FOR POLICE, NOT PROFESSORS: WHY UNIVERSITY OFFICIALS SHOULD BE DENIED QUALIFIED IMMUNITY FOR FIRST AMENDMENT VIOLATIONS (AND WHY POLICE OFFICERS AND THE FOURTH AMENDMENT ARE DIFFERENT)

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ABSTRACT

Contrary to public perception, qualified immunity does not apply just to police officers. Instead, the controversial doctrine shields all government officials from civil liability for all types of constitutional torts. This includes public university officials who violate students' First Amendment rights through censorship and viewpoint discrimination. Like the doctrine itself, the application of qualified immunity to universities' First Amendment violations has come under increased scrutiny. As recently asked by Justice Thomas, "why should university officers, who have time to make calculated choices about enacting or enforcing unconstitutional policies, receive the same protection as a police officer who makes a split-second decision to use force in a dangerous setting?"[1] This Article is the first comprehensive examination of that question in academic literature. Specifically, it is the first to argue, from both legal and public-policy perspectives, that university officials and police officers are entirely different types of officials who merit entirely different qualified immunity analyses for their most common constitutional torts.

Both common law and statutory law support treating university officials' First Amendment violations differently than police officers' Fourth Amendment violations. Likewise, numerous practical and public-policy concerns weigh in favor of treating these two types of officials and violations differently. Even while arguing that qualified immunity—at least from an originalist perspective—is a legal fiction, this Article recognizes the doctrine's important role in keeping police on the streets and keeping

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1. Hoggard v. Rhodes, 141 S. Ct. 2421, 2422 (2021) (Thomas, J., concurring).

those streets safe. Therefore, for those skeptical of qualified immunity's legal basis but sympathetic to the doctrine for public-policy reasons, this Article provides a framework for reform. Using First Amendment violations on university campuses as an example, this Article outlines why the Supreme Court should abolish qualified immunity in many contexts but still maintain an "immunity" of sorts for police officers via the Fourth Amendment itself. Many legal and political obstacles stand in the way of comprehensive qualified immunity reform. But as the first step on a long journey, the Supreme Court should heed Justice Thomas's call to reconsider its inapt "one-size-fits-all test" for qualified immunity. When it does so, the Court should remember that the First Amendment is not the Fourth Amendment, and professors are not police.

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I. INTRODUCTION

The right to free speech is under assault in America, especially on public university campuses.[2] The Supreme Court has invalidated nearly every university speech code that has come before it and has regularly denounced censorship and viewpoint discrimination on college campuses.[3] But despite clear and repeated violations of students' free speech and free exercise rights, university officials frequently avoid accountability by successfully invoking the doctrine of qualified immunity.[4] Like the doctrine as a whole, the application of qualified immunity to First Amendment violations by public universities has come under increased scrutiny as of late.[5] Indeed, Justice Clarence Thomas recently asked, "why should university officers, who have time to make calculated choices about enacting or enforcing unconstitutional policies, receive the same protection as a police officer who makes a split-second decision to use force in a dangerous setting? [The Court has] never offered a satisfactory explanation to this question."[6] There is a compelling and simple answer: Professors should not receive the same protection as police officers.[7] This Article seeks to provide a "satisfactory explanation" as to *why* they should not.

This Article is the first to examine why and how police differ from professors when it comes to qualified immunity. The term professor is used herein as shorthand for all public university employees, including instructors,

2. Jonathan Turley, *Harm and Hegemony: The Decline of Free Speech in the United States*, 45 HARV. J.L. & PUB. POL'Y 571, 571 (2022) ("[T]he United States is arguably living through one of its most serious anti-free speech periods, and there are signs that the current period could result in lasting damage for free speech due to a rising orthodoxy and intolerance on our campuses . . . .").

3. Azhar Majeed, *Putting Their Money Where Their Mouth Is: The Case for Denying Qualified Immunity to University Administrators for Violating Students' Speech Rights*, 8 CARDOZO PUB. L. POL'Y & ETHICS J. 515, 516–17 (2010).

4. *See, e.g.*, Turning Point USA v. Rhodes, 973 F.3d 868, 879–81 (8th Cir. 2020) (finding university speech policy unconstitutional but granting university officials qualified immunity for their unlawful actions). *But see, e.g.*, Intervarsity Christian Fellowship/USA v. Univ. of Iowa, 5 F.4th 855, 859 (8th Cir. 2021) (upholding denial of qualified immunity for university officials who violated religious student group's First Amendment rights). *See generally* Majeed, *supra* note 3.

5. *See, e.g.*, *Turning Point USA*, 973 F.3d at 879–81; *Intervarsity Christian Fellowship/USA*, 5 F.4th at 866; Horvath v. City of Leander, 946 F.3d 787, 794–803 (5th Cir. 2020) (Ho, J., concurring in part and dissenting in part).

6. Hoggard v. Rhodes, 141 S. Ct. 2421, 2422 (2021) (Thomas, J., concurring).

7. For purposes of this Article, the term professor refers to all public university employees (including faculty members, administrators, officials, and staff).

administrators, and staff. Several recent articles have argued for the abolition of qualified immunity.[8] Likewise, several authors have pointed out the myriad of violations of students' rights by university officials.[9] At least one article has specifically argued that university administrators should be denied qualified immunity when they violate students' clearly established free speech rights.[10] But, as Justice Thomas laments, there has been no examination as to why qualified immunity should apply to some types of officials and violations but not others.[11]

This question is critical because—despite various calls for abolition across the ideological spectrum—several Supreme Court Justices and members of Congress have serious concerns about the societal and criminal justice effects of abolishing qualified immunity for law enforcement officers.[12] This Article is the first to argue, from both legal and public-policy perspectives, that police and professors are entirely different types of officials who merit entirely different qualified immunity analyses for their alleged constitutional torts. In doing so, this Article provides a framework for allowing citizens to hold government officials accountable while also ensuring that 42 U.S.C. § 1983 does not "dampen the ardor of . . . [police officers] in the unflinching discharge of their duties."[13]

Part I introduces and sets this issue in context.[14] Part II outlines the First Amendment in the university context and qualified immunity jurisprudence in the United States.[15] Part III.A argues that common law and statutory law support treating university officials' alleged First Amendment violations differently than police officers' alleged Fourth Amendment violations.[16] Part III.B argues that practical and public-policy concerns also weigh in favor of treating these two types of officials and violations differently.[17] Part IV makes recommendations to the Supreme Court and Congress for changing the status quo.[18] Part V concludes the Article.[19]

8. *See, e.g.*, Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1800 (2018).

9. *See, e.g.*, Majeed, *supra* note 3; Turley, *supra* note 2, at 672–79.

10. Majeed, *supra* note 3.

11. *See Hoggard*, 141 S. Ct. at 2422.

12. Schwartz, *supra* note 8, at 1838–39.

13. Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982) (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949)).

14. *See supra* Part I.

15. *See infra* Part II.

16. *See infra* Part III.A.

17. *See infra* Part III.B.

18. *See infra* Part IV.

19. *See infra* Part V.

II. BACKGROUND

A. *The State of the First Amendment on University Campuses*

The First Amendment to the Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[20] The provisions of the First Amendment also apply to state and local governments via incorporation under the Fourteenth Amendment.[21] Therefore, the First Amendment is implicated when state-funded public universities make decisions or enact policies that prohibit students from speaking (or freely associating with other students or freely exercising their religion). Unfortunately, state universities have a long and sordid history of doing just that.[22] University administrations continue to infringe on First Amendment rights and many university students are becoming more hostile to speech they disagree with.[23] While this Article focuses primarily on university infringements on the freedom of speech, many cases overlap to show concurrent violations of free exercise, freedom of the press, and freedom of association. The following surveys and cases illustrate the scope and severity of the problem.

According to a comprehensive 2022 survey by the Knight Foundation, 65 percent of college students believe their school's climate "prevents some people from saying things they believe because others might find it offensive."[24] This represents an 11 percent increase since 2016.[25] Among Republican students, the

20. U.S. CONST. amend I.

21. *See generally* U.S. CONST. amend XIV; Everson v. Bd. of Educ., 330 U.S. 1 (1947) (incorporating the Establishment Clause); Cantwell v. Connecticut, 310 U.S. 296 (1940) (incorporating the Free Exercise Clause); Gitlow v. New York, 268 U.S. 652 (1925) (incorporating freedom of speech and the press); De Jonge v. Oregon, 299 U.S. 353 (1937) (incorporating freedom of assembly); Edwards v. South Carolina, 372 U.S. 229 (1963) (incorporating the right to petition government); NAACP v. Alabama, 357 U.S. 449 (1958) (finding freedom of expressive association in First Amendment and applying it to the states).

22. Majeed, *supra* note 3.

23. KNIGHT FOUND., COLLEGE STUDENT VIEWS ON FREE EXPRESSION AND CAMPUS SPEECH 2022: A LOOK AT KEY TRENDS IN STUDENT SPEECH VIEWS SINCE 2016, at 22 (Knight Foundation-Ipsos 2022), https://knightfoundation.org/wp-content/uploads/2022/01/KFX_College_2022.pdf [https://perma.cc/X3RW-GJQR].

24. *Id.* at 20.

25. *Id*.

percentage who feel their campus environment restricts free speech is 71 percent.[26] Approximately one-fifth of college students believe it is more important for their institutions to protect students from certain types of speech than to expose students to all different types of speech.[27]

Few students favor disinviting controversial speakers or instituting restrictive speech codes, but a majority still support "safe spaces, or areas of campus designed to be free from threatening actions, ideas, or conversations."[28] Across racial and gender subgroups, "Democratic students are most likely to support colleges doing all three" of the above.[29] "There is a 26-point gap in support between Democratic and Republican students" for campus safe spaces, and 42 percent of Democratic students favor disinviting controversial speakers compared to only 9 percent of Republican students.[30] Overall, the Knight Foundation found that "[f]ewer students believe that free speech is secure in America today, while more say that their school's climate limits people from saying what they truly believe, as compared with 2016."[31]

Another comprehensive 2022 survey by College Pulse and the Foundation for Individual Rights and Expression (FIRE) found that "notable proportions of students report[ed] that they often self-censor their views."[32] Specifically, 22 percent of college students "reported that they often felt that they cannot express their opinion on a subject because of how students, a professor, or the administration would respond."[33] Concerningly, there were stark "[d]ifferences among liberal, moderate, and conservative students (13%, 23%, and 42% respectively)" on this question.[34] Likewise, over 40 percent of students said it was difficult to have an open and honest conversation on their campus about issues like abortion, race, mask and vaccine mandates, transgender issues, gun control, or police misconduct.[35]

26. *Id*.

27. *Id.* at 22.

28. *See id.* at 22–29.

29. *Id.* at 28.

30. *Id*.

31. *Id.* at 42.

32. FOUND. FOR INDIVIDUAL RTS. & EXPRESSION, 2022-2023 COLLEGE FREE SPEECH RANKINGS: WHAT IS THE STATE OF FREE SPEECH ON AMERICA'S COLLEGE CAMPUSES? 46 (College Pulse & FIRE 2022), https://www.thefire.org/sites/default/files/2022/09/CFSR-2022-09-07-a.pdf [https://perma.cc/KDK2-LQTR].

33. *Id.* at 35.

34. *Id*.

35. *Id.* at 37.

Also concerning were FIRE's findings that 76 percent of liberal students and 44 percent of conservative students feel it is acceptable to shout down a controversial speaker.[36] Similarly, 25 percent of liberal students and 16 percent of conservative students even feel using physical violence is "at least rarely acceptable" to stop a campus speech.[37]

Finally, FIRE found a disturbing lack of student confidence in their university administrators' support for free speech.[38] Only 23 percent of students thought it was extremely or very likely that, if a controversy over offensive speech were to occur, their administration would defend the speaker's right to freedom of expression.[39] Likewise, 69 percent of students described it as unclear or only somewhat clear to them that their college administration protects free speech on campus.[40] FIRE concluded that its findings

> should concern anyone who supports a vision of higher education as a free marketplace of ideas, one that should produce graduates who are ready to join the vigorous debates within American society and beyond. Too many students are not ready, and too many of their colleges are not helping them but, instead, perpetuating an unclear or even a hostile climate for free expression.[41]

Unfortunately, the qualitative data is no less concerning than the quantitative data outlined above. Recent anecdotes of student censorship by university administrations abound. For example, last spring the University of Idaho sanctioned and issued no-contact orders to several law student members of the Christian Legal Society.[42] Their crime: telling an LGBTQ+ student that the Bible defines marriage as between one man and one woman.[43] Fortunately, a federal judge found that the case was not a "close call" and that, although "[s]ome may disagree with Plaintiffs' religious beliefs[,] . . . none should disagree that Plaintiffs have a right to express their religious beliefs without fear of retribution. The

36. *Id.* at 41.

37. *Id*.

38. *See id.* at 42.

39. *Id.* at 62.

40. *Id*.

41. *Id.* at 46.

42. Jonathan Turley, *University of Idaho Loses Major Free Speech and Religious Freedom Case*, JONATHAN TURLEY: RES IPSA LOQUITUR – THE THING ITSELF SPEAKS (July 7, 2022), https://jonathanturley.org/2022/07/07/university-of-idaho-loses-major-free-speech-and-religious-freedom-case/ [https://perma.cc/G5WB-SE9Q]; Perlot v. Green, 609 F. Supp. 3d 1106, 1114 (D. Idaho 2022).

43. Turley, *supra* note 42; *Perlot*, 609 F. Supp. 3d at 1113.

Constitution makes that clear."[44] The court issued a preliminary injunction in favor of the law students last July in what Jonathan Turley called "a major win for free speech and religious expression."[45] Also last spring, a graduate student at Southern Illinois University Edwardsville was accused of "oppressive acts" and issued a no-contact order with no due process after she shared her religious and political views on social media.[46]

In December 2022, Stanford University published a lengthy list of prohibited words designed "to eliminate many forms of harmful language, including racist, violent, and biased . . . language."[47] Stanford's "Elimination of Harmful Language Initiative"—a name with quite the Orwellian ring to it—prohibits a litany of words and phrases including: *American* ("insinuat[es] that the US is the most important country in the Americas"), *walk-in* ("[a]bleist language"), *freshman* ("[l]umps a group of students . . . into gender binary groups"), *people of color* (imprecise language), *victim*, *stupid*, *Hispanic*, *master* (even as a verb), *brown bag lunch* (institutionalized racism), *white paper* ("subconsciously racialized"), *war room* ("[u]nneccessary use of violent language"), *kill two birds with one stone* ("normalizes violence against animals"), *killing it* ("a good job should not be equated with death [and could be] triggering"), and *no can do* ("mock[s] non-native English speakers").[48] The list goes on and on.[49] Responding to widespread criticism, Stanford clarified that the list does not represent official university policy, is non-binding, and is meant for internal use by Stanford departments.[50] Although Stanford admitted it "missed the mark" by including the term *American*,

44. *Perlot*, 609 F. Supp. 3d at 1111, 1126.

45. Turley, *supra* note 42.

46. *Grad Student Sues Illinois University that Punished Her for Expressing Her Christian, Political Views*, ALL. DEFENDING FREEDOM (May 31, 2022), https://adflegal.org/press-release/grad-student-sues-illinois-university-punished-her-expressing-her-christian-political [https://perma.cc/UFW4-DCXC].

47. STANFORD UNIV., ELIMINATION OF HARMFUL LANGUAGE INITIATIVE 1 (Standford Univ. 2022), https://s.wsj.net/public/resources/documents/stanfordlanguage.pdf [https://perma.cc/MFY4-9LU3]; *see* Nick Mordowanec, *Stanford Slammed for Putting 'American' on Forbidden Word List: 'Take That,'* NEWSWEEK (Dec. 20, 2022, 1:53 PM), https://www.newsweek.com/stanford-criticism-slammed-putting-american-forbidden-word-language-list-1768543 [https://perma.cc/49MT-GQSS].

48. STANFORD UNIV., *supra* note 47, at 3–13.

49. *Id.*

50. Mayra Franco, *Stanford IT Releases Banned List of 'Harmful Language': American, Hispanic, or Karen*, FOX 26 NEWS (Dec. 21, 2022), https://www.msn.com/en-us/news/us/stanford-it-releases-banned-list-of-harmful-language-american-hispanic-or-karen/ar-AA15vjqB [https://perma.cc/V8V2-HYQW].

the university still defended the list as providing "reasons why those terms could be problematic" and "support[ing] an inclusive community."[51]

And the three examples above are just recent drops in the bucket. Students have been kicked out of graduate counseling programs for publicly adhering to a biblical sexual ethic.[52] Undergraduate students have been threatened with rape and murder—necessitating armed police protection—after speaking out against restrictive speech codes.[53] Students and employees have been accused of racial harassment for silently reading historical books on campus.[54] Universities frequently deny disfavored groups (often conservative) permission to post flyers or host on-campus speakers due to their political views.[55]

Problems of censorship and viewpoint discrimination against right-leaning students occur even at politically moderate institutions located in politically conservative areas.[56] Take Texas Tech University in Lubbock, Texas, for example. It took a federal court order for university officials there to respect student speech rights outside a miniscule 20-foot-wide area.[57] And, just last year, a Texas Tech

51. *Id*.

52. *Jennifer Keeton*, ALL. DEFENDING FREEDOM, https://adflegal.org/client-story/jennifer-keeton [https://perma.cc/46CU-NW69]; *Julea Ward*, ALL. DEFENDING FREEDOM, https://adflegal.org/client-story/julea-ward [https://perma.cc/C6HN-PAT6].

53. *Ruth Malhotra & Orit Sklar*, ALL. DEFENDING FREEDOM, https://adflegal.org/client-story/ruth-malhotra-and-orit-kwasman [https://perma.cc/TL96-XU74].

54. *University Says Sorry to Janitor Over KKK Book*, NBC NEWS (July 15, 2008, 6:49 AM), https://www.nbcnews.com/id/wbna25680655 [https://perma.cc/K692-N42G]; Majeed, *supra* note 3, at 549.

55. *See, e.g.*, *Flores v. Bennett: California College Censors Conservatives on Campus*, FIRE, https://www.thefire.org/cases/clovis-community-college-california-college-censors-conservatives-on-campus/ [https://perma.cc/8LN8-MXY5]; *Southern New Hampshire University: Administration Requires Students Seek Approval of Invitations to Weed Out Controversial Speakers*, FIRE, https://www.thefire.org/cases/southern-new-hampshire-university-administration-requires-students-seek-approval-of-invitations-to-weed-out-controversial-speakers/ [https://perma.cc/D6DW-CD3P]; Lauren McGaughy, *GOP Lawmaker to File Free-Speech Lawsuit Against Texas Southern University Over Canceled Speech*, THE DALL. MORNING NEWS (Oct. 16, 2017, 10:48 AM), https://www.dallasnews.com/news/education/2017/10/16/gop-lawmaker-to-file-free-speech-lawsuit-against-texas-southern-university-over-canceled-speech/ [https://perma.cc/PZ23-ZMLZ].

56. *See generally* Roberts v. Haragan, 346 F. Supp. 2d 853, 872 (N.D. Tex. 2004); Turley, *supra* note 2, at 594–98.

57. *See Roberts*, 346 F. Supp. 2d at 872 (striking down Texas Tech University's 20-foot-wide free-speech zone and criticizing its speech restrictions, which "include[d] much speech that, no matter how offensive, is not proscribed by the First Amendment").

law professor allegedly refused students sought-after clinic positions if they were "FedSoc white boys"; he also allegedly encouraged progressive students to attend the "Nazi meetings" of the Federalist Society in order to take food and disrupt the meeting.[58]

In sum, when between 62 and 80 percent of college students are afraid to speak their minds on the very campuses that are supposed to be bastions of free inquiry and critical thinking, it supports only one logical inference: there is a problem.[59] Nonetheless, some call the "university 'free speech crisis'" a longstanding "rightwing myth."[60] Others believe the problematic phenomenon is very real but now largely driven by "woke" students rather than university administrators calling for censorship.[61] But the statistics and anecdotal examples outlined above suggest otherwise. Whether due to bias or fear they might be criticized for defending *every* student's civil liberties, university administrators continue to violate the First Amendment.[62]

To be sure, the overtly content-based "'speech codes' of many public universities that limited student rights 'began to melt away' as they were legally challenged in the 1990s and early 2000s"—making as-applied First Amendment violations, especially against political and religious conservatives, the more common problem on campuses.[63] But this only means that today, two decades

58. Interviews with Anonymous Students, Tex. Tech Univ. Sch. of L., in Lubbock, Tex. (2021–2022).

59. Myles McKnight, *Fight University Censorship, but Don't Neglect the Big Picture*, NAT'L REV. (Feb. 13, 2022, 6:30 AM), https://www.nationalreview.com/2022/02/fight-university-censorship-but-dont-neglect-the-big-picture/ [https://perma.cc/74KY-T4TK].

60. Evan Smith, *The University 'Free Speech Crisis' Has been a Rightwing Myth for 50 Years*, THE GUARDIAN (Feb. 22, 2020, 5:00 AM), https://www.theguardian.com/commentisfree/2020/feb/22/university-free-speech-crisis-censorship-enoch-powell [https://perma.cc/Y9JL-2LFE].

61. Michael Gryboski, *Campus Censorship Being Driving by Students, Not Administrators: Experts*, THE CHRISTIAN POST (Feb. 11, 2021), https://www.christianpost.com/news/campus-censorship-driven-by-students-not-administrators-experts.html [https://perma.cc/T7GD-5UTU].

62. *See* Ira Stoll, *The University of Chicago Took a Stand for Free Speech. Faculty Say They Live in Fear Anyway.*, REASON (June 22, 2020, 4:05 PM), https://reason.com/2020/06/22/the-university-of-chicago-took-a-stand-for-free-speech-faculty-say-they-live-in-fear-anyway/ [https://perma.cc/JPN3-9V6Q] (quoting former University of Chicago President Robert Zimmer) ("On some campuses there is a tone of discourse ostracizing those with currently unpopular views, . . . and some university administrators are actually fostering an environment in which students' feelings of discomfort with ideas take precedence over the importance of actually discussing ideas.").

63. Gryboski, *supra* note 61.

later, university administrators have had ample notice that content-based and viewpoint-based policies and enforcement actions are intolerable under the First Amendment.[64] Thus, they are without excuse when students whose First Amendment rights have been violated seek to vindicate those rights via civil suit under § 1983. For those university employees who continue to restrict students' free speech and expression, qualified immunity should provide no shield to liability.

B. *A Brief History of Qualified Immunity Jurisprudence*

Before arguing why university officials should be denied qualified immunity for First Amendment violations, a brief overview of the doctrine's development is helpful to provide context. Section 1983 (a post-Civil War statute originally passed in 1871) states the following:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .[65]

For almost a century, "under color of" was interpreted to mean the government official was acting *based upon* a state law.[66] That changed in 1961 when the Supreme Court decided *Monroe v. Pape*.[67] In *Monroe*, the Court examined "whether Congress, in enacting [§ 1983], meant to give a remedy to parties deprived of constitutional rights, privileges, and immunities by an official's *abuse* of his position."[68] The Court answered yes.[69] Before *Monroe*, "[i]t [was] argued that 'under color of' enumerated state authority excludes acts of an official or policeman who can show no authority under state law, state custom, or state usage to do what he did."[70] In those cases where a state official exceeded his authority or violated state law, various common law remedies were available under

64. *See* Majeed, *supra* note 3, at 518.

65. 42 U.S.C. § 1983.

66. *See* William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 63–65 (2018).

67. 365 U.S. 167, 172 (1961).

68. *Id.* (emphasis added).

69. *Id.*

70. *Id.*

state law.[71] Nevertheless, the Court held in *Monroe* that, even if state law provided adequate remedies for rights violations, a primary aim of § 1983 "was to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice."[72] Section 1983 was passed in April 1871 largely in response "to the lawless conditions existing in the South [due to] . . . the activities of the Klan and the inability of the state governments to cope with it[,]" and it was intended to be a remedy "against those who representing a State in some capacity were unable or unwilling to enforce a state law."[73] Thus, an individual whose constitutional rights had been violated by government agents in violation of state law could now use § 1983 to sue under federal law.[74]

Opinions differ as to whether the *Monroe* Court accurately interpreted the statute.[75] Either way, *Monroe* undeniably caused a drastic increase in the number of § 1983 suits filed each year.[76] This led the Court to develop the qualified immunity doctrine as a counterweight to offset and moderate the effects of the Court's expanded reading of the statute.[77]

The foundational qualified immunity case is *Pierson v. Ray*.[78] In *Pierson*, the Court held that "[t]he legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities" when it enacted § 1983.[79] In this case, police officers arrested a group of white and black "clergymen who attempted to use segregated facilities at an interstate bus terminal in Jackson, Mississippi."[80] The clergymen were convicted of violating a Mississippi statute which made it a misdemeanor to congregate in any public place under circumstances which may lead to a breach of the peace and subsequently refuse to

71. *Id.*

72. *Id.* at 173–74.

73. *Id.* at 174–76.

74. *See* Baude, *supra* note 66, at 63–66.

75. *See* Crawford-El v. Britton, 523 U.S. 574, 611–12 (1998) (Scalia, J., dissenting) (arguing the *Monroe* Court "invented" a new statute that "bears scant resemblance to what Congress enacted almost a century earlier").

76. *See id.* ("*Monroe* changed a statute that had generated only 21 cases in the first 50 years of its existence into one that pours into the federal courts tens of thousands of suits each year . . . .").

77. *See id.* ("We find ourselves engaged, therefore, in the essentially legislative activity of crafting a sensible scheme of qualified immunities for the statute we have invented . . . ."); *see also* Pierson v. Ray, 386 U.S. 547 (1967).

78. *Pierson*, 386 U.S. at 547.

79. *Id.* at 554.

80. *Id.* at 549.

leave when ordered by a police officer.[81] After their charges were dropped on appeal, the clergymen sued the judge and police officers under § 1983 for false arrest and imprisonment.[82]

When the matter reached the Supreme Court, the Court explained that common law "solidly established . . . the immunity of judges from liability for damages for acts committed within their judicial jurisdiction"[83] and that such absolute immunity survived the enactment of § 1983 because "Congress would have specifically so provided had it wished to abolish the doctrine."[84] As to nonjudicial officials, the Court acknowledged that "common law has never granted police officers an absolute and unqualified immunity," but the Court nevertheless held that police "should not be liable if they acted in good faith and with probable cause in making an arrest under a statute that they believed to be valid."[85] The Court famously reasoned 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."[86] And thus, the doctrine that became known as qualified immunity was born.[87]

Fifteen years later, the Supreme Court established the modern test for qualified immunity in *Harlow v. Fitzgerald*.[88] There, the Court held that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[89] Two decades after *Harlow*, the Supreme Court further developed this test in *Saucier v. Katz*.[90] There, the Court held that the qualified immunity analysis must essentially consist of two separate and sequential steps.[91] First, a court must ask whether "the facts alleged show the officer's conduct violated a

81. *Id.* at 549–50.

82. *Id.* at 550.

83. *Id.* at 553–54.

84. *Id.* at 555.

85. *Id.*

86. *Id.*

87. A few years later, the Supreme Court also created a cause of action against *federal* agents similar to the one § 1983 creates against state officials in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*. 403 U.S. 388 (1971). Like § 1983 cases, officials facing a *Bivens* action can also raise qualified immunity as a defense. *Id.*

88. 457 U.S. 800 (1982).

89. *Id.* at 818.

90. 533 U.S. 194 (2001).

91. *Id.* at 201.

constitutional right[.]"[92] Second, *if* a constitutional right was violated, the court must determine whether the constitutional right was "clearly established."[93] However, the Court relaxed and walked back its holdings in *Saucier* only a few years later.[94]

In the 2009 case *Pearson v. Callahan*, a unanimous Court held that "while the sequence set forth [in *Saucier*] is often appropriate, it should no longer be regarded as mandatory in all cases."[95] Judges "should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first . . . ."[96] The Court explained that, although the *Saucier* protocol "is often beneficial," it also "comes with a price" because it can waste judges' time and effort in "cases in which it is plain that a constitutional right is not clearly established but far from obvious whether in fact there is such a right."[97]

Importantly, the *Pearson* Court also reaffirmed the foundation of qualified immunity: that liability only extends to violations of clearly established constitutional principles and that accordingly, the doctrine "protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'"[98] The unanimous Court also affirmed the justification for qualified immunity: "Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably."[99] Therefore, despite recent grumblings and increasingly vocal dissents among the federal judiciary, *Pearson* is an emphatic statement by the Court that the doctrine of qualified immunity is still alive and well and that it serves an important societal purpose.[100]

92. *Id.*

93. *Id.*

94. *See* Pearson v. Callahan, 555 U.S. 223, 227 (2009) ("We now hold that the *Saucier* procedure should not be regarded as an inflexible requirement and that petitioners are entitled to qualified immunity on the ground that it was not clearly established at the time of the search that their conduct was unconstitutional.").

95. *Id.* at 236.

96. *Id.*

97. *Id.* at 236–37.

98. *Id.* at 231 (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).

99. *Id.*

100. *See id.* at 243–45.

III. ANALYSIS

A. *Common Law and Statutory Law Support a Version of Qualified Immunity for Police, but Not for Professors*

As Justice Thomas recently observed, the Supreme Court's qualified immunity "analysis is [not] grounded in the common-law backdrop against which Congress enacted [§ 1983]."[101] Instead, the Court has essentially "'substitute[d] [its] own policy preferences for the mandates of Congress' by conjuring up blanket immunity and then failed to justify [its] enacted policy."[102] The crux of recent qualified immunity debates has centered on public-policy concerns and generally failed to ask if qualified immunity is even legal or valid as a matter of statutory interpretation.[103] This failure to examine the common law and statutory bases for qualified immunity has also contributed to the Supreme Court's inapt "one-size-fits-all test."[104] Fortunately, several scholars and judges have begun to move beyond policy arguments to examine the legal foundation—or lack thereof—on which the doctrine rests.[105] This historical inquiry and analysis is critical because of what it may reveal about the disparate natures of different officials and alleged violations.[106] "It may be that the police officer would receive more protection than a university official at common law. Or maybe the opposite is true. Whatever the history establishes, [the Court] at least ought to consider it."[107] This Part considers what the common law and the statute say about this issue.

In short, there is no qualified immunity, express or implied, in § 1983.[108] But the Fourth Amendment has a qualified immunity of sorts built into its very text,

101. Hoggard v. Rhodes, 141 S. Ct. 2421, 2422 (2021) (Thomas, J., concurring) (alteration in original).

102. *Id.* (internal quotations and citations omitted).

103. *See* Baude, *supra* note 66, at 46–47 (pointing out this failure and scrutinizing the legal bases for qualified immunity).

104. *Hoggard*, 141 S. Ct. at 2422.

105. *See, e.g.*, Baude, *supra* note 66; Schwartz, *supra* note 8; Andrew S. Oldham, *Official Immunity at the Founding*, 46 HARV. J.L. & PUB. POL'Y 105 (2023); Horvath v. City of Leander, 946 F.3d 787, 794–803 (5th Cir. 2020) (Ho, J., concurring in part and dissenting in part); Zadeh v. Robinson, 928 F.3d 457, 479–81 (5th Cir. 2019) (Willet, J., concurring in part and dissenting in part) (arguing that "qualified immunity smacks of unqualified impunity" and is a "judge-created doctrine [that] excuses constitutional violations by limiting the statute Congress passed to redress constitutional violations").

106. *See, e.g.*, Baude, *supra* note 66; Schwartz, *supra* note 8; Oldham, *supra* note 105.

107. *Hoggard*, 141 S. Ct. at 2422 (internal citations omitted).

108. 42 U.S.C. § 1983.

which makes alleged violations of Fourth Amendment rights different than alleged violations of First Amendment rights.[109] For this reason—as well as others—courts should not grant university officials qualified immunity in First Amendment suits, even while affirming a form of qualified immunity for police officers facing Fourth Amendment suits.

1. *The Doctrine of Qualified Immunity Is Without Legal Basis and Should Be Abolished*

There is now growing skepticism across the ideological spectrum concerning the contention that Congress originally intended qualified immunity to be read into the statute in 1871.[110] Forms of *absolute* immunity—such as presidential, judicial, and prosecutorial immunity—"have their own firmer historical and legal bases" which most agree are not nullified by § 1983.[111] For example, "[c]ases decided nearly contemporaneously with Section 1983's enactment support judicial immunity."[112] The doctrine of *qualified* immunity, on the other hand, simply lacks a credible and verifiable historical foundation.[113]

Section 1983 contains no express provision of absolute or qualified immunity for government officials.[114] It is undisputed that neither the original nor current version of § 1983 "makes any reference to immunity" of any sort.[115] The Supreme Court simply read it into the statute in its "canonical qualified-immunity decision, *Pierson v. Ray*."[116] The Court's argument in *Pierson*—and the argument of many qualified immunity proponents today—"is that qualified immunity derives from a putative common-law rule that existed when Section 1983 was adopted. But this argument does not withstand historical scrutiny."[117] Many qualified immunity proponents who defend the doctrine on public-policy grounds (primarily related to law enforcement and crime control) have begun to side with their originalist and textualist convictions over their policy preferences because

109. *See* U.S. CONST. amend. IV (prohibiting only "*unreasonable* searches and seizures") (emphasis added); *see also* U.S. CONST. amend. I. *See generally* Oldham, *supra* note 105.

110. *See* Baude, *supra* note 66, at 48–50. *But see, e.g.*, Lawrence Rosenthal, *Defending Qualified Immunity*, 72 S.C. L. REV. 547 (2020).

111. Baude, *supra* note 66, at 79–80.

112. *Id.* at 79.

113. *Id.* at 88; *see also* Horvath v. City of Leander, 946 F.3d 787, 801 (5th Cir. 2020) (Ho, J., concurring in part and dissenting in part) ("[T]here is no textualist or originalist basis to support a 'clearly established' requirement in § 1983 cases.").

114. 42 U.S.C. § 1983.

115. Baude, *supra* note 66, at 50.

116. Oldham, *supra* note 105, at 108; *see* Pierson v. Ray, 386 U.S. 547, 554–58 (1967).

117. Baude, *supra* note 66, at 51; *Pierson*, 386 U.S. at 554.

"lawsuits against officials for constitutional violations did not generally permit a good-faith defense during the early years of the Republic."[118] On the contrary, "good-faith reliance did not create a defense to liability—what mattered was legality."[119] Therefore, a "strict rule of personal official liability, even though its harshness to officials was quite clear," was a central feature of the law during America's early years and antebellum period.[120] Rather than granting qualified immunity to government officials when they violated individual rights, courts mediated the harshness of holding officials personally responsible by often granting individual petitions for indemnification.[121]

Why then has a Supreme Court dominated by staunch originalists and textualists granted qualified immunity "such a privileged status" in recent years and resorted to unpersuasive justifications to keep the doctrine alive?[122] Perhaps for public-policy reasons,[123] and one reason in particular: jurists likely worry about the detrimental effects that abolition would have on law enforcement recruitment and retention, crime rates, and the criminal-justice system in general.

To be sure, some justices may agree with Justice Antonin Scalia that because *Monroe* was wrongly decided, the doctrine of qualified immunity is a necessary compensating adjustment, which essentially "correct[s] the course of an old doctrine by inventing a new one that tacks back the other way."[124] But this two-wrongs-make-a-right theory is a curious position for an originalist to hold.[125] And it appears to be nothing more than a weak attempt to justify bad statutory interpretation and judicial activism motivated by public policy.[126] Put simply, many fair-minded jurists today—particularly originalists and textualists—might like to limit or abolish qualified immunity, but they worry about the effects on police officers of doing so.[127] As it turns out, there is a way for these jurists to have their cake and eat it too.

118. Baude, *supra* note 66, at 55.

119. *Id.* at 56.

120. David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1, 19 (1972).

121. Baude, *supra* note 66, at 56–57.

122. *See id.* at 85–88.

123. *See* Schwartz, *supra* note 8, at 1812–13, 1836–39.

124. Baude, *supra* note 66, at 63.

125. Noah Watson, Note, *"Yes Harm, No Foul": Recalibrating Qualified Immunity*, 64 WASH. U. J.L. & POL'Y 231, 241 (2021) ("Scalia's response may seem bizarre considering his originalist interpretations.").

126. *See* Baude, *supra* note 66, at 62–64.

127. *See* Schwartz, *supra* note 8, at 1811–12.

As outlined above, there is no statutory or common law support for the doctrine of qualified immunity generally. Therefore, university officials who unconstitutionally restrict the free speech rights of students should not be granted qualified immunity. The doctrine, as it exists today, should be abolished. But if qualified immunity is circumscribed, or even abolished, to vindicate college students' First Amendment rights (or simply on principle), how do we ensure that the "police officer who makes a split-second decision to use force in a dangerous setting" is judged in light of the totality of circumstances and his good-faith beliefs at the time?[128] The answer lies not in § 1983 or any judicially invented statute, but in the substantive right itself.[129]

2. *The Fourth Amendment Itself Provides a Better Source of Immunity for Police*

While there are practical reasons to treat police differently than professors, as a constitutional and legal matter the reason lies not so much in the differences between the types of officials themselves but in the rights each is usually accused of violating.[130] In § 1983 suits against police officers, the allegation is almost always that the officers violated the plaintiff's Fourth Amendment right to be free from unreasonable searches and seizures.[131] Officers are most often accused of using excessive force (a form of unreasonable seizure under the Fourth Amendment).[132] On the other hand, university officials are almost never accused of using unreasonable physical force against a student.[133] But they are often accused of violating a student's First Amendment right to free speech, to freely associate, or to practice her religion.[134] In short, a one-size-fits-all approach to police and professors is inappropriate because a one-size-fits-all approach to the disparate constitutional rights they most often violate is inappropriate.[135] The First Amendment and Fourth Amendment are simply not the same when it comes to official immunities. This is because—as Judge Andrew Oldham recently argued—

128. Hoggard v. Rhodes, 141 S. Ct. 2421, 2422 (2021) (Thomas, J., concurring).

129. 42 U.S.C. § 1983.

130. *Hoggard*, 141 S. Ct. at 2422 (citing Oldham, *supra* note 105, at 105).

131. *See, e.g.*, Tennessee v. Garner, 471 U.S. 1 (1985); Pearson v. Callahan, 555 U.S. 223 (2009). *But see, e.g.*, Sause v. Bauer, 138 S. Ct. 2561 (2018) (per curiam).

132. *Garner*, 471 U.S. at 7 ("[T]here can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment.").

133. *See, e.g.*, *Hoggard*, 141 S. Ct. at 2421; Intervarsity Christian Fellowship/USA v. Univ. of Iowa, 5 F.4th 855, 867 (8th Cir. 2021); Turning Point USA v. Rhodes, 973 F.3d 868, 879–81 (8th Cir. 2020).

134. *See, e.g.*, *Hoggard*, 141 S. Ct. at 2421; *Intervarsity Christian Fellowship/USA*, 5 F.4th at 867; *Turning Point USA*, 973 F.3d at 879–81; *Ruth Malhotra and Orit Sklar*, *supra* note 53.

135. *See* Oldham, *supra* note 105, at 132.

the Fourth Amendment has a form of immunity built into its very text while the First Amendment does not.[136]

The Fourth Amendment states that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against *unreasonable* searches and seizures, shall not be violated."[137] "In 1791, the word 'unreasonable' meant 'against the reason of the common law.' That common law brought with it a host of immunities for officers charged with searching and seizing."[138] There are several examples, from both English common law and early congressional practices, of officers being granted some variation of qualified immunity for searching and seizing people.[139] "[O]fficer immunity [under English common law] remained a central part of search-and-seizure litigation well into the eighteenth century."[140] Likewise, when James Madison penned the Fourth Amendment, he did not choose the word *unreasonable* by accident.[141] "It had a distinct legal meaning at the time of the Founding—namely, against the reason of the common law. . . . [And that common law] brought with it a series of protections for officers who were charged with executing searches and seizures."[142] In alleging a Fourth Amendment violation, a plaintiff would have to show the officer's behavior to be such an egregious violation as to cause him to forfeit his various common law protections.[143] In other words, the officer's search or seizure had to be "not just wrong" but "*so* wrong that he lost the qualified immunity afforded to him by the common law."[144]

A related way of reaching the same conclusion is through the two-prong framework laid out by the Supreme Court in *Pearson*.[145] Recall that, in order to prevail, a plaintiff must show that a government official violated his constitutional right (prong one) and that said right was "'clearly established' at the time of defendant's alleged misconduct" (prong two).[146] Prong two is being increasingly viewed by judges as "controversial because it lacks any basis in the text or original

136. *See id.* at 121–25.
137. U.S. CONST. amend. IV (emphasis added).
138. Oldham, *supra* note 105, at 105.
139. *See id.* at 111–26.
140. *Id.* at 119.
141. *Id.* at 123–24.
142. *Id.*
143. *Id.* at 124.
144. *Id*.
145. Pearson v. Callahan, 555 U.S. 223, 232 (2009).
146. *Id.*

understanding of § 1983."[147] Nevertheless, many of these same judges lean toward Scalia's two-wrongs-make-a-right justification and believe that, because "courts too often impose liability on public officials under the first prong[,] . . . the second prong is needed to limit judicial adventurism."[148] But, as Judge James Ho recently argued, "that is a false choice—not to mention a troubling one. . . . We can get *both* prongs of the doctrine right."[149] "[I]f courts simply applied the *first* prong of the doctrine in a manner more consistent with the text and original understanding of the Constitution, we might find that the second prong is unnecessary . . . [and] unwarranted by the text."[150] In other words, if courts correctly interpret and apply the Fourth Amendment's *unreasonable* qualifier, police officers who make reasonable mistakes in good-faith or based on probable cause will generally be granted the appropriate level of immunity for their actions. If the primary concern with abolishing qualified immunity is chilling police recruitment, retention, and conduct, there should be "no need for an atextual 'clearly established' requirement . . . if [courts] get the substantive Fourth Amendment analysis right."[151]

Therein lies another difference between First and Fourth Amendment violations. "When it comes to the First Amendment, . . . we are concerned about government chilling the citizen—not the other way around."[152] There is little legitimate concern about university officials being discouraged from vigorously restricting free speech rights, even in the name of proscribing so-called "hate speech" or advancing "diversity, equity, and inclusion" (DEI) policies. At least from a classically liberal perspective, more speech is a victory to be celebrated—not a harm to be avoided.[153] But there *is* legitimate concern about police officers fearing civil liability to such a degree that they refuse to proactively police or even

147. Horvath v. City of Leander, 946 F.3d 787, 800 (5th Cir. 2020) (Ho, J., concurring in part and dissenting in part).

148. *Id.* at 803.

149. *Id.*

150. *Id.* at 801.

151. *Id.* at 802.

152. *Id.*

153. Fortunately, since the publication of the Chicago Statement on Freedom of Expression in 2015, many universities have affirmed this view (at least in principle if not also in practice). *See* Peter Bonilla, *On Free Speech, the University of Chicago's Next President Has Big Shoes to Fill*, FIRE (May 18, 2021), https://www.thefire.org/news/free-speech-university-chicagos-next-president-has-big-shoes-fill [https://perma.cc/96VY-MD4T].

avoid acting in dangerous situations to protect the public from violent criminals.[154] Less effective law enforcement generally is not something to be celebrated.[155]

To be sure, police officers can sometimes violate constitutional rights outside the Fourth Amendment—including the First Amendment rights of free exercise or free speech[156]—and when they do so, a different analysis would have to apply.[157] But more often it is the right to be free from *unreasonable* searches and seizures that police allegedly violate;[158] whereas it is the right to free speech that university officials allegedly violate.[159] Therefore, in sum, it is not simply that university officials should always be denied qualified immunity while police officers should always be granted qualified immunity. The appropriateness of their disparate treatment lies in the inherent differences between the particular constitutional provisions each group is generally accused of violating. When university officials violate First Amendment rights, there is no qualified immunity—express or implied—to shield them from liability.[160] When police officers violate Fourth Amendment rights, there is likewise no express or implied qualified immunity for them under § 1983.[161] But so long as their violations were *reasonable* under the totality of circumstances and common law as it existed at the Founding, police

154. *See* Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982) (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949)) ("[T]here is 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.'"); Malley v. Briggs, 475 U.S. 335, 353–54 (1986) (Powell, J., concurring in part and dissenting in part) ("The specter of personal liability for a mistake in judgment may cause a prudent police officer to close his eyes . . . . Law enforcement is ill-served by this *in terrorem* restraint.").

155. *See Harlow*, 457 U.S. at 814.

156. *See, e.g.*, Sause v. Bauer, 138 S. Ct. 2561 (2018) (per curiam) (remanding case to consider whether police responding to a noise complaint interfered with plaintiff's First Amendment free-exercise rights when they ordered her to stop praying in her home).

157. *See* Oldham, *supra* note 105, at 132 (arguing that courts "regularly apply different standards of review to different constitutional claims . . . [s]o of course the analysis is different for different constitutional rights").

158. *See, e.g.*, Tennessee v. Garner, 471 U.S. 1 (1985); Pearson v. Callahan, 555 U.S. 223 (2009).

159. *See, e.g.*, Hoggard v. Rhodes, 141 S. Ct. 2421 (2021) (Thomas, J., concurring); Intervarsity Christian Fellowship/USA v. Univ. of Iowa, 5 F.4th 855, 867 (8th Cir. 2021); Turning Point USA v. Rhodes, 973 F.3d 868, 879–81 (8th Cir. 2020).

160. *See* Baude, *supra* note 66, at 49–50.

161. 42 U.S.C. § 1983.

should be shielded from liability where university officials accused of First Amendment violations should not.[162]

B. *Practical and Public-Policy Considerations Surrounding Qualified Immunity Apply to Police, but Not to Professors*

As argued above, there are good constitutional and statutory arguments for treating university officials' First Amendment violations differently than police officers' Fourth Amendment violations.[163] Moreover—even putting common law and statutory arguments aside—there are strong public-policy and common-sense reasons to treat these two groups differently when it comes to qualified immunity.[164]

In *Harlow*, the Supreme Court agreed "that public policy at least mandates an application of the qualified immunity standard that would permit the defeat of insubstantial claims without resort to trial."[165] Just as it was in 1982, the Court today remains concerned about the "cost not only to the defendant officials, but to society as a whole" if it were to abolish qualified immunity.[166] Specifically, the Court is worried about "the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally, there is the danger that fear of being sued will dampen the ardor of all but the most resolute" police officers.[167] None of these concerns apply nearly as much to university administrators as they do to police officers.[168] Additionally, arguments for qualified immunity based on fair notice or lenity are more applicable to police than professors.[169] Finally, the radically different natures of a university official's job and a police officer's job call for radically different levels of deference when each is alleged to have violated an individual's constitutional right.[170]

162. *See* Horvath v. City of Leander, 946 F.3d 787, 801 (5th Cir. 2020) (Ho, J., concurring in part and dissenting in part) ("[T]he Fourth Amendment does not prohibit reasonable efforts to protect law-abiding citizens from violent criminals—it forbids only '*unreasonable* searches and seizures.'").

163. *See supra* Part III.A.

164. *See infra* Part III.B.

165. Harlow v. Fitzgerald, 457 U.S. 800, 813 (1982).

166. *Id.* at 814; *see* Watson, *supra* note 125, at 238.

167. *Harlow*, 457 U.S. at 814 (internal quotations omitted).

168. *See supra* Part III.A.1.

169. *See infra* Part III.B.2.

170. *See supra* Part III.A.2.

First, § 1983 suits against university officials for First Amendment violations generally seek only injunctive relief and nominal damages, or perhaps merely a declaratory judgment.[171] In contrast, many § 1983 suits against police officers stem from the officers' use of deadly force against a suspect and seek millions of dollars in damages.[172] Thus, one would expect overall litigation expenses in low-stakes First Amendment suits against university officials to be less than in high-stakes suits against police officers.

Second, distracting university officials from their jobs (part of which is undoubtedly ensuring an open academic environment anyway)[173] or deterring them from accepting their jobs in the first place do not seem to be realistic concerns. There is no shortage of applicants for jobs in academia.[174] Likewise, a distracted professor is merely a distracted professor. A distracted cop is a dead cop (or a cop whose hesitation leads to the death or injury of a citizen). The consequences are much more dire for law enforcement officials. Police recruitment and retention is suffering, largely as a result of anti-police rhetoric in the wake of the Black Lives Matter and defunding the police movements.[175] Unsurprisingly, states that have

171. *See, e.g.*, Uzuegbunam v. Preczewski, 141 S. Ct. 792, 802 (2021) (holding that, because plaintiff "experienced a completed violation of his constitutional rights when [university officials] enforced their speech policies against him . . . [n]ominal damages can redress [his] injury even if he cannot or chooses not to quantify that harm in economic terms").

172. *See A Look at Big Settlements in US Police Killings*, AP (Mar. 12, 2021, 5:28 PM), https://apnews.com/article/shootings-police-trials-lawsuits-police-brutality-2380f38268a504ae689ad5b64b5de2e7 [https://perma.cc/G994-XY59].

173. *See* GEOFFREY R. STONE ET AL., REPORT OF THE COMMITTEE ON FREEDOM OF EXPRESSION 2 (Univ. of Chi. 2015), https://provost.uchicago.edu/sites/default/files/documents/reports/FOECommitteeReport.pdf [https://perma.cc/2PNS-66V5] ("[F]ostering the ability of members of the University community to engage in such debate and deliberation in an effective and responsible manner is an essential part of the University's educational mission.").

174. *See* Jonathan Malloy et al., *Ph.D. Oversupply: The System Is the Problem*, INSIDE HIGHER ED (June 21, 2021), https://www.insidehighered.com/advice/2021/06/22/how-phd-job-crisis-built-system-and-what-can-be-done-about-it-opinion [https://perma.cc/AJT9-DZL3].

175. *See* Eric Westervelt, *Cops Say Low Morale and Department Scrutiny Are Driving Them Away from the Job*, NPR (June 24, 2021, 2:53 PM), https://www.npr.org/2021/06/24/1009578809/cops-say-low-morale-and-department-scrutiny-are-driving-them-away-from-the-job [https://perma.cc/R3UW-8JRR]; Christina Maxouris, *Police Officers Across the US Have Quit Their Jobs in Recent Days. Here is Where There Have Been Resignations*, CNN (June 16, 2020, 8:47 PM), https://www.cnn.com/2020/06/16/us/us-police-officers-resigning/index.html [https://perma.cc/AF8C-SXDF]; Casey Chalk, *Police Will Keep Quitting in Droves Until the Left Stops Neutering Them with Nonsense 'Reforms'*, THE FEDERALIST (Aug. 18, 2022), https://thefederalist.com/2022/08/18/police-will-keep-quitting-in-droves-until-the-left-stops-neutering-them-with-nonsense-reforms/ [https://perma.cc/FF3K-356Y].

abolished or restricted qualified immunity for police have seen exoduses of officers to more law-enforcement-friendly states.[176] The Supreme Court's deterrence concerns are especially applicable to potential police officers who may already be deterred by the dangers, physical and legal, and unpopularity of the job.[177] The last thing our society should do is add the threat of civil suit (and resulting personal bankruptcy) to the litany of worries confronting police officers.[178] Whereas police officers can face bankruptcy and prison for their Fourth Amendment violations,[179] university officials who violate students' First Amendment rights generally only face the prospect of apologizing and refraining from future unconstitutional behavior.[180] Our society needs qualified immunity to keep good cops—it does not need it to keep good professors.

Likewise, there is little concern about "dampening the ardor" of university officials in the performance of their duties.[181] Enforcing speech codes or dealing with as-applied violations constitute only a tiny fraction of their job.[182] And, as mentioned above, even without qualified immunity, the legal and monetary consequences if they step out of bounds would be minimal.[183] Thus, qualified immunity is unnecessary to ensure that university officials can energetically pursue their profession. In any case, the greater concern is university officials chilling students' constitutionally protected speech, not the other way around.[184]

176. *See* Westervelt, *supra* note 175; Maxouris, *supra* note 175; Chalk, *supra* note 175; Jason Johnson, *Why Violent Crime Surged After Police Across America Retreated*, USA TODAY (Apr. 9, 2021, 6:00 AM) https://www.usatoday.com/story/opinion/policing/2021/04/09/violent-crime-surged-across-america-after-police-retreated-column/7137565002 [https://perma.cc/C249-E4SH]; David Migoya, *More than 200 Police Officers Have Resigned or Retired Since Colorado's Police Reform Bill Became Law*, THE DENVER POST, https://www.denverpost.com/2020/08/18/colorado-police-resign-retire-reform-law/ [https://perma.cc/5DAH-Q7JB] (Aug. 19, 2020, 6:31 PM).

177. *See* Michell v. Forsyth, 472 U.S. 511, 525–26 (1985); Chalk, *supra* note 175.

178. *See Michell*, 472 U.S. at 525–26; Chalk, *supra* note 175.

179. *See* Lamar Johnson, *Feds Charge 4 Officers with Violating Breonna Taylor's Rights*, POLITICO, https://www.politico.com/news/2022/08/04/feds-charge-4-officers-with-violating-breonna-taylors-rights-00049867 [https://perma.cc/W9M4-PGAP] (Aug. 4, 2022, 5:10 PM).

180. *See, e.g.*, Uzuegbunam v. Preczewski, 141 S. Ct. 792, 797 (2021) (seeking only nominal damages and injunctive relief for university's violation of students' free-speech and free-exercise rights).

181. *See* Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982) (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949)).

182. *See* Majeed, *supra* note 3, at 539–43.

183. *See supra* Part III.B.

184. *See* Horvath v. City of Leander, 946 F.3d 787, 802 (5th Cir. 2020) (Ho, J., concurring in part and dissenting in part).

On the other hand, if police officers are concerned about being held personally liable for reasonable mistakes made in the performance of their duties, they will be much less likely to vigorously enforce the law and protect the public.[185] To be sure, they will come to work and respond to calls as needed.[186] But it is unrealistic to ignore the inherent and negative influence of a culture defined by the adage, "no good deed goes unpunished"; law enforcement officers will not practice proactive policing, enthusiastically seek to prevent serious crime, or unflinchingly use force when necessary to protect innocent lives.[187] They will "hide" in their police stations and in their patrol cars parked in deserted lots. To avoid placing themselves in legal jeopardy, they will increasingly respond to calls only when absolutely necessary.[188] They will hesitate to make arrests when they should make arrests.[189] They will hesitate to shoot when they should shoot. More violent criminals will stay on the streets, more citizens will be victimized, and more innocent lives will be lost as a result.

In short, the principal consequence of deterred and dampened university officials is more free speech and free exercise on college campuses; this may stir controversy, but in so doing will also generate dialogue, debate, and, ideally, intellectual evolution (the very goal of the academy).[190] Concerns about increased toleration of controversial speech leading to increased discrimination and harassment on campuses are understandable but misplaced.[191] "In fact, harassment is less likely to occur in schools where ideas can be freely and respectfully exchanged."[192] The consequences of deterred, discouraged, and dampened police officers are much more serious.

185. *See* Johnson, *supra* note 179.

186. *Id.*

187. *Cf. id.* ("Those who remain on the force are disempowered, so they disengage from the hardest, and riskiest, but most necessary types of police work.").

188. *Id.* ("Today's increasingly hostile work environment for law enforcement has made them more risk averse, reactive and discouraged.").

189. *See id.*

190. *See* STONE ET AL., *supra* note 173, at 3 (arguing that universities have a solemn responsibility "to promote a lively and fearless freedom of debate and deliberation" because "without a vibrant commitment to free and open inquiry, a university ceases to be a university").

191. *See Preventing Harassment and Protecting Free Speech in School*, ACLU (June 15, 2003), https://www.aclu.org/other/preventing-harassment-and-protecting-free-speech-school [https://perma.cc/8GSJ-7KKQ] ("Preventing harassment does not require unnecessarily restricting free speech.").

192. *Id*.

Third—in addition to common law, compensating-adjustment, and stare decisis arguments—the Supreme Court has justified qualified immunity based on the doctrine of lenity and fair warning.[193] This justification is much more applicable to police than to professors. "The theory of lenity and fair warning imagines a state official as akin to a criminal defendant in need of special solicitude before being punished."[194] Although "[m]odern qualified immunity doctrine does not usually mention the criminal rule of lenity, and one might have expected it to be limited to criminal cases[,]" the Court has invoked it on occasion.[195] For example, the Court has explicitly stated that "[o]fficers sued . . . under 42 U.S.C. § 1983 have the same right to fair notice as do defendants charged with the criminal offense defined in 18 U.S.C. § 242."[196] The Court has also said that qualified immunity, "in effect . . . is simply the adaptation of the fair warning standard to give officials . . . the same protection from civil liability and its consequences that individuals have traditionally possessed in the face of vague criminal statutes."[197]

Universities have already received more than a fair warning about content-based speech restrictions, students' free exercise rights, and other First Amendment issues.[198] When they insist on "turn[ing] a blind eye to decades of First Amendment jurisprudence or . . . proceed[ing] full speed ahead knowing they [are] violating the law[,] . . . qualified immunity provides no safe haven."[199] Certainly there are cases of Fourth Amendment situations where police have received a fair warning as well. Shooting an unarmed, non-violent, fleeing felon comes immediately to mind.[200] In such clear-cut cases, police should not be protected by qualified immunity. But in most police use-of-force cases, the situation is dynamic, dangerous, and not clearly spelled out in binding case law.[201] The rule of lenity is much more necessary in those situations than in university officials' slow, reflective policy decisions on well-litigated First Amendment matters.[202]

193. Watson, *supra* note 125, at 242–43.

194. Baude, *supra* note 66, at 71.

195. *Id.*

196. Hope v. Pelzer, 536 U.S. 730, 739 (2002). *See generally* 18 U.S.C. § 242 (criminalizing "[d]eprivation of rights under color of law").

197. United States v. Lanier, 520 U.S. 259, 270–71 (1997).

198. *See* Majeed, *supra* note 3, at 559–62.

199. Intervarsity Christian Fellowship/USA v. Univ. of Iowa, 5 F.4th 855, 867 (8th Cir. 2021).

200. *See* Tennessee v. Garner, 471 U.S. 1 (1985); Graham v. Connor, 490 U.S. 386 (1989).

201. *See Garner*, 471 U.S. at 32.

202. *See Intervarsity Christian Fellowship/USA*, 5 F.4th at 867.

Furthermore, some critics of qualified immunity have "misgivings about importing the limited construction of the criminal [rule-of-lenity] statute to the civil one" because the consequences, and thus the requisite standard of certainty, are much higher in criminal prosecutions than in civil actions.[203] This relates to another reason police and professors are different when it comes to qualified immunity. A § 1983 action against a police officer for excessive force often accompanies criminal charges against the officer.[204] And, even if it does not, the consequences for the officer can include a lifetime bar to serving in law enforcement and can cost millions of dollars.[205] Section 1983 suits against police, even if unaccompanied by criminal charges, mimic the severity of criminal prosecutions.[206] Section 1983 suits against university officials do not.[207]

Regarding fair warning, university officials have had clear notice of what constitutes a First Amendment violation for decades. While this is sometimes the same for police officers, Fourth Amendment cases—especially those dealing with uses of force—are highly fact specific and depend on the totality of circumstances in each case.[208] In fact, the Supreme Court has held that "[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application"[209] but "requires careful attention to the facts and circumstances of each particular case."[210] Thus, by its very nature, what constitutes an excessive use of force (the most frequently alleged Fourth Amendment violation) cannot be governed by a universal, clearly established rule.[211] Rather, "[t]he 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight" taking into account three primary factors: "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight."[212] The appropriateness of some very specific type or level of force in

203. Baude, *supra* note 66, at 72–74.

204. 42 U.S.C. § 1983; Baude, *supra* note 66, at 73.

205. *See A Look at Big Settlements in US Police Killings*, *supra* note 172.

206. *Cf. id.*

207. *See* Majeed, *supra* note 3, at 572–76.

208. *See* Petition for Writ of Certiorari at 25, Hoggard v. Rhodes, 141 S. Ct. 2421 (2021) (No. 20-1066), 2021 WL 408250, at *25.

209. Graham v. Connor, 490 U.S. 386, 396 (1989) (quoting Bell v. Wolfish, 441 U.S. 520, 559 (1979)).

210. *Id.*

211. *See id.*

212. *Id.*

very specific circumstances may be clearly established.[213] But—given the highly dynamic, dangerous, and unique nature of many police encounters—the vast majority cannot be clearly established by their very nature.[214] Thus, when officers make reasonable mistakes, especially when acting in good faith and based on probable cause, they must not be judged "with the 20/20 vision of hindsight" and should be granted a form of qualified immunity for their actions.[215]

First Amendment law and free speech situations on college campuses are different. "[T]he law governing students' speech rights at public colleges and universities is clearly established . . . [and] speech codes at public institutions have been clearly shown to be unconstitutional . . . ."[216] First Amendment free speech analysis is fairly simple for university administrations and general counsel offices in the vast majority of cases: Verbal conduct, regardless of viewpoint, is generally protected speech under the First Amendment unless it falls into one of several specific exceptions the Supreme Court has laid out.[217] Imposing prior restraints on speech or outright proscribing it based on its content or viewpoint—rather than merely imposing a content-neutral time, place, and manner restriction—violates the First Amendment.[218] Therefore, even under the Court's current test, university administrators should be denied qualified immunity for First Amendment violations because the law in this area is "clearly established."[219] Because the Court's free speech jurisprudence is longstanding and clearly established, those administrators who continue to violate students' rights either "lack an understanding of the . . . case law or are acting in defiance of the law, or perhaps in some cases both. Whatever the case may be, they are simply not 'getting it.'"[220] Whether due to willful ignorance or political animus, such violations of clear First Amendment principles should not be rewarded with grants of qualified immunity.

Finally, police and professors are simply very different types of government officials. They should be treated differently for qualified immunity purposes for several common-sense reasons. First, several "Justices fear eliminating or

213. *E.g.*, Tennessee v. Garner, 471 U.S. 1 (1985).

214. *See id.* at 20.

215. *Graham*, 490 U.S. at 396.

216. Majeed, *supra* note 3, at 572.

217. *See id.* at 552–59, 528 n.53 ("[T]he narrow exceptions to the First Amendment include the categories of fighting words, obscenity, defamation, incitement to imminent lawless action, and true threats and intimidation."); *see also* Virginia v. Black, 538 U.S. 343, 359–60 (2003); R.A.V. v. St. Paul, 505 U.S. 377, 382–83 (1992); Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

218. *See R.A.V.*, 505 U.S. at 383, 430.

219. Majeed, *supra* note 3, at 572.

220. *Id.* at 574.

restricting qualified immunity would alter the nature and scope of policing . . . in ways that would harm . . . society . . . ."[221] But nobody seriously believes there would be any "parade of horribles were qualified immunity eliminated" for university officials.[222]

Second, university officials usually have time for "reasoned reflection," whereas police often do not.[223] More analysis and deference are called for in Fourth Amendment situations where police face dynamic circumstances involving split-second, life-or-death decisions.[224] The opposite is true in First Amendment cases on college campuses. There are generally no complex fact patterns or split-second decisions involved.[225] Even controversial, offensive speech "assuredly pose[s] no lethal threat."[226] University officials, in stark contrast to police officers, have the benefit of unlimited time for deliberation and discussion with legal counsel before crafting a First Amendment policy.[227] In fact, they typically "ha[ve] years to adopt, debate, review, revise, amend, and implement their speech policies."[228] So, requiring a prior case with almost the exact same set of facts and circumstances before a university official can be held accountable for their unconstitutional policies or policy enforcement makes much less sense than it does in the Fourth Amendment, law-enforcement context.[229]

Relatedly, the Court has unequivocally stated that qualified immunity is only intended "to shield officials . . . when they perform their duties *reasonably*."[230] Asking whether government officials have performed their duties "reasonably" requires examining all the relevant circumstances,[231] and this should include how much access the officials had to legal advice and how much time they had to make an informed decision. A choice might be eminently reasonable if an official has three *seconds* to decide and act; the same choice could be entirely unreasonable if the official has three *weeks* to confer with an attorney and consider the best course of action.[232] Qualified immunity in the law-enforcement context generally arises

221. Schwartz, *supra* note 8, at 1800.
222. *See id.*
223. Dillard v. City of Springdale, 930 F.3d 935, 945 (8th Cir. 2019).
224. Graham v. Connor, 490 U.S. 386, 396–97 (1989).
225. *See, e.g.*, Petition for Writ of Certiorari, *supra* note 208, at 25.
226. *Id.*
227. *Id.*
228. *Id.*
229. *See generally id.*
230. Pearson v. Callahan, 555 U.S. 223, 231 (2009) (emphasis added).
231. *Id.* at 244.
232. *See id.* at 244–45.

due to split-second decisions made by officers in rapidly evolving, life-threatening situations.[233] This is very rarely—if ever—the case for university administrators.[234] Thus, under the Court's own qualified immunity test, the decision-making context distinguishes university administrators and policymakers from police officers.[235] What is *reasonable* for a police officer in a Fourth Amendment context likely will not be reasonable for a university official in a First Amendment context.[236]

Third, "college officials and administrators should be held to a *higher* standard than police officers and other state officials—not a lower one."[237] University officials have doctoral degrees, round-the-clock access to legal counsel, and the duty to advance the free exchange of ideas as part of a liberal education.[238] As the Supreme Court has recognized, the "university is a traditional sphere of free expression" that is "fundamental to the functioning of our society[,]" and university officials have a duty to maintain it as such.[239] Due both to their greater responsibilities as applied to the First Amendment and their higher levels of training and education, university officials are without excuse when they choose to unconstitutionally restrict a student's First Amendment rights.[240] "[Courts] do not hold police officers to the same standard [they] would apply to a law professor walking the beat."[241] Therefore, "the inverse should also be true: when professors and other university officials are sued over policies that violate their students' constitutional rights, they should be held to a higher standard than a police officer 'walking the beat.'"[242]

233. Graham v. Connor, 490 U.S. 386, 396–97 (1989).

234. *See, e.g.*, Petition for Writ of Certiorari, *supra* note 208, at 25.

235. *See, e.g.*, *id.* at 23–24.

236. *Id.* at 23.

237. *Id.*

238. *The Role of Liberal Arts Education in a Democracy*, ACTA (July 17, 2019), https://www.goacta.org/2019/07/the-role-of-liberal-arts-education-in-a-democracy/ [https://perma.cc/L8T2-E9WU].

239. Rust v. Sullivan, 500 U.S. 173, 200 (1991).

240. *See* McGaughey v. Chicago, 664 F. Supp. 1131, 1138 (N.D. Ill. 1987), *vacated in part*, 690 F. Supp. 707 (N.D. Ill. 1988).

241. *Id.*

242. Petition for Writ of Certiorari, *supra* note 208, at 23.

IV. RECOMMENDATIONS TO ABOLISH (OR AT LEAST QUALIFY) THE DOCTRINE OF QUALIFIED IMMUNITY

A. *The Supreme Court Should Abolish Qualified Immunity and Congress Should Amend § 1983 as Needed*

Qualified immunity should not protect university officials who intentionally restrict free speech or free exercise rights. To ensure that students whose rights are violated can hold universities accountable, the doctrine of qualified immunity needs to be constrained and reformed. Either Congress or the Supreme Court could reform qualified immunity, but the ideal solution would come from both branches working together.

The Supreme Court should abolish the doctrine of qualified immunity generally. Public-policy concerns and recent events aside, qualified immunity is simply bad law. In its current form, the qualified immunity doctrine is judicially invented law with no basis in the statute or Constitution. The Court's holding in *Pierson* was likely correct, if limited to the particular facts and context of the case.[243] But unfortunately, because the Supreme Court did not like the policy consequences of the law Congress enacted, unelected judges have radically expanded qualified immunity over the last 60 years to cover virtually all types of government officials and all types of alleged violations.[244] Not only is such a construction nowhere to be found in the text or common law background of the original act, it is also radically different than the probable-cause, good-faith, and notice considerations applied to police in *Pierson*.[245] If § 1983 is too deferential to plaintiffs or has unacceptable social and public-policy consequences, it is up to Congress to fix it—not the Court.[246] The role of the Court is to say what the law is, not to change the law to what it perhaps should be. Therefore, the Supreme Court should overrule its qualified immunity decisions—from *Pierson* and *Harlow* to more recent cases—and call on Congress to reform the statute as it sees fit.[247]

Next, Congress should do its job and amend the statute. When it does so, it should rewrite the statute to (1) ensure plaintiffs first exhaust their common law and tort remedies under state law before resorting to the federal courts and (2) provide a variation of qualified immunity for law enforcement personnel who act

243. Pierson v. Ray, 386 U.S. 547 (1967).

244. *See supra* Part II.B.

245. *See supra* Part III.A; Hoggard v. Rhodes, 141 S. Ct. 2421, 2422 (2021) (Thomas, J., concurring); 42 U.S.C. § 1983; *Pierson*, 386 U.S. at 555.

246. *See supra* Part III.A.1.

247. *Pierson*, 386 U.S. at 547; Harlow v. Fitzgerald, 457 U.S. 800, 800 (1982).

reasonably in good faith and based on probable cause. Changing the first factor would ensure that the federal courts are not overwhelmed by a flood of new § 1983 litigation. Also, 150 years after Reconstruction, it is appropriate to again trust that state remedies will be available both de jure and de facto.

Changing the second factor would ensure that—even when a § 1983 claim is necessary because the plaintiff was denied relief in state court—police will still enjoy the common-sense protections they had under English common law and at the time of the Founding.[248] Finally, Congress should recognize the insidious irony of allowing state institutions of higher education to restrict free and open discourse by their students. Therefore, to supplement state tort remedies and § 1983, Congress should pass additional laws to protect First Amendment rights on public university campuses. As a carrot, Congress should use additional federal funds to incentivize universities to adopt a version of the Chicago Principles on free speech and expression.[249] As a stick, Congress should enact sanctions—such as the reduction and eventual complete loss of federal funding—when universities blatantly violate students' rights.[250] Congress wrote § 1983, and Congress should be the one to fix § 1983 if it needs fixing.[251]

B. *At the Very Least, the Supreme Court Should Qualify the Doctrine of Qualified Immunity to Ground It in the Common Law*

While the above solution is the ideal outcome, it is perhaps unrealistic. Given the public-policy and stare-decisis factors at play, the Supreme Court is unlikely to completely reverse its qualified immunity decisions.[252] Likewise, it would be a heavy lift for Congress to enact a comprehensive qualified immunity reform law given the subject's controversy and the polarized political environment of late.[253] Plus, Congress is generally happy to shirk its responsibilities and abdicate its role if the Executive or Judicial Branch will do its job for it. Therefore, an alternate recommendation is needed.

248. *See generally* Oldham, *supra* note 105.

249. *See generally* STONE ET AL., *supra* note 173.

250. David French, *It's Time to Crush Campus Censorship*, NAT'L REV. (Apr. 24, 2017, 7:07 PM), https://www.nationalreview.com/2017/04/free-speech-campus-censorship-congress-must-punish-universities-indulging-student-mob/ [https://perma.cc/8GPH-UR8Z]; Turley, *supra* note 2, at 688 ("Congress can require that universities adopt a list of basic protections for the exercise of free speech as a precondition for any federal funding, from grants to tuition support.").

251. 42 U.S.C. § 1983.

252. Watson, *supra* note 125, at 243–44.

253. *See generally* Rosenthal, *supra* note 110, at 547.

In the alternative, Congress need not do anything, and the Supreme Court should begin to gradually narrow the doctrine of qualified immunity. First, the Court should stop issuing policy-motivated qualified immunity decisions. After all, the Supreme Court itself has admitted that it "do[es] not have a license to establish immunities from § 1983 actions in the interests of what [it] judge[s] to be sound public policy."[254] Its decisions should be rooted in faithful interpretation of the law, including the statute itself and the common law context at the time of its enactment.[255] Indeed, in a more recent qualified immunity decision, *Filarsky v. Delia*,[256] "the Court invoked the common-law background once again, suggesting that it remains an important grounding for the legitimacy of the doctrine."[257]

This gradual reformation of qualified immunity should start with treating different types of officials and different types of constitutional rights differently (if they were treated differently at common law).[258] Qualified immunity should not be "applied 'across the board' to all constitutional claims . . . regardless of 'the precise character of the particular rights.'"[259] The Court should retreat from its one-size-fits-all approach and do the difficult historical analysis necessary to determine where and how common law immunities applied. Far from being a radical reversal of all the Court's qualified immunity jurisprudence, this approach would be more like a faithful return to the Court's seminal qualified immunity decision, *Pierson*.[260]

Pierson was a narrow decision.[261] While "one might have expected [the Court's] reasoning to be limited to false arrests or other torts with similar elements" and "to support a subjective defense of good faith," the Supreme Court later drastically and "rapidly expanded [*Pierson*] to executive action generally" and "transformed it into an objective analysis" without basis in the common law.[262] As

254. Tower v. Glover, 467 U.S. 914, 922–23 (1984).

255. *See* Malley v. Briggs, 475 U.S. 335, 342 (1986) ("[O]ur role is to interpret the intent of Congress in enacting § 1983, not to make a freewheeling policy choice, and that we are guided in interpreting Congress' intent by the common-law tradition.").

256. 566 U.S. 377 (2012).

257. Baude, *supra* note 66, at 53; *see Filarsky*, 566 U.S. at 383–84 (arguing that common law immunities "well grounded in history and reason" were not abrogated by § 1983).

258. *See* Baude, *supra* note 66, at 59 ("[A]n element of a specific tort does not provide evidence of a more general backdrop that one would expect to export to other claims, let alone from common law to constitutional claims.").

259. *Id.* at 60.

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

261. *Id*.

262. Baude, *supra* note 66, at 53.

Justice Thomas recently admitted, "[i]n further elaborating the doctrine of qualified immunity . . . [the Court has] diverged from the historical inquiry mandated by the statute" and has "not attempted to locate that standard in the common law as it existed in 1871."[263]

The Court needs to limit the doctrine, adopt a narrow interpretation of *Pierson*, and faithfully interpret the statute and common law.[264] To do so, it need only "vote to limit qualified immunity to those defenses available at common law in 1871" (at least in the absence of legislation extending the doctrine beyond that point).[265] If the Court conducted an unbiased and thorough historical analysis, it would find that "the common law in place in 1871 would require dramatically limiting qualified immunity doctrine or doing away with the defense altogether."[266] Relevant here, the Court would likely find—as argued above—that the Fourth Amendment has built in immunity while the First Amendment does not.[267] It also would find that police have always enjoyed common law protections for their reasonable, good faith actions taken based on probable cause, whereas university officials have not.[268]

V. CONCLUSION

Qualified immunity is a complex and controversial topic for both legal experts and lay people today. Comprehensive solutions have proven elusive and may remain out of reach for the near future. But some problems can be solved now. Immunity for university officials who blatantly and repeatedly violate students' First Amendment rights is one of them. Regardless of whether they act out of ideological animus, a misguided attempt to promote DEI, or some other reason, university officials should not be untouchable when they choose to censor students. But, candidly, many sympathetic judges—who have the ability and desire to do so—are afraid to vindicate students' First Amendment rights for fear of how their decisions may affect qualified immunity in the law enforcement context.

263. Ziglar v. Abbasi, 582 U.S. 120, 158–59 (2017) (Thomas, J., concurring in part and concurring in judgment).

264. *Pierson*, 386 U.S. at 547.

265. Schwartz, *supra* note 8, at 1803.

266. *Id*.

267. *Id.* at 1803–04.

268. *See* Philip Lee, *The Curious Life of* In Loco Parentis *at American Universities*, 8 HIGHER EDUC. REV. 65, 67 (2011) ("From the mid-1800s to the 1960s, American colleges assumed [*in loco parentis*] responsibility over their students' lives that went well beyond academics. During this time, constitutional rights stopped at the college gates . . . .").

Many judges likely recognize that the modern qualified immunity doctrine is a fiction from an originalist and textualist perspective.[269] Nevertheless, they also recognize the doctrine's public-policy role in keeping police officers on the streets and keeping those streets safe.[270] Therefore—for those who doubt qualified immunity's legal basis but nevertheless insist on maintaining the doctrine to protect police officers—this Article provides a framework for reform. Using First Amendment violations on university campuses as an example, this Article has demonstrated that qualified immunity can (and should) be denied in many situations,[271] but still preserved for law enforcement in the Fourth Amendment context.

No doubt the Supreme Court will continue to wrestle with the issue of qualified immunity. When the opportunity comes to reexamine and reform the doctrine, the Court should remember that the First Amendment is not the Fourth Amendment, and professors are not police.

269. *See supra* Part III.A.

270. Pierson v. Ray, 386 U.S. 547, 555 (1967).

271. *See supra* Part III.