Jeffrey L. Fisher, *The Supreme Court Reform that Could Actually Win Bipartisan Support*, POLITICO (July 21, 2022, 4:30 AM EDT), <https://www.politico.com/news/magazine/2022/07/21/supreme-court-reform-term-limits-00046883> [https://perma.cc/HS29-SJLN].

89. The lower federal courts have received relatively scant attention, but there is, of course, some scholarship in this area. Prior work on the need to focus on lower court reform includes Merritt E. McAlister, *Rebuilding the Federal Circuit Courts*, 116 NW. U. L. REV. 1133, 1137 (2022) (urging Congress "to engage in lower court reform by adding judges to the most underresourced federal appellate courts"); Menell & Vacca, *supra* note 8, at 795 (suggesting reform to lower federal courts to address "the growing caseload and congestion problems plaguing the federal judiciary").

90. See, e.g., *Taylor v. Riojas*, 592 U.S. 7 (2020) (vacating and remanding the Fifth Circuit's grant of qualified immunity).

91. VLADECK, *supra* note 27, at 56–57 (observing that the Supreme Court Case Selections Act of 1988 fundamentally altered the Supreme Court's power by changing "the Supreme Court's appellate jurisdiction into discretionary review").

92. 102 Stat. 662 (repealed 1988), <https://www.congress.gov/100/statute/STATUTE-102/STATUTE-102-Pg662.pdf> [https://perma.cc/VE5G-3F7T] (last visited Mar. 6, 2024). As Steve Vladeck details, by 1988 the Supreme Court had long exercised discretion not only in selecting cases for review but also in determining specific issues within petitions worthy of certiorari. VLADECK, *supra* note 27, at 56. In passing the Supreme Court Case Elections Act that year, Congress essentially finalized a trend Chief Justice Howard Taft initiated in 1925. The act "convert[ed] all but one of the remaining fonts of the Supreme Court's appellate jurisdiction into discretionary review." *Id.* at 57.

93. See VLADECK, *supra* note 27, at 57 (describing the downward trend in the number of merit decisions issued by the Court and connecting the court's shrinking docket to the Supreme Court Case Selections Act of 1988).

interpretation of the law. This, in turn, reduced the need for the Court to intervene resolve disagreements between the courts.⁹⁴ During a speech at the Judicial Conference of the Ninth Circuit, Justice Breyer stated that “[f]or a number of years there have been fewer conflicts in the circuit, so perhaps we are entering an era of harmony in the circuits.”⁹⁵ Testifying before the House Committee on Appropriations in 1996, Justice Souter had this to say:

[twelve] years of the sort of Reagan-Bush appointments which resulted in a greater degree . . . of [philosophical] homogeneity in the Courts of Appeals . . . than you are likely to find in too many judicial epochs. The result of that was that there were simply fewer conflicts in the circuits than historically you will find to be the case.⁹⁶

Over the last decade, the Court has reviewed about one-third of its pre-1988 volume each year.⁹⁷

As the Court’s docket shrinks, lower federal courts are assuming a greater role in defining the content of federal law,⁹⁸ and “there are entire swaths of lower-court decisions that the Justices appear to be all-but ignoring.”⁹⁹ Take cases involving constitutional challenges to convictions in state courts as an example.¹⁰⁰ Only two such cases were heard by the Court during the entire 2019–20 term.¹⁰¹

2. Lower Federal Courts are Rolling Back Protections Too

Critics strongly condemn the decisions made by Republican-appointed Justices, arguing that these rulings are driven by a partisan agenda and will disproportionately impact disadvantaged groups. However, judges on the lower federal courts have been largely escaped criticism despite issuing decisions with similar implications for disempowered groups.¹⁰² The parallel decision-making is no accident. Appreciating the significance of lower federal courts perhaps more than their colleagues across the ideological spectrum, “Republican officials and groups have long pushed to make them as conservative as they can, similar to GOP efforts

94. Frost, *supra* note 38, at 1636 (“Even if true, a decrease in circuit splits is not a reason for the Supreme Court to hear fewer cases unless it considers providing uniformity to be its primary role in our system of government.”).

95. *Id.* (quoting Pamela A. MacLean, *Justices Defend High Court’s Taking Fewer Cases*, DAILY J. (July 29, 1999), at 3).

96. *Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations for 1997: Hearings Before a Subcomm. of the House Comm. on Appropriations*, 104th Cong., 2d Sess. Part 6 at 23–24 (1996) (testimony of Justice Souter).

97. See VLADDECK, *supra* note 27, at 57.

98. See Steve Vladeck, *The Supreme Court is Handing Down its Fewest Decisions in Decades. Here’s what that Means*, MSNBC (June 4, 2022, 2:35 AM) (explaining that the Supreme Court’s dwindling merits-decision docket means that “from a structural perspective, [the court is] increasingly *not* having the last word on important questions of federal law; lower state and federal courts are”).

99. *Id.*

100. *Id.*

101. *Id.*

102. See Bacon, Jr., *supra* note 10.

to shape the Supreme Court.”¹⁰³ Former President Donald Trump, in particular, prioritized overhauling the federal judiciary in a radically rightward direction.¹⁰⁴ He did so with remarkable success.¹⁰⁵

During his only term in office, Trump appointed 226 federal judges.¹⁰⁶ Of that figure, fifty-four were appointed to the federal courts of appeals, representing about one-third of all federal appeals court judges today.¹⁰⁷ To put this number in perspective, President Barack Obama appointed fifty-five judges to the federal appeals courts in his eight years in office.¹⁰⁸ Trump’s aggressive appointment process flipped the balance of several appeals courts where his nominees now dominate.¹⁰⁹ It is true that presidents generally appoint judges in line with their parties’ political preferences, so Trump is not unusual in that regard.¹¹⁰ But Trump’s approach to judicial appointments (among other things) broke sharply with convention.

Despite conventions of judicial independence,¹¹¹ Trump did not even pretend to hide his objective to appoint conservative judges to the bench with professional records that suggested they would be hostile to marginalized rights claimants.¹¹² Among his appellate appointees are former litigators who argued to uphold bans on legalizing same-sex marriage,¹¹³ block transgender people from using their

103. *Id.*

104. Ruiz et al., *supra* note 30.

105. *Id.*

106. See John Gramlich, *How Trump Compares with Other Recent Presidents in Appointing Federal Judges*, PEW RSCH. CTR. (Jan. 13, 2021), <https://www.pewresearch.org/fact-tank/2021/01/13/how-trump-compares-with-other-recent-presidents-in-appointing-federal-judges/> [<https://perma.cc/E3J2-G3H7>].

107. See All Things Considered, *How Conservatives Worked for Decades to Fill Courts with Anti-Abortion Rights Judges*, NPR (June 26, 2022, 5:02 PM ET), <https://www.npr.org/2022/06/26/1107713225/how-conservatives-worked-for-decades-to-fill-courts-with-anti-abortion-rights-ju> [<https://perma.cc/WV3Z-8GD9>].

108. Gramlich, *supra* note 106.

109. *Id.*

110. See BARRY J. McMILLION, CONG. RSCH. SERV., R44235, SUPREME COURT APPOINTMENT PROCESS: PRESIDENT’S SELECTION OF A NOMINEE (2022) summary (“Political considerations typically play an important role in Supreme Court appointments. It is often assumed, for example, that Presidents will be inclined to select a nominee whose political or ideological views appear compatible with their own.”).

111. See generally Tara Leigh Grove, *The Origins (and Fragility) of Judicial Independence*, 71 VAND. L. REV. 465 (2018) (explaining that conventions—unwritten rules governing political behavior—have historically looked unfavorably on judicial appointments that are rampant with political bias).

112. Ruiz et al., *supra* note 30 (“He unapologetically view[ed] judges as agents for the presidents who appointed them—calling out an ‘Obama judge,’ for instance, for ruling against [his] administration in an immigration case.”).

113. See Hailey Fuchs & Colby Itkowitz, *Sen. Collins to Oppose Trump Judicial Nominee Over Record Opposing Gay Rights*, WASH. POST (June 14, 2019, 7:51 PM EDT), https://www.washingtonpost.com/politics/sen-collins-to-oppose-trump-judicial-nominee-over-record-opposing-gay-rights/2019/06/14/118480ee-8ee0-11e9-8f69-a2795fca3343_story.html [<https://perma.cc/AB5Z-Z4F2>]; Ian Millhiser, *Trump Judge Lashes Out at a Transgender Litigant in a Surprisingly Cruel Opinion*, VOX (Jan. 17, 2020, 8:10 AM EST), <https://www.vox.com/2020/1/17/21067634/trump-judge-transgender-cruel-kyle-duncan-united-states-varner> [<https://perma.cc/8EVE-APE7>] (reporting on, among other things, the record of Judge Stuart Kyle Duncan who, before his appointment to the Fifth Circuit U.S. Court of Appeals, was a prominent anti-LGBTQ lawyer).

bathroom of choice,¹¹⁴ restrict access to birth control,¹¹⁵ among other pressing issues primarily impacting disfavored groups.¹¹⁶ Of course, a person’s background and positions in litigation do not inevitably dictate the positions they will take as a judge.¹¹⁷ But it matters who the judge is. As Joanna Schwartz has observed, “[f]or many plaintiffs’ civil rights lawyers, finding out which judge has been assigned to their case is among the most momentous pieces of information they can learn about their case.”¹¹⁸ Moreover, “analysis of thousands of qualified immunity decisions revealed that judges appointed by Republican presidents are more likely to grant qualified immunity than judges appointed by Democratic presidents, and judges located in more Republican-leaning regions of the country are more likely to grant qualified immunity.”¹¹⁹

These findings are corroborated by the early results of Trump’s judicial appointments, which show that the judges have adjudicated in ways that are entirely consistent with their profile.¹²⁰ Consider the following: Trump has urged police officers to use force when making arrests and not to “be too nice.”¹²¹ He has also complained that the “laws are so horrendously stacked against” police officers and made to “protect the criminal.”¹²² In recent decisions, the U.S. Court of Appeals for the Fifth Circuit, where six relatively young Trump appointees sit with lifetime tenure,¹²³ adopted remarkably broad interpretations of qualified immunity as demonstrated in the discussion below.

*a. Ramirez v. Guadarrama*¹²⁴

Texas officers responded to a 911 call placed by a member of Olivas’s family who had called because Gabriel Eduardo Olivas (their husband and father,

114. Letter from Vanita Gupta, Pres. & CEO, Leadership Conf. on Civ. and Hum. Rts., Oppose the Confirmation of Stuart Kyle Duncan to the U.S. Court of Appeals for the Fifth Circuit (Nov. 28, 2017), <http://civilrightsdocs.info/pdf/policy/letters/2017/Stuart-Kyle-Duncan-opposition-letter-11-28-17.pdf> [<https://perma.cc/KKM8-CJVG>] (discussing opposition to the confirmation of Stuart Kyle Duncan to the federal bench including his defense of a Virginia law that barred transgender high school student Gavin Grimm from using the bathroom of his preference).

115. See Ruiz et al., *supra* note 30.

116. See Victoria Bekiempis, *Meet Some of Trump’s Most Conservative Judicial Picks*, *GUARDIAN* (Apr. 30, 2020, 5:35 AM EDT), <https://www.theguardian.com/us-news/2020/apr/30/meet-trump-most-conservative-judicial-picks> [<https://perma.cc/78EF-V2X5>].

117. BAUM, *supra* note 35, at 163.

118. JOANNA SCHWARTZ, *SHIELDED: HOW THE POLICE BECAME UNTOUCHABLE* 122 (2023).

119. *Id.*

120. All Things Considered, *supra* note 107.

121. Jeremy Venook, *Trump’s Record on Police Brutality and Peaceful Protest: Making the Problem Worse*, *CAP ACTION* 20 (June 15, 2020), <https://www.americanprogressaction.org/article/trumps-record-on-police-brutality-peaceful-protests-making-problem-worse/> [<https://perma.cc/2YJJ-PZZA>].

122. *Id.*

123. See David Smith, *How Trump Reshaped the Fifth Circuit to Become the ‘Most Extreme’ US Court*, *GUARDIAN* (Nov. 15, 2021, 3:00 AM), <https://www.theguardian.com/law/2021/nov/15/fifth-circuit-court-appeals-most-extreme-us> [<https://perma.cc/P72M-G53T>].

124. *Ramirez v. Guadarrama* (*Guadarrama I*), 2 F.4th 506 (5th Cir. 2021).

respectively) had threatened to burn the house down and immolate himself.¹²⁵ The cops arrived on the premises and found Olivas in a bedroom.¹²⁶ He subsequently doused himself with gasoline in their presence.¹²⁷ Despite being trained that tasers could ignite gasoline, two of the officers discharged their tasers at Olivas. This action came mere moments after a third cop on the scene critically warned that “[i]f we [t]ase him, he is going to light on fire.”¹²⁸ With Ramirez and her children looking on, the tasers caused Olivas to “burst into flames,”¹²⁹ thereby inflicting precisely the harm the officers had been called to avert. The family was safely evacuated, but their house burned to the ground and Olivas succumbed to his injuries.

Ramirez and her children filed a Section 1983 suit against the two cops, alleging in relevant part that they had violated the Fourth Amendment’s prohibition against excessive force when they tased Olivas and immolated him in circumstances that any reasonable cop would have known was unreasonably dangerous.¹³⁰ The cops moved to dismiss the case before discovery on qualified immunity grounds. The district court denied the motion, concluding that “more factual development was needed” to make a determination on the defendants’ qualified immunity defense.¹³¹ A unanimous Fifth Circuit panel reversed, reasoning that the cops were entitled to qualified immunity as a matter of law.¹³² While the “use of a taser in unwarranted circumstances can be unconstitutional,”¹³³ Olivas’s decedents needed to show that Olivas had a “clearly established” “constitutional right not to be tased” and caused to “burst into flames,” and they had not met this burden.¹³⁴ The panel also claimed that “the officers had no apparent options to avoid calamity,” and it was “not apparent what might have been done differently to achieve a better outcome.”¹³⁵

Dissenting from the denial of rehearing en banc by a 13-4 vote, Judge Don R. Willett explained that “[s]uch speculation is out of place at the motion-to-dismiss stage” and is “exactly why we have discovery.”¹³⁶ At the motion-to-dismiss stage, the court is required to take the facts alleged in the complaint as true.¹³⁷ But instead of applying the appropriate standard and determining whether, *if true*, the plaintiffs had alleged a plausible claim, the court applied a heightened standard of review resembling the sort applied at the summary judgment stage.¹³⁸ The court’s decision led to its “hesitating over ‘disputed facts,’ crediting the officers’ allegations instead

125. *Id.* at 507–08.

126. *Id.* at 508.

127. *Id.*

128. *Id.* at 516.

129. *Id.*

130. *Ramirez v. Guadarrama (Guadarrama II)*, 3 F.4th 129, 132 (5th Cir. 2021).

131. *Id.*

132. *Id.* at 137.

133. *Id.* at 135.

134. *Id.* at 134.

135. *Id.* at 136.

136. *Guadarrama I*, 2 F.4th 506, 517 (5th Cir. 2021).

137. *Id.*

138. *Id.* at 517–18.

of Plaintiffs,’ and speculating about what nonlethal options the officers had.”¹³⁹ As Judge Willett and the other dissenting judges interpreted the issue, “the complaint alleges a plausible Fourth Amendment violation, and an obvious one at that [I]t is unfathomable to conclude with zero discovery, yet 100% finality, that no facially plausible argument exists that [the] officers acted unreasonably.”¹⁴⁰ From the dissenter’s perspective, the decision represented a new low in the courts’ remedial stinginess for victims of police misconduct: “we have stumbled through the looking glass when we conclude—as a matter of constitutional law at the motion-to-dismiss stage—that government officials can burn someone alive and not even be troubled with discovery.”¹⁴¹

The Supreme Court declined to review the case over Justice Sonia Sotomayor’s dissent.¹⁴² Justice Sotomayor wrote, “Under this Court’s precedent, that claim is entitled to proceed to discovery to determine whether the family is entitled to some recompense for their unnecessary losses.”¹⁴³ By cutting off the qualified immunity inquiry at the complaint stage, prior even to discovery, the court distorted basic rules of civil procedure to give cover to cops who were alleged to have committed obvious and egregious abuse without so much as allowing the plaintiffs to attempt to make their case. As Judge Willett put it: “Where is the bottom? . . . nothing better captures the yawning rights-remedies gap of the modern immunity regime than giving a pass to alleged conscience-shocking abuse at the motion-to-dismiss stage and step one of the immunity inquiry.”¹⁴⁴ Sadly, *Ramirez* is not a one-off case.

*b. Cope v. Cogdill*¹⁴⁵

Derrek Monroe was a pretrial detainee in Coleman County jail in Texas. During intake, Monroe noted on a screening form that he “wished [he] had a way” to die by suicide that day and that he had attempted to kill himself two weeks earlier.¹⁴⁶ Monroe also reported on the form that he had previously received psychiatric care, had been diagnosed with “some sort of schizophrenia,” and showed other signs of psychiatric illness and emotional instability.¹⁴⁷ These details were communicated to jail administrator Mary Jo Brixey and Sheriff Leslie Cogdill. Brixey put Monroe on suicide watch.¹⁴⁸

The next day, Monroe experienced a medical emergency that required hospitalization.¹⁴⁹ He was taken to Coleman County Medical Center and, after

139. *Id.* at 518.

140. *Id.* at 519.

141. *Id.*

142. *Guadarrama I*, 2 F.4th 506 (5th Cir. 2021), *cert. denied*, 592 U.S. __ (2022).

143. *Id.*

144. *Id.* at 524.

145. *Cope v. Cogdill*, 3 F.4th 198 (5th Cir. 2021).

146. *Id.* at 202.

147. *Id.*

148. *Id.* at 202–03.

149. *Id.* at 203.

receiving treatment, returned to jail the following day and was placed in a cell with other incarcerated people.¹⁵⁰ Shortly thereafter, Monroe twice tried to kill himself by strangulation while jailer Jessie Laws watched through the cell bars and did not attempt to stop him.¹⁵¹ Although Cogdill had been trained that it was dangerous to isolate a suicidal detainee and that the practice was frowned on, Cogdill and Brixey transferred Monroe to an isolation cell after the incidents.¹⁵² Compounding the issue, the cell contained a wall-mounted telephone with a cord extending thirty inches—an unmistakable hazard for suicide by strangulation.¹⁵³

Two years prior to the incident, the Texas Commission and Jail Standard had issued a memorandum addressed to all sheriffs and jail administrators.¹⁵⁴ The guidance document advised against placing suicidal detainees in cells with ligatures similar to those found in Monroe's cell.¹⁵⁵ The document explicitly referenced telephone cords, noting that telephone cords in cells should not exceed twelve inches in length and that telephone cords had been used for suicide on four occasions in Texas jails in the space of eleven months.¹⁵⁶ Once in his cell, Monroe overflowed the toilet.¹⁵⁷ This action prompted Laws to shut off the water supply to Monroe's cell which visibly angered and upset him.¹⁵⁸ Monroe used the toilet plunger to beat the toilet in his cell and proceeded to slam the phone receiver against the wall repeatedly while Laws mopped the overflowing water.¹⁵⁹ Monroe then wrapped the telephone cord securely around his neck several times as Laws looked on through the cell bars.¹⁶⁰ As Monroe continued strangling himself with the cord, Laws did not call emergency services, although he had been specifically trained to do so in such circumstances.¹⁶¹ Nor did he call 911, contravening jail policy.¹⁶² Instead, he called his supervisors Cogdill and Brixey who were off duty at the time and away from the jail and so could not respond immediately.¹⁶³ One or two minutes after he began strangling himself without any action by Laws to stop him, Monroe became motionless.¹⁶⁴

While awaiting his supervisors' arrival, Laws peered into Monroe's cell several times as Monroe lay motionless, never unlocking or entering it.¹⁶⁵ It was against jail

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150. *Id.*
151. *Id.* at 213.
152. *Id.*
153. *Id.* at 213.
154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.* at 203.
158. *Id.*
159. *Id.*
160. *Id.* at 214 (Dennis, J., dissenting).
161. *Id.*
162. *Id.* at 222.
163. *Id.* at 208.
164. *Id.*
165. *Id.* at 203.

policy for jailers to enter a cell without other jail personnel present.¹⁶⁶ Only after Brixey arrived on-site ten minutes after Monroe had begun strangling himself did Laws unlock the cell and unwrap the ligature from Monroe’s neck.¹⁶⁷ Neither officer tried to resuscitate Monroe who still had a pulse.¹⁶⁸ They instead called emergency services, which arrived about fifteen minutes after Monroe had begun to strangle himself.¹⁶⁹ On their arrival, emergency services performed chest compressions and took Monroe to the hospital; he died the following day.¹⁷⁰

Monroe’s mother Patsy Cope sued Cogdill, Brixey, and Laws under 42 U. S. C. § 1983.¹⁷¹ Cope alleged that Laws was deliberately indifferent to Monroe’s well-being by not properly intervening as Monroe strangled himself,¹⁷² and that this inaction violated the Fourteenth Amendment’s Due Process Clause.¹⁷³ The complaint also alleged that Cogdill and Brixey were similarly liable for placing Monroe in a cell containing a lengthy phone cord even though they knew he was suicidal.¹⁷⁴ The officers moved for summary judgment on the ground that they were entitled to qualified immunity.¹⁷⁵

Recall that to pierce the qualified immunity shield, a plaintiff must show that the defendant official violated the U.S. Constitution or any other law within the ambit of Section 1983 *and* that the law prohibiting the conduct was clearly established.¹⁷⁶ When asked why he did not intervene by calling emergency services, Laws responded, “Honestly, I don’t know.”¹⁷⁷ As to Laws, the district court determined that “watching Monroe wrap the phone cord around his neck and then failing to assist Monroe to free him from the cord will have to be analyzed by a jury to determine whether his conduct was reasonable under the circumstances.”¹⁷⁸ As to Laws’ supervisors, the court also denied qualified immunity because “evidence clearly demonstrates a high and obvious risk of suicide by maintaining a policy of housing suicidal inmates in a cell with a phone (and attached cord).”¹⁷⁹

On appeal, a panel of the Fifth Circuit unanimously agreed that defendant Laws had violated Monroe’s constitutional rights by acting unreasonably.¹⁸⁰ But over a spirited dissent by Judge James L. Dennis, the majority granted qualified immunity to all the officials because “[e]xisting case law . . . was not so clearly on

166. *Id.*

167. *Id.*

168. *Id.* at 203, 214.

169. *Id.* at 203.

170. *Id.*

171. *See id.* at 202 & n.1.

172. *See id.* at 209.

173. *Id.* at 203.

174. *Id.* at 221-26.

175. *See id.* at 203.

176. *See supra* note 17 and accompanying text.

177. *Cope v. Cogdill*, 3 F.4th 198, 214 (5th Cir. 2021).

178. *Id.* at 203.

179. *Id.* at 204.

180. *Id.* at 209.

point.”¹⁸¹ As to Brixey and Cogdill, the court recognized that Brixey had placed Monroe on a temporary suicide watch and that Cogdill knew Monroe had tried to kill himself by hanging the day before.¹⁸² The court also acknowledged that the Fifth Circuit had previously held that qualified immunity did not protect officers who gave suicidal detainees beddings or blankets that they could use to kill themselves.¹⁸³ However, in this case, the court found no prior incidents of suicide attempts by strangulation with phone cords at the facility in question. Additionally, there was no evidence that Brixey was aware of such a risk, and that the risks of a telephone cord to a suicidal detainee were “not as obvious as the dangers posed by bedding.”¹⁸⁴ Thus, according to the court, placing Monroe in a cell containing a 30-inch telephone cord did not violate a clearly established constitutional right.¹⁸⁵

In *Hope v. Pelzer*, the Supreme Court held that “a general constitutional rule . . . may apply with obvious clarity to the specific conduct in question, even though the very action in question has not previously been held unlawful.”¹⁸⁶ Reasoning from this position, Judge Dennis emphasized in dissent that the constitutional violations were so egregious and obvious that any reasonable officer should have recognized its illegality even if there was no case law squarely on point prohibiting it.¹⁸⁷ Cope asked the Supreme Court to review the ruling and amici from both conservative and liberal institutions urged the Supreme Court to grant certiorari and reverse the Fifth Circuit’s decision.¹⁸⁸

Over Justice Sotomayor’s dissent that the case was “truly extraordinary . . . involving categories of errors that strike at the heart of our legal system,” the Supreme Court denied review, preserving the Fifth Circuit’s expansion of the qualified immunity doctrine beyond the already parsimonious standard for relief the Court itself has prescribed.¹⁸⁹ In essence, the Fifth Circuit erected a nearly impenetrable barrier to liability when officials violate constitutional rights by requiring a nearly factually identical case to demonstrate that the unlawfulness of the conduct was clearly established.

In *Taylor v. Rojas*,¹⁹⁰ the Supreme Court explained that lower courts could deny qualified immunity even when a plaintiff did not have a case directly on point to

181. *Id.* at 209.

182. *Id.* at 223–24.

183. *Id.* at 222.

184. *Id.* at 210–11.

185. *Id.* at 211.

186. *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) (quoting *United States v. Lanier*, 520 U.S. 259, 271 (1997) (brackets and internal quotations omitted)).

187. *Cope v. Cogdill*, 3 F.4th 198, 220 (5th Cir. 2021).

188. See Clark Neilly & Jay Schweiker, *Cope v. Cogdill*, CATO INST. (Dec. 23, 2021), <https://www.cato.org/legal-briefs/cope-v-cogdill> [<https://perma.cc/GGL8-UF73>] (“Cato, joined by the Law Enforcement Action Partnership and MacArthur Justice Center . . . urged] the Supreme Court to summarily reverse the lower court.”).

189. *Cope v. Cogdill*, 3 F.4th 198 (5th Cir. 2021), *cert. denied*, 142 S. Ct. 2573, 2576 (2022) (Sotomayor, J., dissenting).

190. *Taylor v. Rojas*, 592 U.S. 7, 7 (2020) (per curiam).

show that the alleged violation was clearly established. The denial of qualified immunity in *Taylor* was appropriate, said the Court, because “any reasonable officer should have realized” that the violation “offended the Constitution.”¹⁹¹ *Taylor* “revived the notion in *Hope* that qualified immunity could be denied if a constitutional violation is obvious, even if the precise fact pattern is novel.”¹⁹² However, as the decisions in *Cope* and *Ramirez* and the Supreme Court’s denial of their review suggest, *Taylor* appears to be an aberration. The Court continues to put a heavy thumb on the scale in favor of government officials’ entitlement to qualified immunity. It should thus be unsurprising that the Court overwhelmingly exercises plenary review over lower court decisions only when government officials lose.¹⁹³ This means that much of the widening rights-remedies gap related to qualified immunity is a result of lower federal court decisions. Importantly, cases that terminate through entry of qualified immunity in the lower federal courts reflect the very same widening of the rights-remedies gap that has frustrated observers of the Supreme Court and sunk the Court’s legitimacy. But these decisions receive relatively scant attention in scholarly circles and in the popular press.¹⁹⁴ With this landscape in mind, I explore whether establishing a specialized federal appellate court with exclusive jurisdiction over cases brought under 42 U.S.C. § 1983 would be more desirable than the status quo. Before turning to that analysis, Part II sketches court specialization at the federal level.

II. COURT SPECIALIZATION

It is widely assumed that Article III judges in the United States are, and should be, generalists.¹⁹⁵ Integral to this conception of judges as generalists is that judges typically decide cases across a wide variety of subject matters.¹⁹⁶ There is some truth to this.¹⁹⁷ But many courts are also vested with narrow jurisdiction over particular areas of the law; in other words, specialized courts.¹⁹⁸ This Part provides background on court specialization. Part II.A provides an overview of specialized

191. *Id.* at 9.

192. SCHWARTZ, *supra* note 118, at 88.

193. ALEXANDER A. REINERT, QUALIFIED IMMUNITY ON APPEAL: AN EMPIRICAL ASSESSMENT 6 (2021) (“Although plaintiffs sought certiorari at a slightly higher rate than defendants, the Supreme Court was about six times as likely to grant certiorari when requested by a defendant than by a plaintiff.”).

194. See generally Andrew Chung, *U.S. Supreme Court Rebuffs Challenges in Texas ‘Qualified Immunity’ Cases*, REUTERS (July 1, 2022, 7:22 AM PDT), <https://www.reuters.com/world/us/us-supreme-court-rebuffs-challenges-texas-qualified-immunity-cases-2022-06-30/> [<https://perma.cc/MAE9-CHAR>].

195. See BAUM, *supra* note 35, at 1.

196. *Id.*

197. See Frost, *supra* note 38, at 1611 (“Congress has left it to generalist courts to resolve most of the nation’s legal disputes, establishing specialized courts only in narrow areas and often for limited periods . . .”).

198. See BAUM, *supra* note 35, at 13–18 (providing a summary of specialized courts in the federal judiciary, including the Court of Federal Claims (Article I), Court of Appeals for the Federal Circuit (Article III), and Court of International Trade (Article III)).

courts. Part II.B discusses the various axes upon which a court can be specialized.

A. Overview of Specialized Courts

The judiciary, in comparison to the executive and legislative branches and other nongovernmental professions, is by and large a bulwark of generalists.¹⁹⁹ For some commentators, the range of subject matter in federal judges' caseloads is an essential feature of the profession.²⁰⁰ Federal Judge Deanell Tacha expressed a common sentiment: "I like the fact that federal judges are generalists. I often say that judges may be the last generalists left in professional life, and I have resisted mightily any suggestion that the federal courts become specialized in any particular area."²⁰¹ Exemplifying a sort of path dependence,²⁰² the history and continuing vitality of generalist courts reinforces the idea that courts *should* be generalists and that generalist courts will likely continue to be the norm.²⁰³ Because of the dominance of generalist courts, it is easy to overlook that the court system is replete with specialized courts. This is especially true at the state level where court specialization is widespread.²⁰⁴

B. Mechanics of Specialization

Judicial specialization, like the kind in government generally, can occur in multiple ways.²⁰⁵ Even among generalist courts, regional patterns in litigation will occasionally generate a very uneven spread of cases in a specific area of law in a way that functionally amounts to judicial specialization.²⁰⁶ In the 1950s and 1960s, for instance, most federal civil rights issues were litigated in the Fourth and Fifth Circuits because of the regional character of Jim Crow.²⁰⁷ Lawyers challenging segregation, discrimination, and other aspects of systemic racism were repeat players in the Fourth and the Fifth circuits; they argued in front of the same handful of judges. For example, at the time of the *Brown v. Board of Education*²⁰⁸ decision in 1954,

199. *Id.* at 3.

200. *Id.* at 1.

201. Howard Bashman, *20 Questions for Chief Judge Deanell Reece Tacha of the U.S. Court of Appeals for the Tenth Circuit*, HOW APPEALING (Jan. 5, 2004, 12:00 AM), https://howappealing.abovethelaw.com/20q/2004_01_01_20q-appellateblog_archive/ [<https://perma.cc/MAJ7-K3JF>].

202. Path dependence is the idea that earlier choices/actions have a continuing, constraining effect on future choices/actions. *See, e.g.*, Paul Pierson, *Increasing Returns, Path Dependence, and the Study of Politics*, 94 AM. POL. SCI. REV. 251 (2000).

203. *See* BAUM, *supra* note 35, at 6.

204. *Id.* at 95–96 (explaining that “in the state court systems, there is a great deal of specialization,” particularly “in and within criminal law”).

205. *See* HERBERT A. SIMON, ADMINISTRATIVE BEHAVIOR: A STUDY OF DECISION-MAKING PROCESSES IN ADMINISTRATIVE ORGANIZATION 28–35 (2d ed. 1961) (discussing various ways professional specialization in government can occur).

206. *See* BAUM, *supra* note 35, at 11.

207. *Id.* at 12.

208. *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954).

the Fourth Circuit had only three judges.²⁰⁹ As discussed below, we might expect that the combination of a small number of judges and a high concentration of civil rights cases led to greater civil rights expertise among the judges in those circuits because they became steeped in that particular area of law.²¹⁰ It should not be a surprise that the Fifth Circuit—then covering Texas, Louisiana, Mississippi, Alabama, Georgia, and Florida²¹¹—paved the way “in the doctrinal development of all the major civil rights issues: jury selection, public accommodations, voting rights, and school desegregation.”²¹²

A contemporary example of how geographic patterns can lead to court specialization is the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit). Because of its location in the nation’s capital, where federal administrative decisions are made, the D.C. Circuit hears an outsized number of appeals from regulatory decisions.²¹³ As a result, it has particular subject matter expertise in administrative law.²¹⁴ Rules of venue can also lead to a degree of specialization in generalist courts,²¹⁵ as was the situation before 2016 when almost half of all patent suits in the United States were filed in the Eastern District of Texas and a single judge heard twenty-five percent of patent cases throughout the country.²¹⁶

Aside from these examples of “informal” court specialization, there are several formally specialized courts.²¹⁷ When a court is “formally” specialized, as I use the term, Congress passes legislation consolidating all cases in a specific field (e.g., bankruptcy or international trade) into a single court.²¹⁸ This is the type of specialization contemplated in this Article. When Congress establishes a court of limited jurisdiction, the court is typically concentrated along two dimensions: case concentration and judge concentration. With respect to case concentration, specialized courts have a high concentration of case types “in that they hold monopolies over the types of cases they hear at a particular court level.”²¹⁹ The Court of Appeals for the Federal Circuit is an example of a specialized federal court with

209. See *Remembering the Fourth Circuit Judges: A History from 1941 to 1998*, 55 WASH. & LEE L. REV. 471, 504–06 (1998).

210. See BAUM, *supra* note 35, at 35 (“Judges who specialize in a narrow range of policy become immersed in the subject matter of the cases on which they focus.”).

211. See Robert A. Ainsworth, Jr., *Fifth Circuit Court of Appeals Reorganization Act of 1980*, 1981 BYU L. REV. 523, 523 (1981).

212. Frank T. Read, *The Bloodless Revolution: The Role of the Fifth Circuit in the Integration of the Deep South*, 32 MERCER L. REV. 1149, 1150–51 (1981) (internal citations omitted).

213. See Sapna Kumar, *Patent Court Specialization*, 104 IOWA L. REV. 2511, 2514 (2019) (discussing the increasing specialization of the federal circuit and explaining the various forms specialization can take).

214. *Id.*

215. See BAUM, *supra* note 35, at 11.

216. See Kumar, *supra* note 213, at 2514–15.

217. See Lawrence Baum, *Probing the Effects of Judicial Specialization*, 58 DUKE L.J. 1667, 1672 (2009); Kumar, *supra* note 213, at 2515.

218. See BAUM, *supra* note 35, at xi–xii. This is also true of the state court system, particularly in criminal law.

219. *Id.* at 13–16.

high case concentration because it has exclusive jurisdiction over patent appeals.²²⁰

As to judge concentration, specialized federal courts typically have a high concentration of judges, meaning that relatively few judges hear all the cases in a given field.²²¹ A notable exception is the federal bankruptcy court. There is a low degree of judge concentration in bankruptcy court because the number of bankruptcy judges exceeds 300.²²² This Article embraces a view of court specialization along the axes where the term is typically located: high case concentration along with high judge concentration.

III. “SPECIALIZING” SECTION 1983

Given the perceived superior status of generalist courts, why might it be desirable to channel appeals of Section 1983 suits from the district courts into a single federal appellate court? To answer this question, it is helpful to add some doctrinal texture to Section 1983 and qualified immunity, which comes in Parts III.A and B, respectively. Part III.C then provides hypotheses about the benefits of “specializing” Section 1983 focusing on qualified immunity. It bears emphasis here again that the point is not to provide watertight conclusions. Rather, this Article aims to describe possible consequences of specializing Section 1983. This thought experiment comes at a time when interest in court reform is ascending and conditions on the ground reflect the circumstances which prompted the statute’s passage. However, there appears to be Congressional hesitation to direct substantive reforms such as the outright elimination of qualified immunity.²²³ In Part III.D, I suggest that a specialized Section 1983 court could plausibly be understood as within the tradition of antislavery courts—courts in operation from 1817–1871 to eradicate the international slave trade.²²⁴ Moreover, I leverage the concept of diffusion—the idea that the operation or prior existence of a similar specialized court indicates establishing a new one is desirable²²⁵—to suggest the prior existence of antislavery courts makes the prospects of establishing a court vested with narrow jurisdiction over Section 1983 suits less experimental than at first glance.²²⁶

220. See Paul R. Gugliuzza, *The Federal Circuit as a Federal Court*, 54 WM. & MARY L. REV. 1791, 1795 (2013).

221. See BAUM, *supra* note 35, at 8–9.

222. See *Status of Bankruptcy Judgeships – Judicial Business 2019*, U.S. COURTS, <https://www.uscourts.gov/statistics-reports/status-bankruptcy-judgeships-judicial-business-2019> [<https://perma.cc/D78D-WXUA>] (last visited Mar. 6, 2024).

223. On June 4, 2020, Representatives Justin Amash (L-Michigan) and Ayanna Pressley (D-Massachusetts) introduced the Ending Qualified Immunity Act, a bill that would abolish qualified immunity for state and federal officials in the United States. The bill was read twice and submitted to Senate Committee on the Judiciary on March 3, 2021. It has remained there for more than a year without any Congressional action to bring it into law. Ending Qualified Immunity Act, S. 492, 117th Cong. (2021).

224. See Martinez, *supra* note 45 (discussing the near-forgotten history of the antislavery courts as an example of the earliest form of international human rights advocacy in action).

225. See BAUM, *supra* note 35, at 211.

226. It has been well documented that “[d]iffusion has played a major part in the growth of judicial specialization, in that the existence of specialized courts has encouraged the creation of

A. *Monroe v. Pape*: “Throw Open the Doors of the United States Courts”

Invoking wide-ranging authority, Section 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or any 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.²²⁷

The statute’s broad authority was a response to the lawlessness that blanketed the South during Reconstruction as the Ku Klux Klan terrorized newly emancipated Black people to relegate them to a permanent underclass.²²⁸ The Ku Klux Klan Act of 1871—now codified at 42 U.S.C. § 1983 (along with other parallel but less prominent civil rights statutes)²²⁹—dramatically reworked the structure of relationships among the federal government, states, and the people by expanding federal judicial power to levels unseen since 1789.²³⁰ This large-scale broadening of federal court jurisdiction “seems to reflect both the Republicans’ belief that the federal judiciary was the most appropriate institution to effectuate their ‘moderate revolution’ in civil rights and their increasing distrust of the willingness of state judges to enforce vigorously . . . or fulfill national policies.”²³¹

While Section 1983’s broad language gave courts wide latitude to construe its meaning,²³² courts in the immediate aftermath of Reconstruction gradually hollowed the legislation by embracing parsimonious readings of the interests Section 1983 was intended to safeguard.²³³ The judicial effort to constrain the potentially enormous scope of the statute was, to a considerable extent, propelled by narrow interpretations of the statute’s “under color” of state law requirement so that it would only apply to actions specifically authorized by the state.²³⁴ Outside of

additional courts.” *Id.*

227. 42 U.S.C. § 1983.

228. Osagie K. Obasogie & Anna Zaret, *Plainly Incompetent: How Qualified Immunity Became an Exculpatory Doctrine of Police Excessive Force*, 170 U. PA. L. REV. 407, 417 (2022) (explaining that “Section 1983 was passed in the context of Reconstruction after the Civil War” and that the failures of the Reconstruction Amendments to “bring an end to white supremacy and intergenerational subordination of Black Americans” prompted its passage) (footnote omitted).

229. See Richard Briffault, *Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1141–42 (1977).

230. See STANLEY I. KUTLER, JUDICIAL POWER AND RECONSTRUCTION POLITICS 143–60 (1968); Briffault, *supra* note 229, at 1147–49, 1191.

231. Briffault, *supra* note 229, at 1150 (internal quotation citation omitted).

232. *Id.* at 1156 (“The vagueness of the language of the Civil Rights Act left the courts—perhaps intentionally—with broad latitude to construe [its] provisions.”).

233. *Id.* (“In the immediate post-Reconstruction years, this legislation was progressively eviscerated by restrictive interpretations of the interests the federal government was empowered to protect, and of the range of conduct it could prohibit consistent with the fourteenth amendment.”).

234. *Id.* at 1191 (“[I]he federal courts in the late nineteenth century through narrow interpretation of the constitutional rights protected by the statute and of the concept of ‘under color’

a few cases during the 1920s and 1930s when Section 1983 was used with some measure of success to challenge deprivations under the Constitution,²³⁵ the statute largely lay dormant until the 1960s. This changed when Section 1983 was lifted from its desuetude in *Monroe v. Pape*.²³⁶

The circumstances that gave rise to *Monroe* in the late 1950s could have been a hypothetical put on the Congressional debate floor in 1871 to exemplify the outrages that necessitated the statute. James Monroe, an African American, was sleeping in his bed naked when thirteen officers with the Chicago Police Department broke in without a warrant and ransacked the place.²³⁷ The officers found Monroe in bed and removed him at gunpoint.²³⁸ Monroe's wife and children were also asleep at the time and were awoken and forced to stand naked in the living room while being abused as their entreaties for compassion fell on deaf ears.²³⁹ The officers then arrested Monroe.²⁴⁰ They took him to the police station where he was detained incommunicado and interrogated for ten hours.²⁴¹ He was subsequently released without charges filed against him.²⁴² The Monroes brought a Section 1983 suit, naming as defendants the officers, the city of Chicago, and the Chicago Police Department.

The plaintiffs alleged that the defendants had deprived them of their right to be free from unreasonable searches and seizures as guaranteed under the Fourth Amendment.²⁴³ The district court dismissed the complaint²⁴⁴ and the Seventh Circuit affirmed.²⁴⁵ The Supreme Court reversed the lower courts in relevant part, holding that the defendants had violated the plaintiffs' Fourth Amendment rights and that the Monroes were entitled to relief under Section 1983.²⁴⁶ *Monroe* reinvigorated Section 1983 by expanding the scope of activities that could fall within the parameters of "under color of" law for purposes of stating a cause of action.

Prior to *Monroe*, government officials sued under Section 1983 could only be liable for actions that were authorized or approved by the state.²⁴⁷ *Monroe* reinterpreted the traditionally narrow definition of "under color of state law" by

of state law successfully restricted the scope of the statute.") (footnote omitted).

235. *Id.* at 1167 ("During the 1920's, the use of section 1983 was for the most part confined to deprivations of voting rights. Unlike the situation around the turn of the century, however, Section 1983 plaintiffs began to achieve a measure of success."); *See generally* Nixon v. Herndon, 273 U.S. 536 (1927) (invalidating a 1923 Texas law that had prohibited Blacks from casting votes in the Texas Democratic primary); Hague v. CIO, 307 U.S. 496 (1939) (holding that restrictions on holding political meetings in public spaces violated First Amendment protections concerning the freedom to assemble).

236. *Monroe v. Pape (Monroe I)*, 365 U.S. 167 (1961).

237. SCHWARTZ, *supra* note 118, at 1.

238. *Id.*

239. *Id.* at 1–2.

240. *Id.*

241. *Id.* at 2.

242. *Id.*

243. *Monroe v. Pape (Monroe II)*, 365 U.S. 167, 169–70 (1961).

244. SCHWARTZ, *supra* note 118, at 9.

245. *Id.*; *Monroe I*, 272 F.2d 365, 365 (1959).

246. *Monroe II*, 365 U.S. at 191–92.

247. *See* Briffault, *supra* note 229, at 1169–70; Obasogie & Zaret, *supra* note 228, at 421.

pointing to its earlier holdings in *United States v. Classic*²⁴⁸ and *Screws v. United States*.²⁴⁹ Those cases stood for the proposition that the “[m]isuse of power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state action is action taken ‘under color of’ state law.”²⁵⁰ *Classic* and *Screws* were criminal cases brought under a statute (18 U.S.C. § 242) with almost the same wording as Section 1983.²⁵¹ The Court reasoned that the construction of “under color” of law in Section 242 offered a general principle for enlarging the meaning of that term in the Section 1983 context.²⁵² This broader scope breathed new life into Section 1983, and the statute became an important tool for civil rights plaintiffs alleging constitutional violations to vindicate their interests in federal court.²⁵³

Importantly, the Court held that the Monroes could sue the officers in federal court even if Illinois law provided an adequate remedy.²⁵⁴ The Court determined, “The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked[.]”²⁵⁵

B. Qualified Immunity: Closing the Doors of the United States Courts

There has been an extraordinary rise in the volume of Section 1983 cases filed in federal court since *Monroe*. In 1960, just 280 claims were filed in federal court under all civil rights statutes;²⁵⁶ in 1972 about 8,000 cases were brought under Section 1983 alone.²⁵⁷ It has been said that the doctrine of qualified immunity emerged, in part, as a response to the explosion of Section 1983 cases facilitated by *Monroe*’s expansive construction of the “under color” of law requirement.²⁵⁸ There

248. *United States v. Classic*, 313 U.S. 299 (1941).

249. *Screws v. United States*, 325 U.S. 91 (1945).

250. *Id.* at 109.

251. *Classic* and *Screws* were brought under 18 U.S.C. § 242. It provides: Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects, or causes to be subjected, any inhabitant . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States . . . by reason of his color, or race . . . shall be fined not more than \$1,000, or imprisoned not more than one year, or both[.]

18 U.S.C. § 242.

252. *See* Briffault, *supra* note 229, at 1168–70.

253. *Id.* at 1172.

254. *Monroe II*, 365 U.S. 167, 183 (1961).

255. *Id.*

256. *See*

Patricia W. Moore, *The Civil Caseload of the Federal District Courts*, 2015 U ILL. L. REV. 1117, 1221 (2015) (noting that “[c]ivil rights cases [in federal court] were negligible in 1960” and that there were only “280 case filings” that year).

257. *See* Wayne McCormack, *Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Claims, Part II*, 60 VA. L. REV. 250, 250 (1974).

258. Obasogie & Zaret, *supra* note 228, at 434 (explaining that qualified immunity is often justified on the ground that “it makes up for an earlier error in expanding the scope of § 1983”); William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 62–63 (2018) (describing the Supreme Court’s three primary justifications for qualified immunity as including to “correct” the *Monroe II* Court’s expansion of the meaning of under color of law).

is no mention of qualified immunity in the U.S. Constitution or in Section 1983 itself. The reason it exists is because judges—particularly the sorts of judges who on other matters are strict textualists or originalists—made it up because they thought it to be good policy.²⁵⁹

Pierson v. Ray is the fountainhead.²⁶⁰ In the summer of 1961, a multiracial group of Episcopal clergymen took a trip to Mississippi to participate in the Freedom Rides—bus tours throughout the South organized to challenge segregation in public transportation.²⁶¹ Awaiting a bus stop in the state’s capital of Jackson, the priests entered a segregated café where they were met by two police officers who ordered them to disperse.²⁶² They refused, prompting the officers to arrest them because they had allegedly breached a vague Mississippi ordinance that authorized law enforcement to arrest any group of people who were actual or perceived threats to the “peace.”²⁶³ The clergymen were jailed, convicted, and sentenced to four months’ incarceration.²⁶⁴ Determining that they had been unlawfully arrested, the First Judicial Court of Hinds County threw out the convictions.²⁶⁵ The Mississippi law at issue was later held unconstitutional, and the priests thereafter filed a Section 1983 suit against the arresting officers and the trial judge for violating their constitutional rights.²⁶⁶

The officers argued that they were entitled to limited immunity for the Section 1983 suit and the state tort claim for false imprisonment brought against them.²⁶⁷ They claimed that the common law in Mississippi when Section 1983 was passed conferred immunity to police officers accused of false imprisonment who acted in “good faith” and with probable cause.²⁶⁸ The Fifth Circuit rejected this defense,²⁶⁹ reasoning straightforwardly that the officers could only avail themselves of the common law tort defense in state tort suits in which that defense applied, not to a distinct violation in which the defense did not apply.²⁷⁰

Reversing the Fifth Circuit, the Supreme Court held that the good faith and probable cause defense also applied to Section 1983 suits for false arrest.²⁷¹ To reach this result, the Court reasoned that Congress did not say when drafting Section 1983 whether government officials could claim immunities to suit.²⁷² Rather than reading the absence of a limited immunity defense as strong evidence that no such defense

259. See, e.g., Joanna Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1803 (2018).

260. *Pierson v. Ray* (*Pierson II*), 386 U.S. 547 (1967).

261. *Id.* at 549.

262. *Id.*

263. *Id.*

264. *Id.*

265. *Pierson v. Ray* (*Pierson I*), 352 F.2d 213, 216 (5th Cir. 1965).

266. *Pierson II*, 386 U.S. at 550.

267. *Id.*

268. *Id.* at 551–52.

269. *Id.* at 551.

270. *Id.* at 551–52.

271. *Id.* at 557.

272. *Id.* at 555.

applied, the Court read the absence of a defense as suggesting an implicit Congressional intent to import the concept from similar state tort suits.²⁷³ The silence, the Court reasoned, dictated the conclusion that officers sued for false arrest under Section 1983 *could* claim a “good faith and probable cause” defense.²⁷⁴ Because some states had this common law defense, the Court assessed that Congress probably intended for it to apply to Section 1983 suits when an arresting officer acts “under a statute that he reasonably believed to be valid but that was later held unconstitutional, on its face or as applied.”²⁷⁵ Writing for the majority, Chief Justice Earl Warren observed that “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.”²⁷⁶

This framing was a bit of sophistry.²⁷⁷ The ordinance at issue—though later overturned—did not even on its own terms in any way compel, or even justify, the arrest of the priests who were fully within their constitutional rights to enter the café. By importing the “good faith and probable cause” defense from the common law tort context to Section 1983, the Warren Court introduced the qualified immunity doctrine, which in the decades later would become a high-powered tool for denying recourse to victims whose civil rights have been violated. But this path was not preordained. The *Pierson* Court specifically confined the application of the “good faith and probable cause” defense to “the limited context of an officer being sued for false arrest when the statutory basis for the arrest is later deemed invalid.”²⁷⁸ As scholars have noted, “[i]t would have been hard for anyone to predict, based on the decision in *Pierson*, that qualified immunity would grow into what it has become today.”²⁷⁹

Qualified immunity acquired its modern gloss in *Harlow v. Fitzgerald*,²⁸⁰ a case that did not involve state officials at all and, therefore, did not involve Section 1983.²⁸¹ In that case, the Court retrofitted qualified immunity, applied it outside the

273. *Id.* at 555.

274. *Id.* at 555.

275. *Id.* at 555, 557.

276. *Id.* at 555.

277. *See generally* Baude, *supra* note 258.

278. Obasogie & Zaret, *supra* note 228, at 425.

279. *Id.*

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

281. Fitzgerald was a high-ranking aide to President Richard Nixon who testified in Congress about the Nixon administration’s fraudulent financial activities and was subsequently fired by Bryce Harlow and Alexander Butterfield. *Id.* at 802. While Section 1983 provides a cause of action in federal court when state officers deprive citizens of rights protected by the Constitution and federal laws, there is no analogue for deprivations by federal officials. In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the Court held that there is an implied right of action in federal court under the Fourth Amendment against federal officials. Fitzgerald filed a *Bivens* suit against Harlow and Alexander, also aides to Nixon, alleging that their decision to terminate him amounted to retaliation. The defendants argued that Fitzgerald’s claims could not succeed because as presidential aides they were entitled to *absolute* immunity. The Court granted them qualified rather than the absolute immunity they had requested. Subsequent decisions have since hollowed *Bivens*, rendering it nearly

false arrest context, and altered its subjective standard requiring “good faith” to an objective standard²⁸² that protected “government officials performing discretionary functions . . . insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”²⁸³ The Court reasoned that the old qualified immunity rules, which turned on factual determinations about a defendant’s subjective intent, could not be resolved on summary judgment if there was a genuine issue of material fact.²⁸⁴ Thus, as a matter of policy, the subjective standard was “incompatible” with the notion “that insubstantial claims should not proceed to trial.”²⁸⁵ Roughly reflecting the formulation in *Harlow*, qualified immunity today has become a strait jacket for civil rights claimants alleging violations by government officials.

The Court has said that qualified immunity protects “all but the plainly incompetent or those who knowingly violate the law.”²⁸⁶ For a plaintiff to prevail and overcome qualified immunity a court must determine, in no particular order,²⁸⁷ not only that the plaintiff’s constitutional right was violated *but also that* the alleged violation was clearly established such that every objectively reasonable officer would have known that the conduct was unlawful.²⁸⁸ Individual officials have little incentive to act lawfully if they are rarely held responsible for either the expense of defending the suit or the obligation to pay damages.²⁸⁹ Even when the alleged constitutional violation is obvious, the “clearly established” requirement is supposed to permit officials to anticipate when the violation will give rise to liability. In the run of cases, courts rarely find that the law is sufficiently established to pierce the qualified immunity shield.²⁹⁰ Courts of appeals have taken the need for clearly established law even further than the Supreme Court, requiring a nearly identical set

impotent in enabling claims for violations by federal actors, even more so than the limits on claims brought against state actors under Section 1983. *See, e.g.,* Egbert v. Boule, 596 U.S. 482 (2022).

282. *Harlow*, 457 U.S. at 818 (“Reliance on the objective reasonableness of an official’s conduct . . . should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment.”) (footnote omitted).

283. *Id.*

284. *Id.* at 816.

285. *Id.* at 815–16.

286. *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011) (internal citation omitted).

287. In *Pearson v. Callahan*, 555 U.S. 223 (2009), the Court overruled the requirement in *Saucier v. Katz*, 533 U.S. 194 (2001) that courts analyzing qualified immunity claims must first ask whether the alleged violation is unconstitutional before deciding whether it is clearly established.

288. *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018).

289. Qualified immunity does not apply to injunctive relief, but that is far less often at issue. And in any event, individual officials have little incentive to try to ensure they are acting lawfully if they are rarely responsible for either the expense of defending the suit or the obligation to pay any damages to compensate for the harm they caused by their unlawful conduct. *See* Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 890 (2014) (reporting the findings of a national study which showed that “police officers are virtually always indemnified”).

290. *See generally* Scott A. Keller, *Qualified and Absolute Immunity at Common Law*, 73 STAN. L. REV. 1337, 1338 (2021) (explaining that the “resort to the clearly-established-law test . . . frequently denies plaintiffs money damages when their constitutional rights are violated”).

of facts.²⁹¹ A specialized appellate court would help address this hostility to civil rights claimants and lack of uniformity.

C. *Specializing Section 1983*

This section offers hypotheses about the benefits of adopting a specialized federal appellate court with exclusive jurisdiction over Section 1983 suits. Many court reform proposals are beset by the fact that they have a political valence²⁹² that serves as an impediment to their implementation at a time when there is intense political polarization.²⁹³ Recognizing these dynamics, I suggest that the proposed court would not reflect an asymmetrical measure that unduly favors one political party because it would generate what Laurence Baum calls the neutral virtues of specialization²⁹⁴—enhancing quality, efficiency, and uniformity in the adjudication of qualified immunity when invoked in Section 1983 suits.²⁹⁵ The specialized court will develop subject-matter expertise in Section 1983 cases which is (neutrally) good because expertise enhances the quality of judicial decision-making. This expertise will in turn lead to more efficient disposition of Section 1983 cases where qualified immunity is invoked—a neutral benefit. The proposed court would generate uniform, nationwide law. This uniformity would help to clearly establish the law. Currently, splintered decisions from different regional courts of appeals and the rarity of the Supreme Court taking on such cases muddle qualified immunity standards. Consolidating authority in one regional court of appeals would help aid in overcoming the barriers that stand in the way of plaintiffs getting relief.

Let us now turn to these neutral principles.

1. *Quality*

a. Expertise Might Shape the Substance of Judicial Policy

Quality is associated with expertise.²⁹⁶ Expertise is generally defined as superior knowledge or skill in a specific field obtained through repeated study or engagement with a subject.²⁹⁷ When judges repeatedly consider cases within a

291. See, e.g., *Taylor v. Riojas*, 141 S. Ct. 52 (2020) (vacating and remanding the Fifth Circuit’s grant of qualified immunity).

292. Jeffrey L. Fisher, *The Supreme Court Reform that Could Actually Win Bipartisan Support*, POLITICO (July 21, 2022, 4:30 AM), <https://www.politico.com/news/magazine/2022/07/21/supreme-court-reform-term-limits-00046883> (“Many proposals have an overt, or at least implicit, partisan slant.”) [<https://perma.cc/HS29-SJLN>]

293. See Geoffrey Skelley & Holly Fuong, *3 in 10 Americans Named Political Polarization as a Top Issue Facing the Country*, FIVETHIRTYEIGHT (June 14, 2022, 12:09 PM), <https://fivethirtyeight.com/features/3-in-10-americans-named-political-polarization-as-a-top-issue-facing-the-country/> [<https://perma.cc/N8BK-KHBL>].

294. BAUM, *supra* note 35, at 211.

295. *Id.* at 218.

296. *Id.* at 33.

297. Oldfather, *supra* note 32, at 879 (explaining that expertise can be defined relatively and qualitatively. “[A]n expert is simply someone who knows more about the topic at hand, and expertise

particular field, the idea is that those judges develop expertise in the subject matter beyond that which judges otherwise bring to that field. Further, this expertise is likely to yield “better” quality decisions given that experts are more likely to make decisions that are, in some sense, better than if they had less expertise. But what exactly makes a decision “better”? This is a difficult question to probe. Determining whether a particular decision is “better” entails determining the rubric that is used to measure quality.²⁹⁸ If we are concerned about the content of the law (as opposed to its form or stability),²⁹⁹ the quality of judicial decision-making is inherently value laden.³⁰⁰

Experts are more likely to incorporate a wider range of factors in their decision-making process than might be apparent to a generalist judge.³⁰¹ Sometimes these considerations are not even captured in the applicable legal framework.³⁰² As Professor Chad M. Oldfather explains, “the tax court judge, for example, may be able to appreciate the connections between pieces of a transaction in ways that a generalist judge cannot and, as a result, be led to rule on a dispute in a way and for reasons that are neither evident to the generalist” nor expressed overtly in the governing legal doctrine.³⁰³ The generalist judge will, by comparison, lack the same sophistication to appreciate the nuances of the issue at hand.³⁰⁴ Hence, generalists will be more likely to be driven by background principles or legal frameworks.³⁰⁵

Another way to think about the differences between generalists and specialists in terms of expertise is by reference to rules and standards.³⁰⁶ Professor Oldfather is again instructive: “generalist judges will consistently find themselves adjudicating cases as to which they lack both an expert’s grasp of the situation and a firm sense of the background principles that ought to govern.”³⁰⁷ As a result of this, generalists are more likely to “rely on rules—in the form of relatively strict adherence to statutory language and precedent—where they are available.”³⁰⁸ Specialists, on the other hand, “will be better situated to appreciate” the differences in cases “and to have a sense for whether those differences ought to be regarded as consequential in light of her understanding of the purposes of the law.”³⁰⁹ Thus construed, generalist

is a relative rather than an absolute characteristic. Thus, for example, in any group there will be individuals recognized as the best people to consult in order to solve a specific problem, whether it is the best place to order a pizza from or how to interpret an x-ray. Whenever someone is in position to provide useful information to another, that person counts as an expert relative to the person seeking the information.” (footnote omitted).

298. *Id.* at 871.

299. *Id.* at 874 (“It seems reasonable to suspect that the law created by generalist and specialist judiciaries will differ along at least three dimensions: content, form, and stability.”).

300. *Id.* at 866 (“[A]ssessments of quality are to a large degree in the eye of the beholder.”).

301. *Id.* at 874.

302. *Id.* at 874.

303. *Id.* at 871.

304. *Id.*

305. *Id.* at 872–73.

306. *Id.* at 872.

307. *Id.* at 872–73.

308. *Id.* at 873.

309. *Id.*

judges are more likely to “dispense justice that is relatively rough and rules-based.”³¹⁰ By contrast, we might expect expert judges to deviate from the rules produced by other generalist authorities, including higher courts and legislatures.³¹¹

A caveat is warranted here: it is not simply expertise measured in the rough sense of years of experience dealing with the relevant issues that is important in shaping the content of judicial policy. Rather, *who* the judge is also plays a significant role.³¹² The judges appointed to specialized courts have an outsized influence in shaping the substance of judicial policy within that substantive realm.³¹³ “If one court has a monopoly over a particular type of case, officials can choose judges with that field in mind as an efficient means to influence judicial policy in the field.”³¹⁴ When there is high case concentration, criteria for selecting judges might naturally become whether the judge agrees with the objectives the court was established to advance (however that can be determined).³¹⁵

Consider, as an example, the late Judge Jack B. Weinstein of the U.S. District Court for the Eastern District of New York. In 2018, Judge Weinstein denied qualified immunity to four New York Police Department (NYPD) officers who had physically assaulted a Black man for refusing to allow the officers entry into his apartment without a warrant.³¹⁶ The Judge—the longest-serving federal trial judge in U.S. history³¹⁷—reasoned that the Supreme Court’s qualified immunity jurisprudence had gone too far. Its “recent emphasis on shielding public officials and federal and local law enforcement,” Judge Weinstein wrote, “means many individuals who suffer a constitutional deprivation will have no redress.”³¹⁸ But rather than critique what he perceived as wrongheaded precedent from the higher courts and operate within its constraints, Judge Weinstein denied qualified immunity. For Judge Weinstein—who at the time of the decision had served on the federal bench for more than 50 years and had decided numerous qualified immunity cases and thus could be considered an expert—expertise dictated that granting qualified immunity “would be inconsistent with the purpose of” Section 1983³¹⁹ notwithstanding overwhelming precedent holding to the contrary. Judge Weinstein’s decision was described in the popular press as “quite unusual.”³²⁰

310. *Id.* at 871.

311. *Id.* at 872.

312. SCHWARTZ, *supra* note 118, at 122 (“Studies have . . . found that judges’ personal characteristics may influence their decisions: white judges grant summary judgment to defendants in employment discrimination cases more often than judges of color, and court of appeals judges with daughters are more sympathetic to female plaintiffs in employment discrimination cases than those without.”).

313. *See* BAUM, *supra* note 35, at 220–21.

314. *Id.* at 223.

315. *Id.* at 39.

316. *Thompson v. Clark*, No. 14-CV-7349, 2018 WL 3128975, at *3 (E.D.N.Y. June 26, 2018).

317. *In Memoriam, Jack B. Weinstein ‘48*, COLUMBIA L. SCHL., (June 15, 2021), <https://www.law.columbia.edu/news/archive/memoriam-jack-b-weinstein-48> [<https://perma.cc/8S8F-7M87>].

318. *Thompson*, 2018 WL 3128975, at *11.

319. *Id.* at 2.

320. Alan Feuer, *The 96-Year-Old Brooklyn Judge Standing Up to the Supreme Court*, N.Y. TIMES

Recognizing the limitations of Judge Weinstein's power as a lower court judge, Professor Bennett Capers told the *New York Times* that the decision "was written in a way that he seems to have a larger audience in mind."³²¹

The term "movement judge" might be used to describe Judge Weinstein as a jurist. Movement judges, according to Professor Brandon Hasbrouck, "critique precedent and champion the dismantling of oppressive regimes for a better and just society. This requires the movement judge to shatter insular thinking and seek answers from historically repressed communities."³²² An expert judge less concerned than Judge Weinstein was about the widening rights-remedy gap might instead have found that granting qualified immunity was more desirable as a matter of policy.

Under the status quo regime where appeals of qualified immunity decisions under Section 1983 are adjudicated by generalist judges, the proclivity of generalist judges to resort to rules that are stacked in favor of the government does not portend well for vulnerable rights claimants. The current qualified immunity rules are intrinsically more pro-government. So, there is good reason to believe that a shift toward specialists who, by virtue of their expertise, are likely to feel less constrained by rules will be helpful for plaintiffs. That said, increasing expertise through specialization will not necessarily reconfigure the unfairly one-sided nature of the qualified immunity doctrine and generate more "just" outcomes insofar as one is concerned about the expungement of the rights of vulnerable groups. "[W]hat judges believe about the way the world works may influence how they rule in Section 1983 cases," writes Joanna Schwartz.³²³ If a judge believes that "most civil rights suits are frivolous, they may be more likely" to rule in the government's favor even if they are specialists.

b. Concerns that Expertise Might Lead to "Tunnel Vision" are Overstated

Start with the proposition that if one is justice-oriented, the role that enhanced expertise might play in qualified immunity disputes seems desirable. Some people might consider arriving at decisions that correspond with a sense of "justice" as the end goal of adjudication. But suppose that we measure "better" quality by a formalist expectation that judges should be "neutral." It is said that a specialized court seems less impartial and more fixed in its approach to the issues on its docket because its narrow jurisdiction limits the court's ability to be apprised of changes in other areas of law that might shape the body's judgment.³²⁴

During the congressional deliberations about the bill that established the

(June 14, 2018), <https://www.nytimes.com/2018/06/14/nyregion/the-96-year-old-brooklyn-judge-standing-up-to-the-supreme-court.html> [<https://perma.cc/P2RN-3PCD>].

321. *Id.*

322. Brandon Hasbrouck, *Movement Judges*, 97 N.Y.U. L. REV. 631, 635 (2022) (footnote omitted).

323. SCHWARTZ, *supra* note 118, at 122.

324. See BAUM, *supra* note 35, at 34; Kumar, *supra* note 213, at 2531 ("Congress deliberately provided [the Federal Circuit] with jurisdiction over non-patent agencies to help prevent tunnel vision and to ensure good decisionmaking.").

Federal Circuit as a specialized court for patent appeals, Senator Alan Simpson of Wyoming worried that the proposed court would not have the benefit of “diversity of opinion stemming from divergent points of view and sometimes differing strains of geographical philosophy and thought.”³²⁵ Similarly, Judge Diane Wood of the U.S. Court of Appeals for the Seventh Circuit has argued that the Federal Circuit’s exclusive jurisdiction over patent cases should be abolished because of concerns that the court is deprived of divergent perspectives that some perceive as orienting the judges on that court toward certain policy outcomes.³²⁶

These concerns should not be taken lightly. Yet, at the same time, there is good reason to be skeptical.³²⁷ It might be argued on the basis of current evidence that regional federal appellate courts (often staffed with former prosecutors and other former government employees), along with the Supreme Court, are already imbued with a kind of tunnel vision when it comes to the qualified immunity analysis, repeatedly shielding the government from liability. Time after time, the Supreme Court has characterized qualified immunity as essential to government officials and to “society as a whole.”³²⁸ The message that this framing conveys, as Professor Schwartz argues, is that “the world would be worse off” without qualified immunity.³²⁹ The supposed problems that would emerge as an outgrowth of eliminating qualified immunity can be briefly recounted: “Plaintiffs would file many more frivolous suits, plaintiffs would recover much more money against government defendants, and these suits and costs would imperil individual defendants’ pocketbooks and the government fisc, chill officer behavior on the street, and discourage people from accepting government jobs.”³³⁰

It is fair to say that most judges do not take their oath of office planning to make the world a worse place. And if the message from the high court is that neutralizing or eliminating qualified immunity would have such an effect, we might expect that operating within the otherwise freewheeling body of law, the regional circuits would have a tendency to look at things from only one point of view. That point of view is that government officials should ordinarily be entitled to qualified immunity, that liability for state officials’ unlawful conduct should be the highly unusual exception rather than the rule, and that qualified immunity—in the Supreme Court’s words—should shield “all but the plainly incompetent or those who knowingly violate the law.”³³¹ Hence, one might argue that even if a specialized

325. 127 CONG. REC. S29888 (daily ed. Dec. 8, 1981) (remarks of Sen. Simpson).

326. See Diane P. Wood, *Keynote Address: Is It Time to Abolish the Federal Circuit’s Exclusive Jurisdiction in Patent Cases?*, 13 CHI.-KENT J. INTELL. PROP. 1, 10 (2013) (proposing that any regional court be permitted to hear patent cases).

327. See Michael Coenen & Seth Davis, *Percolation’s Value*, 73 STAN. L. REV. 363 (2021) (questioning the strength of arguments along the lines advanced by Judge Wood and Senator Simpson).

328. *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982); *City of San Francisco v. Sheehan*, 575 U.S. 600, 611, n.3 (2015); *White v. Pauly*, 137 S. Ct. 548, 551 (2017).

329. Schwartz, *supra* note 20, at 315.

330. *Id.*

331. *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011) (quoting *Malley v. Briggs*, 475 U.S. 334, 341 (1986)).

body did generate impartiality in the qualified immunity analysis, it would alter conditions on the ground no more than bringing sand to a beach. That is, if a specialized court were somewhat impartial, the baseline is already so slanted in one direction that it wouldn't make much difference.

There are some problems with this argument, however. Suppose that, unlike a majority of the Justices on the Supreme Court, the judges appointed to a specialized Section 1983 court would not wear rose-colored glasses for governmental defendants. And the proposal is challenged on the ground that the expertise that would flow from specialization would impact the substance of judicial policy in favor of *denying* qualified immunity rather than granting it.³³² Professor Schwartz has compellingly argued that fears about the practical implications of the demise of qualified immunity are greatly exaggerated. Consider the conventional wisdom that eliminating qualified immunity would negatively impact the behavior of officers on the ground. Professor Schwartz suggests that eliminating qualified immunity would “have limited impact on officers’ and municipalities’ dollars and decision making.”³³³ Instead, the more likely scenario is that it would “clarify the law, make litigation more efficient, increase the number of suits filed” in which officials have violated the law and reorient civil rights litigation to focus on whether government officials are acting within their constitutional authority.³³⁴

The evidence therefore demonstrates that even if we entertain the argument that the proposed court would be somewhat impartial by being less pro-government entitlement to qualified immunity, that is not the same as the court developing “tunnel vision” with respect to qualified immunity cases. Tunnel vision is more accurately reflected in the current situation where the federal courts have apparently adopted a posture that government officials are entitled to qualified immunity even in extraordinary circumstances where any reasonable officer would have known that their conduct was unlawful. And if the specialized tribunal did have the salutary benefit (in my view) of limiting qualified immunity, the outgrowth of such a result would have little connection to the fears animating the maintenance of qualified immunity while providing benefits such as clarifying constitutional rights and making civil rights litigation more cost-effective.

Any substantive shift in outcome generated by the specialized court would also be justified by the experience with the Class Action Fairness Act (CAFA).³³⁵ Congress enacted CAFA in 2005 principally to provide a federal forum for class actions where the total value of class-wide claims exceeds \$5 million and where there is minimum diversity between any class member and any defendant.³³⁶ Congress felt it fair and proper to ensure that federal courts were the proper forum to resolve

332. *Id.*

333. Schwartz, *supra* note 20, at 316.

334. *Id.*

335. Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified in scattered sections of 28 U.S.C.).

336. *See* Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 4-15, 119 Stat. 4, 9-13 (2005) (codified at 28 U.S.C. § 1332(d), 1453).

such disputes for purposes of enhancing professionalism, expertise, and uniformity in the adjudication of multistate class actions.³³⁷ CAFA made the federal judicial system a specialized court of sorts for class actions because it was thought that specialization was preferable, not only in terms of the neutral principles of court specialization but also in terms of concern about the substantive outcome of cases in the state courts.³³⁸ The Senate Judiciary Committee described CAFA as a “modest” measure,³³⁹ despite acknowledging that the statute was passed for neutral *and* outcome-relevant reasons. It should also be underscored that CAFA moved state court cases into the federal system, which is a far greater structural intrusion upon federalism and states’ rights than redistributing federal court cases in the federal court system as my proposal contemplates. This history thus suggests there is precedent making it acceptable for the proposed court to generate non-neutral benefits.

2. Efficiency

In society, efficiency is the virtue most tightly linked to specialization.³⁴⁰ Because of this perceived connection, policymakers anticipate that court specialization will lead to more efficient handling of cases, which can materialize in a number of ways.³⁴¹ When a new court is founded with narrow jurisdiction over a specific field, specialization can improve efficiency merely by adding more resources to the courts. The underlying assumption is that new judgeships are established with the creation of a new court. The increase in the number of available judges, assuming all else is relatively stable, allows cases to be spread among more judges and thereby lightens the caseload of existing judges. Perhaps due to less burnout and fatigue, the greater distribution of caseloads is associated with enhanced efficiency.³⁴²

But even if specialization does not lead to more judgeships, enhanced efficiency would likely also be achieved in ways that are familiar in the world at large: those who regularly operate within a particular area develop expertise. As Laurence Baum explains, “[l]ike people in other positions, judges who regularly handle a single class of cases are expected to dispose of their work in less time than their counterparts on generalist courts who see that class of cases less frequently.”³⁴³ Efficiency is especially valuable to people whose interests are prejudiced by delay, as courts have said about government officials in qualified immunity cases.³⁴⁴

337. See Emery G. Lee III & Thomas E. Willging, *The Impact of the Class Action Fairness Act on the Federal Courts: An Empirical Analysis of Filings and Removals*, 156 U. PA. L. REV. 1723 (2008).

338. *Id.* at 1739 (“Congress also found abuses in class action settlement terms and enacted both settlements and procedural approaches to notifying public regulatory officials, thereby increasing participation in settlement review for the protection of class members’ interests.”).

339. Edward A. Purcell, Jr. *The Class Action Fairness Act in Perspective: The Old Jurisdiction and the New in Federal Jurisdictional Reform*, 156 U. Pa. L. Rev. 1823, 1824 (2008).

340. See BAUM, *supra* note 35, at 218.

341. *Id.*

342. *Id.* at 32–33.

343. *Id.*

344. *Pearson v. Callahan*, 555 U.S. 223, 237 (2009), (“*Saucier’s* two-step protocol ‘disserve[s]

a. Efficiency is a Primary Justification for Qualified Immunity

A large swath of cases assert that efficiency is a central and substantial concern that justifies the doctrine of qualified immunity. In *Harlow v. Fitzgerald*, the Supreme Court explained that the doctrine of qualified immunity was intended to shield government officials from four threats:

1) the expenses of litigation; 2) the diversion of official energy from pressing public issues; 3) the danger that fear of being sued will “dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties”; and 4) the deterrence of able citizens from acceptance of public office.³⁴⁵

The second and third factors demonstrate that the Court has prioritized ensuring that government officials are not embroiled in litigation because of its belief that the associated burdens (i.e., discovery and testifying) impinge on officials’ productivity. The fourth factor similarly seeks to avoid the perceived problem of citizens declining to become public officials for fear of such burdens.

Recent Supreme Court decisions have expressed similar judgments about shielding government officials from the encumbrances of discovery and trial being “the ‘driving force’ behind the creation of the qualified immunity doctrine.”³⁴⁶ In *Filarsky v. Delia*, the Court granted qualified immunity to a private actor contracted to work for the government partly because the Court worried that the “distraction of lawsuits . . . will also often affect any public employees with whom they work by embroiling those employees in litigation.”³⁴⁷ Similarly, in *Pearson v. Callahan*, the Court abolished the mandatory two-step qualified immunity analysis that had required courts to decide first whether an alleged violation was unconstitutional before addressing the “clearly established” question.³⁴⁸ *Pearson* held that the rigid two-step test “disserve[s] the purpose of qualified immunity” because it “forces the parties to endure additional burdens of suit—such as the costs of litigating constitutional questions and delays attributable to resolving them—when the suit otherwise could be disposed of more readily.”³⁴⁹ There is a countervailing effect

the purpose of qualified immunity’ when it ‘forces the parties to endure additional burdens of suit—such as the costs of litigating constitutional questions and delays attributable to resolving them—when the suit otherwise could be disposed of more readily.’”) (alteration in original).

345. *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982) (alteration in original) (emphasis added) (citations omitted).

346. *Pearson*, 555 U.S. at 231 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 n.2 (1987)).

347. *Filarsky v. Delia*, 566 U.S. 377, 391 (2012).

348. *Pearson*, 555 U.S. at 232. The Supreme Court had held in *Saucier v. Katz* that courts should perform the qualified immunity analysis by following a mandatory two-step test. The test first directed courts to decide whether the defendant official had violated the plaintiff’s constitutional rights. If, and only if, the first step was in the affirmative, the court could then proceed to the clearly established prong. 533 U.S. 194, 201 (2001).

349. *Pearson*, 555 U.S. at 237 (alteration in original) (quoting Brief for National Ass’n of Criminal Defense Lawyers as Amicus Curiae Supporting Respondent, *Pearson v. Callahan*, 555 U.S.

when courts no longer need to address whether the conduct is unconstitutional before holding that, in any event, it is not clearly unconstitutional: such decisions prevent the law from ever becoming clearly established.

The foregoing suggests concerns about delay animate much of the landscape of qualified immunity cases. A specialized appellate court would likely quickly and efficiently resolve issues of qualified immunity furthering a primary justification for qualified immunity.

b. Qualified Immunity Does Not Save Time in Section 1983 Litigation

In a recent study, Professor Joanna Schwartz concluded that there is little evidence that qualified immunity, for all its costs, actually achieves one of the principal objectives it is designed to promote.³⁵⁰ Professor Schwartz reviewed data sets consisting of 1,183 Section 1983 suits filed in five district courts over a two-year span from January 1, 2011, to December 31, 2012.³⁵¹ The districts, covering the Third, Fifth, Sixth, and Eleventh Circuits, were selected because of an expectation that judges from those circuits would have diverse ideological leanings and, thus, “might differ in their approach to qualified immunity and to Section 1983 litigation more generally.”³⁵² Her findings showed that qualified immunity “rarely served its intended role as a shield from discovery and trial[.]”³⁵³ Of the 1,183 cases in the data set, “qualified immunity was the basis for dismissal in 3.2%” of the cases; “0.6% of cases were dismissed on qualified immunity grounds at the motion to dismiss stage, and 2.6% of cases were dismissed on qualified immunity grounds at summary judgment—either by the district court or on appeal.”³⁵⁴ Additionally, “even in cases in which qualified immunity motions resulted in case dismissals, it is far from certain that qualified immunity saved the courts time.”³⁵⁵

c. Specialization is in Harmony with Courts’ Efficiency Objectives

If courts are determined to subvert constitutional protections in the interest of advancing governmental efficiency, we should at least demand that the means are

223 (2009) (No. 07-751)).

350. Schwartz, *supra* note 41, at 17 (“The Court’s interest in protecting government officials from the burdens of discovery and trial also motivated its decision to allow interlocutory appeals of qualified immunity denials.”) (internal citation omitted).

351. *Id.* at 19. The districts were the Southern District of Texas, Middle District of Florida, Eastern District of Pennsylvania, Northern District of California, and Northern District of Ohio. *Id.*

352. *Id.* Professor Schwartz added that “commentators believe that courts in these circuits vary in their approach to qualified immunity, with judges in the Third and Ninth Circuits favoring plaintiffs, and judges in the Eleventh Circuit so hostile to Section 1983 cases that they are described as applying ‘unqualified immunity.’” (footnote omitted).

353. *Id.* at 2.

354. *Id.* at 45 (citing Professor Alexander A. Reinert’s article *Measuring the Success of Bivens Litigation and Its Consequences for the Individual Liability Model* in which Professor Reinert observed a similar pattern in the role that qualified immunity plays in the dismissal of *Bivens* claims. 62 STAN. L. REV. 809, 843 (2010)).

355. Schwartz, *supra* note 41, at 61.

actually advancing governmental efficiency. I suggest that establishing a specialized Article III appellate tribunal exclusively for Section 1983 cases is in harmony with the courts' stated interest in using qualified immunity to protect government officials from the inefficiencies that accrue in the course of litigation.³⁵⁶

Begin by considering either of the following two scenarios. In the first scenario, the specialized court would be created by establishing new federal judgeships to staff the court. The appointment of more judges would promote efficiency by bringing more resources to address the scarcity problem in Article III adjudication. A recent article by Peter S. Menell and Ryan Vacca discussed the need to reform the federal judiciary because of “the growing caseload and congestion problems plaguing the federal judiciary.”³⁵⁷ The authors reported that at the federal appellate level, the number of cases filed each year between 1971 and 2017 jumped almost 300% from 14,761 in 1971 to 57,872 in 2017.³⁵⁸ While Congress approved additional circuit judgeships to meet the demands of the ballooning dockets,³⁵⁹ it did not appoint enough judges to keep the caseload per judge steady. “Counting active and senior judges,” they reported that “the caseload per judge has roughly doubled since 1971.”³⁶⁰ Specializing Section 1983 by creating new judgeships would contribute to remedying this problem.

In the second scenario, the specialized tribunal would be created and staffed with judges already on the federal bench.³⁶¹ If judges are taken from other circuits, then there would be vacancies in those circuits. Those vacancies would presumably need to be filled. Unless it was thought that the caseload in those circuits would be correspondingly smaller, obviating the need to replace the departing judges. This seems unlikely because all civil rights cases—not just Section 1983 suits—represent only a fraction of the matters on court dockets throughout the regional courts of appeals.³⁶² We can thus infer that if the judges are taken from other circuits in the founding of the specialized Section 1983 court and their work on the new court is exclusively Section 1983 cases, they would not take their full caseload with them

356. It is true that qualified immunity can also be invoked in suits against federal officials, which is outside the scope of Section 1983. Indeed, as stated above, the contemporary understanding of the doctrine emerged in the context of a *Bivens* claim. But the number of Section 1983 suits exceeds *Bivens* claims, suggesting that we should expect qualified immunity to surface more often in the Section 1983 context. Thus, even if any gains in efficiency would only accrue to an incomplete set of qualified immunity cases, it would make a meaningful difference in the overall space.

357. Menell & Vacca, *supra* note 8, at 790.

358. *Id.* at 853.

359. *Id.*

360. *Id.* Much of this increased workload can be explained by the expansion of the administrative state. *Id.* at 854 (explaining that “the growth of the administrative state has contributed to the appellate workload” and that “administrative appeals constitute between 5%–20% of the appellate docket”) (footnotes omitted).

361. This assumption is based on the fact that the last time Congress established a specialized federal appellate court, it filled the bench by drawing from a pool of existing federal judges. *See infra* note 414 and accompanying text.

362. U.S. CTS., *Federal Judicial Caseload Statistics 2021*, <https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2021> [<https://perma.cc/L29L-7CDC>] (last visited Mar. 6, 2024).

and would leave behind responsibilities that would fall on their generalist counterparts. Their departure would thus be a subtraction that imposes capacity constraints by increasing the caseload per judge in the regional circuits where the judges are selected from, thus suggesting the need to fill any vacancies. Under this scenario, it is fair to assume that establishing the court would likely lead to the appointment of more judges to the federal bench. Adding more judges to the federal bench in this way would also likely increase efficiency.

But, there is some evidence that specializing Section 1983 might improve efficiency in the adjudication of qualified immunity disputes beyond the ancillary benefits just noted. To see why, it is helpful, though not determinative, to look at the experience of the Federal Circuit. I use the Federal Circuit as an example because there are important similarities between the types of cases the Federal Circuit hears and the cases that a specialized federal appellate court with exclusive jurisdiction over Section 1983 suits would hear.

The Federal Circuit was founded in 1982 by a merger of the U.S. Court of Customs and the appellate division of the U.S. Court of Claims, and judges on the predecessor courts were appointed to the new court.³⁶³ At its inception, Congress gave the body exclusive jurisdiction to adjudicate appeals of all patent disputes.³⁶⁴ With this responsibility came a mandate to advance uniformity and efficiency.³⁶⁵ Congress decided to channel all patent appeals into a single court after observing that patent cases are “unusually complex [and] technically difficult.”³⁶⁶ At a hearing in 1981 concerning the creation of the Federal Circuit, Howard Markey, who would later serve as Chief Judge of that court, described the potential benefits of the proposed court in this way: “[I]f I am doing brain surgery every day, day in and day out, chances are very good that I will do your brain surgery much quicker, or a number of them, than someone who does brain surgery once every couple of years.”³⁶⁷

Qualified immunity cases are, of course, not brain surgery. But courts³⁶⁸ and

363. Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (1982) (codified in various sections of 28 U.S.C.); Gugliuzza, *supra* note 220, at 1800–01; Emmette F. Hale III, *The “Arising Under” Jurisdiction of the Federal Circuit: An Opportunity for Uniformity in Patent Law*, 14 FLA. ST. L. REV. 229, 229 (1986).

364. Hale III, *supra* note 363, at 229.

365. See Rochelle Cooper Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U. L. REV. 1, 3 (1989) (explaining that the Federal Circuit was established “largely to achieve . . . efficiency and managerial goals”); Laura G. Pedraza-Farina, *Understanding the Federal Circuit: An Expert Community Approach*, 30 BERKELEY TECH. L.J. 89, 117 (2015) (“[T]he Federal Circuit has particular expertise in formulating patent doctrine to fulfill the dual congressional mandate of uniformity and efficiency.”).

366. H.R. REP. NO. 97-312, at 22–23 (1981).

367. *U.S. Court of Appeals for the Federal Circuit and U.S. Claims Court, 1981: Hearing on H.R. 2405 Before the H. Subcomm. On Court, Civil Liberties and the Administration of Justice of the H. Comm. On the Judiciary*, 97th Cong. 42–43 (1981) (statement of the Hon. Howard T. Markey).

368. Alan K. Chen, *The Intractability of Qualified Immunity*, 93 NOTRE DAME L. REV. 1937, 1937 (2018) (“[T]he doctrine has now puzzled, intrigued, and frustrated legal academics, federal judges and litigators for half a century.”) (footnote omitted).

scholars³⁶⁹ consider the cases to be particularly dense and complex. For example, distilling the requirements to establish what makes a law clearly established is rife with complexities. Judge Peter W. Hall of the U.S. Court of Appeals for the Second Circuit put the point this way: “Few issues related to qualified immunity have caused more ink to be spilled than whether a particular right has been clearly established, mainly because courts must calibrate, on a case-by-case basis, how generally or specifically to define the right at issue.”³⁷⁰ A main reason for the lack of uniformity in the analysis of whether law is clearly established is that when the Supreme Court grants plenary review—typically when the defendant government official is seeking certiorari³⁷¹—it often muddies rather than clarifies what law is clearly established.³⁷²

Since *Harlow* was decided 40 years ago, it remains unclear what authorities lower courts must consult to determine whether the law is “clearly establish[ed].”³⁷³ The Court’s guidance on the relevant sources of law that can clearly establish a violation can be boiled down to the amorphous statement that “existing precedent” must place the constitutionality of the alleged violation “beyond debate.”³⁷⁴ Lower federal courts are thus mired in confusion when handling qualified immunity cases, which makes the doctrine more complex than it ought to be. Because of the complex nature of qualified immunity cases, the “specialization” of patent disputes provides an initial basis to draw inferences about whether we might expect a Section 1983 court to yield any gains in efficiency.³⁷⁵

Evidence of whether “specializing” patent disputes have delivered on its efficiency mandate is difficult to find. One study stated that the founding of the

369. Schwartz, *supra* note 20, at 344 (“Doing away with qualified immunity would . . . make irrelevant a complex, uncertain and shifting area of the law.”); Blum, *supra* note 29, at 925 (“One has to work hard to find some doctrinal consistency or predictability in the case law and the circuits are hopelessly conflicted both within and among themselves.”); Jeffries, Jr., *supra* note 29, at 852 (describing qualified immunity as “a mare’s nest of complexity and confusion”).

370. *Golodner v. Berliner*, 770 F.3d 196, 205 (2d Cir. 2014).

371. Reinert, *supra* note 193, at 6 (“Although plaintiffs sought certiorari at a slightly higher rate than defendants, the Supreme Court was about six times as likely to grant certiorari when requested by a defendant plaintiff.”) (unpublished manuscript) (on file with author).

372. Jeffries, Jr., *supra* note 29, at 852 (explaining that the Court’s qualified immunity decisions sends mixed signals); Blum, *supra* note 29, at 946 (describing the Court’s review of Ninth and Eleventh Circuit cases as sending “mixed signals”).

373. Tyler Finn, *Qualified Immunity Formalism: “Clearly Established Law” and the Right to Record Police Activity*, 119 COLUM. L. REV. 445, 450 (2019).

374. *Id.* (footnote omitted)

375. All this said, there are other differences between the Federal Circuit’s docket and the cases a specialized Section 1983 court would hear that should be noted. For example, the Federal Circuit has a wider jurisdiction in the sense that it hears cases other than patent disputes. Another noteworthy difference is that the parties to a dispute in patent cases are usually private rather than involving governmental officials. And we might also assume, given the nature of patents, that the parties are sophisticated and well resourced. Contrast patent defendants with defendants in Section 1983 suits who are often represented by local governments with comparatively more resource constraints. The differences in resources alone could impact how quickly a court processes a case. We might expect, for instance, a party with more resources to keep to a court’s briefing schedule and thereby enable case processing. These limitations speak to the difficulties related to analyses of court specialization I adverted to in the introduction.

Federal Circuit has “arguably addressed” the efficiency objective.³⁷⁶ Additionally, Professor Rochelle Cooper Dreyfuss has observed that in the early years of the Federal Circuit, the court began “to make systemic improvements, developing a patent law that is more rational and easier to apply.”³⁷⁷ From this, it might be inferred that the developments that have led to easier application of patent law have decreased case-processing time and thus enhanced efficiency. As I have suggested above, there is reason to believe that the subject-matter-expertise judges in the specialized court would bring to adjudicating cases would make the law more rational and more predictable and, thus, easier to apply. These developments would also likely enhance efficiency.

But if we set Professor Dreyfuss’s observation aside, there is otherwise a dearth of empirical evidence about whether the Federal Circuit has actually improved efficiency in the adjudication of patent disputes. One reason for this paucity is that it is very difficult to perform systematic comparisons of generalist and specialized courts.³⁷⁸ This is because the creation of a specialized court typically means that the court holds a monopoly on the particular area of law over which it has jurisdiction and that generalist courts at the same level do not hear cases in that field. Although one could use processing time in qualified immunity cases before and after the creation of the specialized court—a natural experiment—it is a flawed comparator because “the multiple dimensions and forms of judicial specialization and the complexity and contingency of its effects would make it difficult to reach firm conclusions.”³⁷⁹ But even when both types of courts exist in the same field of law—such as in federal taxation where there is a generalist and specialized tax court at the trial level—the courts regularly have features that differ, other than specialization, that make comparison challenging.³⁸⁰ As a result, assessing the benefits of a specialized court vis-a-vis its generalist counterpart is necessarily provisional and contingent.³⁸¹ So, the most that can be said at this juncture is necessarily provisional. If Congress were to “specialize” Section 1983, it is unclear whether founding the new court would increase efficiency in the adjudication of qualified immunity cases aside from the ancillary benefits mentioned above.

Yet the significance of this absence of hard data should not be overstated.³⁸² There are strong, commonsense reasons to believe that a specialized court, with judges who repeatedly consider appeals raising similar, complex issues, would resolve them more efficiently. Much of government action in the area of court

376. See Jay P. Kesan & Gwendolyn G. Ball, *Judicial Experience and the Efficiency and Accuracy of Patent Adjudication: An Empirical Analysis of the Case for a Specialized Patent Trial Court*, 24 HARV. J.L. & TECH. 393, 417 (2011).

377. Dreyfuss, *supra* note 365, at 52.

378. See BAUM, *supra* note 35, at 218.

379. *Id.* at 226.

380. *Id.* at 218.

381. See Oldfather, *supra* note 32, at 867 (“Predicting the relative impacts of specialization versus generalism . . . is necessarily a speculative and contingent matter.”).

382. See BAUM, *supra* note 35, at 50.

specialization (and in general) is not based on actual evidence about the consequences of prospective proposals.³⁸³ Rather, it is based “on common-sense beliefs—what might be called folk theories about the impact of policies.”³⁸⁴ Policymakers’ assessment of the likely consequences of judicial specialization is often unsophisticated and rests on notional ideas such as that judges with specialized dockets will process cases faster than their generalist counterparts because they develop expertise after repeated engagement with the same subject matter.³⁸⁵ If, at this stage, we are persuaded, or persuaded enough, that efficiency could be meaningfully enhanced with a specialized Section 1983 appellate circuit and that the proposed court would help to address the problem of scarcity in Article III judgeships, the lack of empirical evidence supporting other potential efficiency gains should not be a barrier to keeping an open mind about “specializing” Section 1983.

3. Uniformity

The third neutral virtue associated with specialization is uniformity. It has long been recognized that one of the federal courts’ principal goals is to ensure the uniform interpretation of federal law.³⁸⁶ Uniformity figures prominently in the endless and perpetually unresolved debates about the structure and role of the federal courts.³⁸⁷ The goal of ensuring uniformity has been sustained on several grounds, including that the lack of uniformity makes the law more unpredictable, is unfair to similarly situated litigants, and raises the cost of doing business for interstate actors.³⁸⁸ To better grasp the perceived centrality of uniformity in the law, the Supreme Court’s docket is usually comprised of cases concerning legal issues that have divided the courts of appeals.³⁸⁹ The Supreme Court is overt that ensuring uniformity is a primary consideration in case selection.³⁹⁰ This explains why it is not uncommon to see on the Court’s docket relatively trivial disputes about which lower courts are divided such as whether it is proper to type a signature on a notice of appeal.³⁹¹

Specialized courts advance uniformity and clarity within the specific subject matters that fall under their jurisdiction.³⁹² Reflecting on bankruptcy courts, Dean Erwin Chemerinsky noted that “[s]pecialization offers two major advantages, expertise and uniformity,” and it might produce the latter by “having fewer courts and fewer judges dealing with particular issues.”³⁹³ As Baum explained in similar terms, the idea is that shifting “from low to high case concentration reduces the

383. *Id.*

384. *Id.*

385. *Id.* at 32–33.

386. *See* Frost, *supra* note 38, at 1568.

387. *Id.*

388. *Id.*

389. *Id.* at 1569.

390. *Id.* (citation omitted).

391. *Id.* (citing *Becker v. Montgomery*, 532 U.S. 757, 760 (2001)).

392. *Id.* at 1568.

393. Erwin Chemerinsky, *Decision-Makers: In Defense of Courts*, 71 AM. BANKR. L.J. 109, 115 (1997).

number of judges who decide cases” in a particular area of law, “changing from a situation in which large numbers of generalist courts occupy a field to one in which a single specialized court does so. Such a change would seem very likely to reduce inconsistency in the law.”³⁹⁴

a. Uniformity Reduces Confusion About “Clearly Established” Law

The courts of appeals differ significantly in their interpretation of both the contours of constitutional rights and what constitutes clearly established law.³⁹⁵ The contradictions and inconsistencies in how the Supreme Court has adjudicated qualified immunity cases have spilled over to the lower courts.³⁹⁶ Circuit courts are not aligned as to which sources of law are capable of informing the clearly established analysis.³⁹⁷ Even within the circuits, no federal appellate court has announced a clear definition of what it means for law to be “clearly established.”³⁹⁸ It is perhaps unsurprising that panels within circuits sometimes articulate diverging approaches to the “clearly established” analysis without recognizing that they are departing from precedent.³⁹⁹

In all the regional circuits, courts are permitted to consider decisions from other circuits as the basis for determining whether a law is clearly established.⁴⁰⁰ “Each acknowledges, if only as a possibility, that a consensus of cases of persuasive authority can clearly establish a right.”⁴⁰¹ When there is no binding authority on an issue from the Supreme Court or within a regional circuit, the absence of unanimity among other circuits that have addressed that issue all but guarantees that the defendant will be granted qualified immunity.⁴⁰² This is because, rather than providing more concrete guidance, the Supreme Court has said that “existing precedent” should demonstrate that the constitutional question is “beyond debate.”⁴⁰³ The existence of differing interpretations of the constitutionality of the challenged conduct thus suggests that the issue is subject to debate and, thus, not clearly established.

But if “fair and clear notice to government officials is a cornerstone of qualified immunity”⁴⁰⁴ as courts have stated, it strains credulity to argue, without

394. BAUM, *supra* note 35, at 32. But any uniformity that might flow from specialized courts must be bracketed with the following qualification: uniformity is more a product of the number of judges that decide cases in an area of law rather than the number of courts. *Id.* This means that “[s]o long as cases in a specialized court are decided by multiple judges or panels, there remains the potential for disparities and conflicts in legal interpretations.” *Id.* at 220.

395. *See* Finn, *supra* note 373, at 452.

396. *Id.*

397. *Id.*

398. *Id.* (footnote omitted)

399. *Id.* at 452–53 (footnote omitted).

400. *Id.* at 453.

401. *Id.*

402. *Id.*

403. *Aschcroft v. al-Kidd*, 563 U.S. 731, 741 (2011).

404. *Vinyard v. Wilson*, 311 F.3d 1340, 1350 (11th Cir. 2002); *Bashir v. Rockdale Cty.*, 445 F.3d

more, that *intrastate* actors sued under Section 1983 are not on notice because the legal interpretation of their conduct might be different in another circuit. Cases such as *Mesa v. City of New York*⁴⁰⁵ demonstrate how courts have gone astray on this front.

In *Mesa*, the plaintiffs brought a Section 1983 suit alleging, in relevant part, that they were roughhoused by officers employed by the NYPD while filming police violently dispersing a crowd during a cultural celebration.⁴⁰⁶ Without reaching the constitutionality of the conduct and instead resolving the case on qualified immunity grounds,⁴⁰⁷ a Southern District of New York judge concluded that the Second Circuit had not clearly established that there is a constitutional right to document police misconduct. The court acknowledged that some circuits had answered this question in the affirmative, reasoning that citizens filming officers “fits comfortably” within the protections of the First Amendment.⁴⁰⁸ Taking the analysis a step further, the court cited Third and Fourth Circuit decisions for the proposition that “other circuits have decided just the opposite, declining to extend First Amendment protections to the recording of police activity,” and, thus, the law was not clearly established.⁴⁰⁹

There are at least two interconnected problems with this analysis. First, the cases cited as purportedly finding no First Amendment right had not, in fact, reached the constitutionality of the alleged violation at all. The decisions turned entirely on a finding that the law in the area was not clearly established.⁴¹⁰ Thus, an initial holding that the law was not yet clearly established served to cement the apparent impossibility of the right ever subsequently becoming clearly established. The second problem, of greater consequence here, reflects a larger pathology in the qualified immunity doctrine that I suggest can be ameliorated with specialization: the tendency to treat perceived or actual circuit splits on an issue as evidence that an alleged violation is not clearly established.⁴¹¹

Suppose that New Jersey police officer John Doe is accused of misconduct in a Section 1983 suit. Doe has only worked in the state of New Jersey and, like most officers, will remain employed as an officer in the state for the duration of their

1323, 1331 (11th Cir. 2006).

405. *Mesa v. City of New York*, No. 09 Civ. 10464, 2013 WL 31002 (S.D.N.Y. Jan. 3, 2013).

406. *Id.*

407. *Id.*

408. *Id.* at *24 (internal quotation marks omitted) (quoting *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2012)).

409. *Id.* The two cases cited by the court are *Kelly v. Borough of Carlisle*, 622 F.3d 248, 262–63 (3d Cir. 2010) and *Szymecki v. Houck*, 353 F. App’x 852, 853 (4th Cir. 2009).

410. The court in *Kelly v. Borough of Carlisle* determined that “there was insufficient case law establishing a right to videotape police officers during a traffic stop.” *Kelly*, 622 F.3d at 262. In *Szymecki v. Houck*, the court summarily affirmed the district court’s conclusion that the right was not clearly established in the circuit at the time of the alleged conduct. *Szymecki*, 353 F. App’x at 853.

411. See Finn, *supra* note 373, at 468 (“*Mesa* is not an outlier. District courts across the country have adopted a similar approach, insisting that there is ‘a circuit split on the issue’ because of qualified immunity decisions that are silent on the constitutional question.”).

career.⁴¹² It is hard to see why turning to Eleventh Circuit law, for example, to ascertain whether Florida views similar conduct as unlawful is relevant to whether Doe had fair notice that they were acting illegally in New Jersey. Yet this is precisely the approach that some lower federal courts take to the qualified immunity analysis. Of course, once conduct has been definitively determined to be unlawful within a particular circuit then the existence of conflicting out-of-circuit cases (at least as a general matter) would not serve to undermine the existence of clearly established law. But if the alleged violation has not been definitely determined to be unlawful within the circuit where the dispute arose, the qualified immunity standard as it stands will often preclude law from ever becoming clearly established within that circuit if cases from other circuits are in conflict—or even if out-of-circuit cases conclude that the law is not yet clearly established. The qualified immunity standard requiring clarity as to the underlying right is likely to preclude the development of clarity as to that right. One way to address this problem is to create a specialized circuit court and thereby eliminate actual or perceived circuit splits.

Suppose we do not share Justice Breyer’s view that “we are entering an era of harmony in the circuits.”⁴¹³ And we cannot count on the Supreme Court to resolve the problem of circuit splits that make it more difficult to hold state officials accountable as a rich body of evidence demonstrates.⁴¹⁴ An ultimate implication is that the problem will either persist, or alternative solutions must be imagined. The fracturing of qualified immunity decisions inter- and intra-circuits, the lack of clarity given *Pearson*,⁴¹⁵ and the very few cases the Supreme Court decides is particularly problematic for qualified immunity because the doctrine turns on what law is clearly established. So—as both a neutral principle and something that is beneficial to civil rights plaintiffs—it would be better for the law in this area to be more uniform and clearly established; this removes an artificial constraint on plaintiffs’ ability to avoid qualified immunity.

If all Section 1983 cases were consolidated into a single court at the federal appellate level, courts could no longer point to conflicting authority in other circuits to show that the constitutionality of the violation is still under “debate,” and thus the *intrastate* actor should be granted immunity. That said, it is true that there would still be some potential for intracircuit variation with court specialization. A court with exclusive jurisdiction over appeals of qualified immunity decisions in Section 1983 cases would need to be fairly large to handle the extensive litigation under the statute,⁴¹⁶ creating the potential for intracircuit conflict. This means that

412. See generally Ben Grunwald & John Rappaport, *The Wandering Officer*, 129 YALE L.J. 1676 (2020).

413. See Frost, *supra* note 38, at 1636.

414. See Jay Schweikert, *Supreme Court Reaffirms Unwillingness to Reconsider Qualified Immunity*, CATO INSTITUTE (October 22, 2021, 2:44 PM), <https://www.cato.org/blog/supreme-court-reaffirms-unwillingness-reconsider-qualified-immunity> [<https://perma.cc/Z89V-TMJG>].

415. See *supra* notes 326–327 and accompanying text.

416. See U.S. CTS., *Judicial Facts and Figures*, https://www.uscourts.gov/sites/default/files/data_tables/jff_4.4_0930.2022.pdf [<https://perma.cc/QM82-7HUK>] (last visited Mar. 6, 2024) (documenting that there were 14,940 Section 1983 filings in U.S. District Courts in 2022).

nonuniformity may still persist under the proposed scheme, particularly since qualified immunity appeals sometimes turn on the materiality of a disputed issue of fact⁴¹⁷ and “[d]ifferent judges can reach different conclusions about the implications that can be reasonably be drawn from the same facts.”⁴¹⁸ But ultimately, a specialized court seems less likely to generate fractured qualified immunity decisions than the status quo where *any* disagreement among the twelve regional circuits can be taken as evidence that the law is not clearly established.

b. Increasing Uniformity Might Come at the Cost of Decreasing Intercircuit Dialogue

It is possible to object to this argument in favor of a specialized Section 1983 court on the ground that “conflicts produced by intercircuit dialogue play a useful function in signaling to the Court the difficulty of particular issues, and thereby helping the Court make better case selection decisions.”⁴¹⁹ The problem with this argument is that under the status quo, where Section 1983 appeals are heard by the regional circuits, the Supreme Court rarely grants certiorari to hear qualified immunity cases when there are intercircuit splits.⁴²⁰ Thus, I am skeptical that in the area of qualified immunity the signaling function of intercircuit splits plays a significant role—and when it does play a role, it is simply perceived as justifying the entry of qualified immunity. For most issues, the Court is meaningfully informed by a range of views from the courts of appeals; for qualified immunity, when the Court is assessing whether the law is clearly established, then the lack of uniformity consistently weighs in favor of granting qualified immunity rather than enabling the Court to make a better decision. The more likely reading is that the most important signal to the Court for certiorari purposes is whether there was a denial of qualified immunity, with the Court intervening in such cases.⁴²¹

4. Limits of Specialization

A natural response to the benefits of a specialized court theorized above is that the Supreme Court can always exercise plenary review and overturn any judgment issued by the specialized court. It is true that Congress could strip the Supreme Court of jurisdiction over Section 1983 cases.⁴²² But there is no indication

417. See MARTIN A. SCHWARTZ, SECTION 1983 LITIGATION, THIRD EDITION 160 (2014).

418. SCHWARTZ, *supra* note 118, at 123.

419. Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking*, 138 U. PA. L. REV. 1111, 1158 (1990); see also Coenen & Davis, *supra* note 327, at 406–09 (explaining that there are plenty of other ways in which litigants, amici, and lower-court judges can signal to the Court that a particular issue is worthy of its attention).

420. See Jay Schweikert, *Supreme Court Reaffirms Unwillingness to Reconsider Qualified Immunity*, CATO INST. (Oct. 22, 2021, 2:44PM), <https://www.cato.org/blog/supreme-court-reaffirms-unwillingness-reconsider-qualified-immunity> [<https://perma.cc/Z89V-TMJG>].

421. See Schwartz, *supra* note 41, at 311–12.

422. See, e.g., Christopher Jon Sprigman, *Written Testimony for the Presidential Commission on the Supreme Court of the United States August 15, 2021: Jurisdiction Stripping as a Tool for Democratic Reform*, <https://www.whitehouse.gov/wp-content/uploads/2021/08/Professor-Christopher-Jon-Sprigman.pdf> [<https://perma.cc/59PY-TFQF>] (last visited Mar. 6, 2024).

any jurisdiction-stripping is likely to occur, let alone with respect to Section 1983 cases, so the Supreme Court probably has the last word on such matters for the foreseeable future if it so chooses. Considering the Court’s proclivity to find in favor of government officials in qualified immunity disputes,⁴²³ it may ultimately be inconsequential in the long run whether a specialized Section 1983 court might temporarily find in favor of civil rights plaintiffs if the Supreme Court regularly reverses those decisions.

There is certainly some truth in that. However, the Supreme Court is, of course, limited in the number of cases it takes, and the cases decided by the specialized court would not involve circuit splits, so we might presume that the cases would be less likely to justify the Court’s attention. More fundamentally, the argument that the Court could ultimately overrule any decision entered by the proposed specialized appellate court misses an underlying point of this Article, which is about highlighting that the content of federal law in the lower courts has also shifted in a dramatically rightward direction, not just in the Supreme Court. If the same cases that would ordinarily terminate at the lower level when decided by generalist judges granting qualified immunity are reviewed and reversed by the Supreme Court after specialist judges have found the claims viable, it would lift these decisions from the shadowy corners of popular and scholarly attention into the public view.

To better appreciate this point, return again to *Ramirez v. Guaderrama*, where the Court declined to review the Fifth Circuit’s decision that the family of a decedent had no recourse after he was immolated by police officers who fired a taser at him after he had doused himself with gasoline.⁴²⁴ Assume that a specialized panel rather than the Fifth Circuit had denied qualified immunity on the pleadings and decided that the suit could move forward to discovery. Assume further that the Court exercised plenary review and overturned the specialized court’s judgment. The expressive function of the Court’s deciding a case, even if by summary reversal rather than denying certiorari, is significant, in large part, due to the fact that the Court is overriding the judgment of what is supposed to be the “expert” body on Section 1983 matters.

In an ideal world, Congress would amend Section 1983 to eliminate qualified immunity, or perhaps the Supreme Court and lower generalist courts would, on their own, not make decisions such as *Ramirez*. And, as I suggest, specialization may generate such a result. However, if the Court were determined to reach the same outcome in *Ramirez* when a specialized court had found in favor of the plaintiffs, it obviously could. But it would have to do so by saying something to the effect that a family losing a loved one because police, at the very least, recklessly set the decedent on fire to prevent him from immolating himself has no recourse because of qualified immunity. The attention that such a decision would draw—rather than

423. *Id.*

424. *Guadarrama II*, 3 F.4th 129 (5th Cir. 2021), cert. denied, 142 S. Ct. 2571 (2022).

being tucked underneath a lower court decision and a denial of certiorari⁴²⁵—would further underscore how far the bottom has fallen from qualified immunity doctrine and perhaps move the needle towards reforming or abolishing it.

D. Reimagining Antislavery Courts

Because of the perceived and actual defects of specialization, attempts to alter the structure and function of courts by specialization may well meet with skepticism.⁴²⁶ At the same time, it is well documented that diffusion⁴²⁷ “has played a major part in the growth of judicial specialization, in that the existence of specialized courts has encouraged the creation of additional courts.”⁴²⁸ Policymakers often extract from the models of prior and existing courts in establishing new ones.⁴²⁹ The most illustrative examples come from the state court system where juvenile courts have expanded across states because of a general impression that juvenile courts have been effective in places such as Chicago and Denver.⁴³⁰ At the federal level, “military tribunals became established as an alternative to civilian courts early in the nation’s history, and that option has been used several times in different circumstances.”⁴³¹

Dean Jenny S. Martinez’s research on antislavery courts suggests that establishing a specialized federal court of appeals with exclusive jurisdiction over Section 1983 would not be starting on a blank slate.⁴³² In operation from 1817–1871, antislavery courts were courts established by bilateral treaties involving Britain and other countries, including the United States, to suppress the international slave trade.⁴³³ Throughout its existence, as many as 80,000 enslaved people found aboard illegal trading vessels won their freedom in these courts.⁴³⁴ The history of antislavery courts is preeminently a story about the potential of deploying international legal mechanisms in service of abolitionist projects and protecting individual rights.⁴³⁵ But insights associated with the concept of diffusion hint at the idea that the history of antislavery courts opens a conceptual space to explore the possibility of the United States establishing a tribunal as a rights-based intervention for individuals whose rights have been breached by practices rooted in slavery.

Section 1983 was brought into being as a consequence of the slave system.

425. See VLADECK, *supra* note 27, at 63 (“[A]n order from the Supreme Court denying a petition for certiorari (a ‘cert. denial’) almost always comes with no public explanation; no public indication of how many justices voted one way or the other; and, except in rare cases, no separate published opinions concurring in or dissenting from the Court’s refusal to grant review.”).

426. See BAUM, *supra* note 35, at 51.

427. See *supra* note 225 and accompanying text.

428. BAUM, *supra* note 35, at 211.

429. *Id.* at 92.

430. See *id.* at 212.

431. *Id.* at 92.

432. Martinez, *supra* note 45, at 550.

433. *Id.*

434. *Id.*

435. *Id.* at 633–34.

The statute was enacted in 1871 when the dust from the rupturing of the slave system had barely settled. In passing the legislation, Congress intended to “throw open the doors of the United States courts,”⁴³⁶ observing that state actors of all stripes were trampling the rights of people who had been newly freed from bondage by relegating them to a permanent underclass. Today, Section 1983 is the preeminent litigation tool to check police misconduct. As scholars have argued, when we appraise the history of policing in the South as a form of slave patrol and acknowledge the continuities between the modern institution and its antebellum forebears, modern policing is a badge and incident of slavery;⁴³⁷ that is, a civil, political, or legal disadvantage that was a defining feature of the slave system or an outgrowth of the insidious institution.⁴³⁸ In this light, Section 1983 has always been about deploying federal courts as a site for uplifting rights claimants alleging violations that are the resonances of slavery—and, in particular, as a forum in which those whose constitutional rights have been violated by state actors can receive justice. Thus, establishing a specialized federal appeals court with exclusive jurisdiction over Section 1983 cases would not only be consistent with existing paradigms about the purpose of the statute, but its founding would also plausibly be located within the tradition of antislavery courts.

All this said, I think the odds that Congress would be so protective of civil rights claimants that it would consciously use the antislavery courts as a model to establish a specialized federal appellate tribunal exclusively for Section 1983 cases is low—and any such Congress would probably just eliminate qualified immunity. This framing is thus best understood as a vehicle for facilitating dialogue about the meaning of badges and incidents of slavery. An enriched understanding of what it truly means to be a badge or incident of slavery is valuable regardless of whether it is tethered to the creation of a new court because it helps us to “[t]hink more systemically about the ways in which slavery continues to live on in contemporary institutions.”⁴³⁹ It may also reignite conversations about the unfulfilled promises of

436. *Patsy v. Florida Board of Regents*, 457 U.S. 496, 504 (1982).

437. Brandon Hasbrouck, *Abolishing Racist Policing with the Thirteenth Amendment*, 67 U.C.L.A. L. REV. 1108, 1114 (2020) (“In both the North and the South, formal policing in America has racist roots. Formal policing in the South developed in the 1700s as slave patrols. The principal tasks of slave patrol policing were to terrorize enslaved Blacks to deter revolts, capture and return enslaved Blacks trying to escape, and discipline those who violated any plantation rules.”) (citations omitted).

438. *See Blyew v. United States*, 80 U.S. 581, 599 (1872) (Bradley, J., dissenting) (“To deprive a whole class of the community of this right [to testify in court], to refuse their evidence and their sworn complaints, is to brand them with a badge of slavery; is to expose them to wanton insults and fiendish assaults; is to leave their lives, their families, and their property unprotected by law.”); *United States v. Rhodes*, 27 F. Cas. 785, 793 (Swayne, Circuit Justice, C.C.D. Ky. 1866) (No. 16,151) (“Slaves were imperfectly, if at all, protected from the grossest outrages by the whites. Justice was not for them. The charities and rights of the domestic relations had no legal existence among them. The shadow of the evil fell upon the free blacks. They had but few civil and no political rights in the slave states. Many of the badges of the bondman’s degradation were fastened upon them.”).

439. ANGELA Y. DAVIS, *ABOLITION DEMOCRACY: BEYOND EMPIRE, PRISONS, AND TORTURE* 31 (2005).

the Thirteenth Amendment,⁴⁴⁰ which the Supreme Court in *Jones v. Alfred H. Mayer Co.*⁴⁴¹ determined authorized Congress “to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States.”⁴⁴²

CONCLUSION

Congress enacted Section 1983 to significantly alter the role of federal courts. It recognized that state actors were implicated in subordinating disadvantaged minorities and, thus, the state court system was not a forum in which Black people and other disempowered litigants could receive justice when government officials either violated their rights or stood by while others did so. The federal courts, whose doors were flung open in 1871, are no longer a hospitable forum for civil rights claimants given not only the composition of the current Supreme Court but also the role of the lower federal courts, the specifics of qualified immunity doctrine, and the interplay between the two. Hence, I suggest that it makes sense to explore using Section 1983 to reimagine the structural role of federal courts at a time when there is growing interest in court reform.

I argue that there is a benefit to Congress establishing a specialized federal appellate court with exclusive jurisdiction over Section 1983 suits that can be gleaned in the context of qualified immunity cases. Notably, a significant part of the problem with qualified immunity is that the splintering of Section 1983 cases throughout the regional courts of appeals makes it difficult for civil rights claimants to point to clearly established intercircuit law enabling them to overcome qualified immunity. Aggregation of appellate cases into a single circuit would make law far more likely to be clearly established, with fewer regions of the constitutional map populated by “Here Be Dragons” regions of uncertainty, independent of the political composition of the members of that court.

440. See generally Ndujoh MehChu, *Help Me to Find My Children: A Thirteenth Amendment Challenge to Family Separation*, 17 STAN. J. C.R. & C.L. 133 (2021).

441. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 439 (1968) (“The constitutional question in this case, therefore, comes to this: Does the authority of Congress to enforce the Thirteenth Amendment ‘by appropriate legislation’ include the power to eliminate all racial barriers to the acquisition of real and personal property? We think the answer to that question is plainly yes.”).

442. *Id.* at 439.