QUALIFIED IMMUNITY IN SECTION 1983 CASES AND THE ROLE OF STATE DECISIONAL LAW

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I. INTRODUCTION

Persons bringing damage actions, pursuant to 42 U.S.C. § 1983, against state and local officials for the violation of federal constitutional rights are frequently barred from recovery by the doctrine of qualified immunity. This doctrine absolves the defendant from monetary liability where the conduct complained of did not violate constitutional rights that were "clearly established" at the time that the conduct took place.[1] The "clearly established law" standard has created an array of complicated and often confusing problems for courts and litigants. These include the following: At what level of abstraction should the right in question be specified to determine whether it had been clearly established at the time that the defendant committed the conduct that provides the basis for the plaintiff's claim?[2] To what extent does the defendant's qualified immunity turn on the defendant's personal knowledge and understanding of the shape or contours of the particular constitutional principle at issue? Does the plaintiff or the defendant have the burden of proof on the qualified immunity question?[3] In what circumstances, and to what extent, does the

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1. *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (holding "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.").

2. In Anderson v. Creighton, 483 U.S. 635, 639 (1987), the Court held that, at least for purposes of the Fourth Amendment, "[t]he contours of the right must [have been] sufficiently clear that a reasonable official would understand that what he [was] doing violate[d] that right." The mere fact that the Fourth Amendment, in terms, required a warrant prior to most searches was insufficient for the plaintiff to survive the defendant's assertion of qualified immunity. The plaintiff had to show that it was clearly established that a warrant was necessary under the particular circumstances confronting the defendant at the time he acted. *See also* Hunter v. Bryant, 112 S. Ct. 534, 537 (1991) (court should ask "whether the agents acted reasonably under settled law in the circumstances....").

3. The Supreme Court has held that the defendant has the burden of pleading the qualified immunity defense. Gomez v. Toledo, 446 U.S. 635, 639–41 (1980). The Court has not addressed the burden of proof issue, however, and the lower federal courts have been divided on that question. *Compare, e.g.*, Pueblo Neighborhood Health Centers, Inc. v.

plaintiff have a right to obtain discovery when a qualified immunity defense is asserted?[4]

Among the most important and difficult issues in qualified immunity law is the question of where courts are to look to determine whether the legal principles upon which the plaintiff's cause of action rests were clearly established at the time that the cause of action arose. What sources of law should be taken as dispositive, or even relevant, to the courts and litigants in resolving the qualified immunity issue? There is a consensus that the decisions of the United States Supreme Court are the most authoritative source for the articulation of constitutional principles. But the fact that such a small percentage of the constitutional cases filed in state and federal courts reach the Court for decision, combined with the frequently fact-sensitive nature of the qualified immunity inquiry, makes the Court's decisions frequently unhelpful, if not completely useless, sources for qualified immunity decision making.

A second source for determining the existence of clearly established law is the decisions of the lower courts.[5] But precisely which lower court decisions are relevant, and the nature and extent of their relevance, has been the subject of considerable disagreement.

Two kinds of problems lie at the heart of this disagreement. First, with respect to section 1983 actions brought in the federal district courts, should courts consider the decisions of federal courts outside the federal circuit in which the court lies? If so, what weight should be accorded foreign-circuit decisions?[6] And if there is no dispositive decision from the forum circuit court,[7] what weight should be accorded to the decisions of other federal circuit

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Losavio, 847 F.2d 642, 645 (10th Cir. 1988) (plaintiff has the burden of proof) *with* Schlegel v. Bebout, 841 F.2d 937, 945 (9th Cir. 1988) (defendant has the burden of proof).

4. In Anderson v. Creighton, 483 U.S. 635, 646 n.6 (1997), the Court noted that one reason for qualified immunity was to protect public officials from extensive and disruptive discovery in circumstances where it was clear that the plaintiff would be unable to show that the defendant's conduct violated clearly established law. The Court recognized, however, that limited discovery might be appropriate in some situations. Precisely when, and to what extent, plaintiffs may conduct discovery has been subject to varying determinations by the lower courts. For a discussion of this and other questions left open by the Supreme Court's qualified immunity decisions, *see* Kit Kinports, *Qualified Immunity in Section 1983 Cases: The Unanswered Questions*, 23 GA. L. REV. 597 (1989).

5. Aside from court decisions, courts have occasionally been asked to consider state and local statutes, ordinances and regulations as relevant to the qualified immunity determination. Following the lead of the Supreme Court in Davis v. Scherer, 468 U.S. 183, 197 (1984) (rejecting the claim that state prescribed employment procedures were relevant to a qualified immunity determination), lower courts have consistently rejected the view that violation of state law guidelines, standing alone, deprives defendants of qualified immunity. *See, e.g.*, Davis v. Holly, 835 F.2d 1175, 1180–81 (6th Cir. 1987).

6. An analogous problem arises where the section 1983 action is brought in state court. Where a qualified immunity defense is raised, should the court look only to the constitutional decisions of the forum state courts, or should it also consider the decisions of the courts of other states? In addition, of course, the state court must determine the relevance of federal court decisions. In that process, it must decide (as must a federal district court) whether there are geographical constraints on the federal court decisions that properly bear on its qualified immunity investigation and how to resolve possible conflicts between the decisional authorities of state and federal courts. These, and related issues, are discussed in *infra* Part V.

7. Normal principles of stare decisis would require that the dispositive decisions of the forum circuit would bind the district court notwithstanding the conflicting decisions of other federal circuit and district courts. *See, e.g.*, Russell v. Coughlin, 910 F.2d 75, 78 (2d Cir. 1990) ("For a right to be clearly established, it is sufficient if decisions of the Supreme Court or of the appropriate circuit have defined the contours of the right with reasonable specificity.").

and district courts? The Supreme Court has provided virtually no guidance on these questions,[8] and, not surprisingly, they have been answered in different ways by the federal circuit courts.[9]

The determination of what (or whose) law to apply in resolving the qualified immunity issue has encountered a second problem, which is the principal problem to be addressed in this article: What is the proper role of state decisional law in the qualified immunity calculus? When a section 1983 action is brought in federal district court, what weight, if any, should the court give to state court decisions in deciding whether the constitutional claim upon which the plaintiff relies was clearly established? And where the action is brought in state court, what weight should the court place on state decisional law in resolving the qualified immunity issue?

The question of the proper role of state decisional law in qualified immunity analysis has both theoretical and practical implications. In recent years, the Supreme Court has stressed the themes of comity and federalism in requiring federal courts to defer to state court processes and decisions prior to, or in lieu of, exercising jurisdiction over federal constitutional claims.[10] The case for deference to state court adjudication of federal rights is, to a large extent, based on the assumption that there is "parity" between state and federal courts — that both are equally disposed and equipped to provide the litigants a full and fair opportunity to present and have competently decided their federal claims. If the Court is proceeding on the assumption of parity between state and federal courts,[11] it would seem that the lower federal courts should be required to accord the same respect to state court constitutional decisions as they accord to those of federal courts.[12] To the extent that the federal courts do not take the constitutional decisions of state courts seriously in their qualified immunity

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Where the forum circuit's decisions are relevant to, but not dispositive of, the qualified immunity question, the district court must decide what weight, if any, it should accord to the decisions of the other circuits.

8. Recently, a petition for certiorari was filed in the Supreme Court where the question presented for review was specified as follows: "For purposes of qualified immunity, can court of appeals, in absence of controlling precedent, rely upon decisions of other courts of appeals in order to determine that law is clearly established such that reasonable public official would understand that his or her actions violate constitutional rights?" The Supreme Court denied review. Campbell v. Daugherty, 935 F.2d 780 (6th Cir. 1991), *cert. denied*, 112 S. Ct. 939 (1992).

9. *See infra* notes 30–36 and accompanying text.

10. *See infra* notes 103–106 and accompanying text.

11. On the issue of parity and the extent to which recent jurisdictional doctrines have been based on the assumption that it exists, *see, e.g.*, Ann Althouse, *Tapping the State Court Resource*, 44 VAND. L. REV. 953 (1991); Akhil Amar, *Parity as a Constitutional Question*, 71 B.U. L. REV. 645 (1991); Erwin Chemerinsky, *Ending the Parity Debate*, 71 B.U. L. REV. 593 (1991); Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977); Martin Redish, *Judicial Parity, Litigant Choice, and Democratic Theory: A Comment on Federal Jurisdiction and Constitutional Rights*, 36 UCLA L. REV. 329 (1988). For defense of the parity thesis, *see* Michael Solimine & James Walker, *Constitutional Litigation in Federal and State Courts: An Empirical Analysis of Judicial Parity*, 10 HASTINGS CONST. L. Q. 213 (1983).

12. To say that federal courts should accord equivalent respect to state court decisions is not necessarily to say that federal courts should view themselves "bound" to follow state court decisions in the same way that, for example, a federal district court is bound to follow the decisions of the federal court of appeals for the circuit in which it sits. Principles derived from the doctrines of stare decisis and precedent, and from the constitutionally informed structure and organization of the federal system, would obviously inform the degree of respect or deference owed by federal to state courts (and vice versa).

analyses, the comity and federalism principles that underlie parity may be disserved.

The role of state decisional law in qualified immunity analysis also raises important practical issues which affect the administration of civil rights litigation. As a general matter, plaintiffs who wish to litigate section 1983 claims have a choice of filing suit in state or federal court.[13] How that choice is exercised will depend upon numerous factors, including the relative convenience of state and federal fora to the plaintiff and her attorney, the plaintiff's perception of the relative hospitability of either forum to the particular substantive and procedural issues that are likely to be raised, and so on.[14] While a plaintiff's choice of forum will naturally be influenced by a general sense of which court, state or federal, is more likely to decide the case in her favor, seldom will the parties confidently be able to predict that the choice of forum will be outcome determinative with respect to the federal questions at issue. Indeed, the very possibility of such a prediction would tend to place the parity principle in question. But if federal and state decisional law with respect to a substantive constitutional question differs significantly, one strongly supporting the existence of the clearly established law that underlies the qualified immunity issue and the other strongly opposing it, the choice of forum is likely to be outcome determinative on the liability question.[15] In such cases, plaintiffs and defendants would be especially well advised to select (and fight for) the forum whose law would favor their respective positions on the question of immunity. But whether such a system provides a coherent and sensible scheme for the adjudication of civil rights and liberties claims may be subject to question.

This article will explore these issues in the following way. Part II will examine decisions of the Supreme Court, lower federal courts, and state courts in an effort to identify which decisional law is deemed relevant to the clearly established law issue. This analysis reveals that the Supreme Court has provided little guidance, and that in the absence of clear standards, different courts have adopted different approaches to the qualified immunity inquiry. Courts differ on the general question of what decisional law — state and federal — is relevant. With few exceptions, however, neither federal nor state courts seem to regard state decisional law as a significant, or even an appropriate, source for qualified immunity decision making.

Part III explores a number of factors that may help explain the failure of courts to take state decisional law seriously. In part, this phenomenon might be

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13. *See* Howlett v. Rose, 496 U.S. 356 (1990) (explicitly noting concurrent jurisdiction in section 1983 cases); *see generally* Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233 (1988).

14. For a good discussion of the factors that commonly are considered in the choice of forum decision, see STEVEN H. STEINGLASS, 1 SECTION 1983 LITIGATION IN STATE COURTS Chs. 7, 8 (rev. ed. 1992).

15. Of course, even if the law is found to be clearly established for purposes of determining the defendant's immunity from monetary liability, the plaintiff may still be able to obtain non-monetary relief from the defendant. *See* Anderson v. Creighton, 483 U.S. 635, 638 (1987) (noting that qualified immunity shields government officials from "civil damage liability"). The ultimate determination of the availability of injunctive or declaratory relief may, or may not, be subject to the same methodological dilemmas as the determination of monetary liability, depending upon how the law has evolved since the date at which the cause of action arose.

attributable to the fact that there is still a relative paucity of available state court federal constitutional precedents. This condition is likely to change as civil rights lawyers, whether by choice or by virtue of jurisdictional principles limiting access to federal court, increasingly turn to state courts for section 1983 litigation. Other explanations, however, are more problematic. They include the possibility that, notwithstanding Supreme Court pronouncements to the contrary, many federal judges continue to regard state courts as — to put it politely — less authoritative sources for determining constitutional meaning than their federal counterparts. Similarly, state courts may suffer from a form of jurisdictional false-consciousness which inhibits them from giving non-federal precedents the weight they otherwise should be accorded.

In Part IV, I explore some consequences that are arguably entailed in the failure of courts to take state decisional law seriously as a source for qualified immunity decision making. These include the creation of a two-track system for the adjudication of federal rights (and the availability of federal remedies) — a system in which certain kinds of section 1983 actions would almost invariably be resolved differently based solely on whether the action was brought in federal or state court. The possibility that some cases will be resolved differently by state and federal courts may well be an inevitable byproduct of a federal system in which both courts possess concurrent jurisdiction over federal (or, for that matter, state) questions. However, the inevitability of conflicting or opposing decisions associated with a regime in which state decisional law is not taken seriously may raise special problems which I address.

A second consequence of such a regime is also considered. An important strand of thought about our constitutional structure and traditions has embodied the notion that state courts should (or at least can) play an important role in the adjudication of federal law.[16] While conceptions of the precise role that state courts ought to play in the enforcement of federal constitutional rights have varied during the course of our national experience, the failure to take state decisional law seriously is problematic when measured against the conception currently embodied in Supreme Court doctrine. Whatever one thinks about the Supreme Court's assumption of federal and state court parity or of the Court's general understanding of the requirements of comity and judicial federalism, they are not easily reconciled with prevailing qualified immunity analysis.

Finally, Part V will propose a general approach to state decisional law that will minimize the potential for striking discrepancies in state and federal court qualified immunity determinations and that will more closely reflect the prevailing understanding of comity and judicial federalism. This approach is premised on the assumption that the constitutional decisions of the lower federal and state courts have equal status, and assumes that public officials, as a general matter, are entitled to regard both as authoritative. The role of state decisional law will be approached in the context of section 1983 litigation in both federal and state courts. While principles of comity and federalism will sometimes conduce toward uniformity in how these courts resolve qualified immunity disputes, this will not always be the case. The hope is that the suggested

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16. For one of the most important and prominent expositions of this idea, see Henry Hart, *The Power of Congress to Limit* the *Jurisdiction of Federal Courts: An Exercise in Dialectic,* 66 HARV. L. REV. 1362 (1953).

approach will at least begin to provide what is almost completely lacking in current section 1983 theory and practice: a coherent and principled framework for conducting the clearly established law inquiry that lies at the core of contemporary qualified immunity doctrine.

II. QUALIFIED IMMUNITY AND THE CLEARLY ESTABLISHED LAW INQUIRY

A. Developments in the Supreme Court

In *Harlow v. Fitzgerald*,[17] the Supreme Court held that a public official's[18] qualified immunity from monetary liability for the violation of federal constitutional rights[19] should be determined by reference to whether the official's conduct violated "clearly established statutory or constitutional rights of which a reasonable person would have known."[20] The task of the judge is to determine "not only the currently applicable law, but whether that law was clearly established at the time the action occurred."[21] The Court did not, however, provide any explicit standards for determining whether the law was clearly established.[22]

In only one decision since *Harlow* has the Court analyzed a qualified immunity issue in a way that provides any concrete suggestion of where courts should look in making the qualified immunity determination.[23] In *Davis v. Scherer*[24] the Court considered the question whether officials of the Florida Highway Patrol were entitled to qualified immunity when sued by a Patrol member who alleged that his dismissal violated his rights to procedural due process. In concluding that the defendants were entitled to qualified immunity, the district court cited a single decision of its own circuit[25] and concluded that the plaintiff did not have a clearly established right to greater procedural pro-

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17. 457 U.S. 800 (1982).

18. Qualified immunity is an affirmative defense that can be asserted by certain classes of public officials when sued for damages for the violation of federal constitutional and statutory rights. For a discussion of the historical evolution of the immunity, and of those officials entitled to assert it, *see* David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. PA. L. REV. 23, 35–44 (1989).

19. 42 U.S.C. § 1983 creates a federal cause of action against state and local officials for the violation of federal constitutional and statutory rights. Maine v. Thiboutot, 448 U.S. 1 (1980).

20. 457 U.S. at 818.

21. *Id.*

22. In a footnote, the Court stated that "we need not define here the circumstances under which 'the state of the law' should be 'evaluated by reference to the opinions of this Court, of the Courts of Appeals, or of the local District Court.'" *Id.* at 818 n.32. The Court stated that it was following the approach it had taken in Procunier v. Navarette, 434 U.S. 555, 565 (1978).

23. The Court has addressed other aspects of qualified immunity law. *See, e.g.*, Wyatt v. Cole, 112 S. Ct. 1827 (1992) (stating that qualified immunity is unavailable to private defendants in section 1983 litigation); Mitchell v. Forsyth, 472 U.S. 511 (1985) (stating that immunity ruling on a motion for summary judgment adverse to the defendant is an immediately appealable order); Anderson v. Creighton, 483 U.S. 635 (1987) (addressing the level of generality at which the right must be specified and, at least in the Fourth Amendment context, requiring focus on whether a reasonable official could have believed that his action was lawful).

24. 468 U.S. 183 (1984).

25. Weisbrod v. Donigan, 651 F.2d 334 (5th Cir. 1981).

tection than he received prior to his dismissal.[26] The Court agreed with this aspect of the district court's decision[27] citing only the Fifth Circuit decision upon which the district court had relied.[28]

Neither *Harlow* nor *Davis* provide clear standards for determining where courts should look to determine whether the rights asserted by the section 1983 plaintiff were clearly established.[29] In the absence of Supreme Court precedents which clearly establish the relevant substantive constitutional rights, and without clear standards for determining the role that other decisional law plays in the qualified immunity inquiry, lower courts have had to struggle with the "where to look" problem when resolving qualified immunity disputes. As the discussion below suggests, the lower courts have not been uniform in their approaches to the issue.

B. Developments in the Lower Federal Courts

Where Supreme Court precedents do not resolve the qualified immunity inquiry, the lower federal courts have, not surprisingly, looked to forum circuit precedent as a major source of law for qualified immunity decision making.[30] But where forum circuit precedents are not dispositive, courts have

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26. The district court nonetheless rejected the defendants' qualified immunity defense, reasoning that the defendants' conduct violated a state regulation which clearly prohibited the conduct of which the plaintiff complained. The Supreme Court rejected the argument that the violation of a state regulation could, by itself, result in the forfeiture of otherwise applicable qualified immunity. 468 U.S. at 193–94.

27. In an opinion concurring in part and dissenting in part, Justice Brennan, writing for four members of the Court, argued that decisions of the Supreme Court, embodied and reiterated in an official opinion of the Florida Attorney General and a Fifth Circuit decision handed down more than a year before the plaintiff's cause of action arose, clearly established that the defendants' conduct violated the plaintiff's due process rights. *Id.* at 197–206.

28. In his dissent in Siegert v. Gilley, 111 S. Ct. 1789, 1799 (1991), Justice Marshall characterized *Davis* as standing for the proposition that "for purposes of determining whether a constitutional right was clearly established, the Court may look to the law of the relevant circuit at the time of the conduct in question." He proceeded to examine several decisions of the D.C. Circuit which he believed compelled the conclusion that the plaintiff had satisfied the clearly established law standard. In both the *Davis* majority opinion and the *Siegert* dissent, the forum circuit had case law which was viewed as clearly establishing the law and there was therefore no reason to consider the relevance of other non-forum circuit decisional law. Thus, the *Siegert* dissent's characterization of *Davis* cannot fairly be understood as suggesting that, aside from Supreme Court decisions, forum-circuit precedents provide the exclusive basis for making the qualified immunity determination.

29. *See* Robinson v. Bibb, 840 F.2d 349, 351 (6th Cir. 1988) (noting that "we have had no specific Supreme Court guidance in deciding when an issue becomes clearly established."); *see also* Richard H. Fallon & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1751 (1991) (noting that, ten years after *Harlow*, the question of where to look for clearly established law "remains unresolved.").

30. Professor Kinports has noted that some circuit court decisions have suggested that Supreme Court precedent is necessary for a right to be clearly established. Kit Kinports, *Habeas Corpus, Qualified Immunity, and Crystal Balls: Predicting the Course of Constitutional Law*, 33 ARIZ. L. REV. 116, 140–41 (1991). To my knowledge, no circuit has explicitly adopted this position, and at least some of the circuits Professor Kinports cites for her observation have since decided cases where Supreme Court authority has not been required. *Compare* Trejo v. Perez, 693 F.2d 482 (5th Cir. 1982) *with* Brown v. Glossip, 878 F.2d 871, 872 (5th Cir. 1989) (concluding that "the law of our Circuit ... was clearly established."). In any event, as Kinports notes, numerous circuit courts have either concluded or proceeded on the premise that Supreme Court authority is not required. Kinports, *supra* at 141–42. Moreover, the Supreme Court itself has suggested that its own decisions are not a prerequisite for qualified immunity analysis. *See*

disagreed on whether and the extent to which other kinds of decisional law should be considered. As a general matter, courts will consider the case law from other circuits as relevant (and presumably equally relevant[31]) sources.[32] But the precise role that extra-circuit precedent should play in the analysis has been the subject of some dispute.

According to the approach adopted by most circuits, all federal court decisional law is, as a matter of course, relevant to the qualified immunity determination.[33] In some circuits, this approach has been explicitly adopted in a panel's opinion.[34] In one circuit — the Sixth — the decisions have been less than clear and consistent in this regard. In one case, the court indicated that the decisions of other circuits could be considered only in "extraordinary" cases.[35]

Mitchell v. Forsythe, 472 U.S. 511, 533 (1985) (relying upon two district court decisions in concluding that the defendants were qualifiedly immune).

31. *But cf.* Johnson-El v. Schoemehl, 878 F.2d 1043, 1049 (8th Cir. 1989) (noting that the "geographical proximity [of a court] may be relevant in determining whether a reasonable official would be aware of the law.").

32. *See, e.g.*, McBride v. Taylor, 924 F.2d 386 (1st Cir. 1991); Molinelli v. Tucker, 901 F.2d 13 (2d Cir. 1990); Brown v. Grabowski, 922 F.2d 1097, 1115–16 (3d Cir. 1990) (considering, although not viewing itself as bound by, the decisions of other circuits), *cert. denied*, 111 S. Ct. 2827 (1991); Stoneking v. Bradford Area Sch. Dist., 856 F.2d 594 (3d Cir. 1988), *vacated*, 109 S. Ct. 1333 (1989) (citing cases from four other circuits); Collinson v. Gott, 895 F.2d 994 (4th Cir. 1990); Lopez v. Robinson, 914 F.2d 486 (4th Cir. 1990); Connelly v. Comptroller of the Currency, 876 F.2d 1209 (5th Cir. 1989) (citing D.C. and Eighth Circuit cases); Thompson v. City of Starkville, Miss., 901 F.2d 456 (5th Cir. 1990); Morfin v. Albuquerque Public Sch., 906 F. 2d. 1434, 1439 (10th Cir. 1990) ("In absence of contemporary Tenth Circuit precedent directly concerning the issue, we may look at the law of other circuits when deciding whether or not a right was clearly established."); Stewart v. Donges, 915 F.2d 572 (10th Cir. 1990) (same); Greason v. Kemp, 891 F.2d 829, 833 (11th Cir. 1990) (court looks "to the law established by the Supreme Court, the courts of appeals, and the district courts.").

33. Of course, the existence of a forum-circuit decision "directly on point" would bind the district courts in that circuit as a matter of stare decisis and precedent. Given the practice of most circuits of following circuit precedent until overruled by the Supreme Court or by the circuit en banc, *see, e.g.*, Nichols v. McCormick, 929 F.2d 507, 509 n.5 (9th Cir. 1991), such a decision would also bind subsequent panels of that circuit. The question whether district court precedents can be relied upon in making the qualified immunity determination was implicitly answered in the affirmative in Mitchell v. Forsyth, 472 U.S. 511, 533 (1985), where the Court cited two district court decisions in support of its conclusion that the defendant had not violated clearly established law.

34. *See, e.g.*, Ward v. County of San Diego, 791 F.2d 1329, 1333 (9th Cir. 1986) ("in the absence of binding precedent, a court should look at all available decisional law including decisions of ... other circuits ... to determine whether the right was clearly established."), *cert. denied*, 483 U.S. 1020 (1987); Rukovich v. Wade, 850 F.2d 1180, 1209 (7th Cir. 1988) ("In the absence of binding precedent, the court should look at whatever decisional law is available."); Morfin v. Albuquerque Public Sch., 906 F.2d 1434, 1439 (10th Cir. 1990) ("In the absence of contemporary Tenth Circuit precedent directly concerning the issue, we may look to the law of other circuits when deciding whether or not a right was clearly established.'); Johnson-El. v. Schoemehl, 878 F.2d 1043, 1049 (8th Cir. 1989) (explicitly rejecting argument that the court should confine its qualified immunity analysis to decisions of courts within the forum circuit); Greason v. Kemp, 891 F.2d 829, 833 (11th Cir. 1990) (looking to the law "established by the Supreme Court, the courts of appeals, and the district courts."); Daugherty v, Campbell, 935 F. 2d 780,785 (6th Cir. 1991), *cert. denied*, 112 S. Ct. 939 (1992) (looking to the case law from other circuits where forum circuit law was "admittedly sparse").

35. Ohio Civil Service Employees Ass'n v. Seiter, 858 F.2d 1171, 1177 (6th Cir. 1988). In *Seiter*, the court stated that, to find a clearly established right, "a district court must find binding precedent by the Supreme Court, its court of appeals or itself. In an extraordinary case, it may be possible for the decisions of other courts to clearly establish a principle of law." *Id. See also* Davis v. Holly, 835 F.2d 1175 (6th Cir. 1987) (decisions of other circuits may be instructive, but the decisions of the Supreme Court and the Sixth Circuit are more pertinent).

Elsewhere, however, the circuit has, without qualification, stated that decisions of any "United States Court of Appeals" are relevant to the qualified immunity determination.[36]

While, as a general matter, federal courts will consider the decisions of all federal courts in deciding the qualified immunity issue, their willingness to consider state court decisions adjudicating federal constitutional rights is much less clear.[37] As was the case with respect to the proper role of extra-circuit precedent, the Supreme Court has provided no guidance. For example, in *Procunier v. Navarette*,[38] the Court found no clearly established law after evaluating Ninth Circuit precedent, as well as several district court decisions from within the Circuit. Apparently no state court decisions were relied upon by the parties, and the Supreme Court gave no indication that state court decisions were relevant to the qualified immunity determination.[39] Four years later, in *Harlow*, the Court again refused to provide a definitive or comprehensive description of sources of decisional law appropriately considered in qualified immunity decision making. However, as was the case in *Procunier*, it omitted state decisional law from the list of "opinions" which might be relevant.[40]

Although the court did not specify precisely what criteria would satisfy its "extraordinary case" requirement, it did state that other decisional law than that to which it explicitly referred could be relevant where it pointed "unmistakably to the unconstitutionality of the conduct complained of and be so clearly foreshadowed by applicable direct authority as to leave no doubt in the mind of a reasonable officer that his conduct, if challenged on constitutional grounds, would be found wanting." 858 F.2d at 1177.

36. Robinson v. Bibb, 840 F.2d 349, 352 (6th Cir. 1988). In Daugherty v. Campbell, 935 F.2d 780 (6th Cir. 1991), *cert. denied*, 112 S. Ct. 939 (1992), the court, although citing the *Seiter* court's admonitions about referring to extra-circuit case law only in "an extraordinary case," *see supra* note 35, proceeded, in light of the "admittedly sparse" Sixth Circuit case law on point, to examine case law in other circuits, which it found to clearly establish the constitutional right asserted by the plaintiff. The court did so without explaining what extraordinary circumstances justified such an examination. Even more recently, the court, after referring to the "ordinary" requirement of finding clearly established law in the decisions of the Supreme Court, the Sixth Circuit, or the district court in which the case is pending, stated that the decisions "of other courts" would do where they "both point unmistakenly to the unconstitutionality of the conduct and ... [are] ... so clearly foreshadowed by applicable direct authority as to leave no doubt in the mind of a reasonable officer that his conduct was unconstitutional." Cagle v. Gilley, 957 F.2d 1347, 1348 (6th Cir. 1992).

37. Several commentators have alluded to the potential problems associated with determining the role of state decisional law in qualified immunity analysis, although none has dealt extensively with the issue. *See, e.g.*, Fallon and Meltzer, *supra* note 29, at 1752 n.106 (noting that "[q]uestions about whether federal courts should treat precedents from state courts as clearly establishing the law (and vice versa) obviously add substantial complexity" to qualified immunity analysis); Kinports, *supra* note 30, at 142–43.

38. 434 U.S. 555 (1978).

39. The Court prefaced its conclusion on the clearly established law issue by noting: "[w]hether the state of the law is evaluated by reference to the opinions of this Court, of the Courts of Appeals, or of the local District Court, there was no 'clearly established' First and Fourteenth Amendment right with respect to the correspondence of convicted prisoners in 1971–1972." *Id.* at 565.

40. Harlow v. Fitzgerald, 457 U.S. at 818 n.32. In Davis v. Scherer, 468 U.S. 183 (1984), a question arose concerning the role of state statutes or administrative regulations in qualified immunity calculations. The Court held that these forms of state law are not to be considered in formulating the qualified immunity standard. *Id.* at 193–96. The Court did not consider state court decisional law in its ultimate decision on qualified immunity. Nor did it give any indication of whether or the extent to which such law might be relevant to the qualified immunity determination.

The lower federal courts have been even less clear and consistent concerning the role of state decisional law in their qualified immunity decisions than they have been with regard to the role of extra-circuit federal court decisions. Not every federal circuit has adopted a formal standard announcing where courts are to look to determine whether the right asserted by the plaintiff was clearly established. Of those which have, only a few have explicitly included state court decisions among the appropriate sources.[41]

The Eighth Circuit is among those which formally acknowledge a role for state decisional law. In *Johnson-El v. Schoemehl*,[42] the defendant argued that he should be entitled to qualified immunity where the specific conduct in which he allegedly engaged had not been proscribed by the forum (Eighth) circuit.[43] The court rejected this argument. It concluded that such a rule would "enable a jail official to claim immunity where several other circuit, district or state courts had condemned the practices on the basis of the federal Constitution, so long as a Missouri court, or the district court for the Eastern District of Missouri or the Eighth Circuit had not yet done so."[44] The court found that such a per se rule did not "adequately capture" what the Supreme Court had in mind when it established its objective test for qualified immunity in *Harlow*.[45] Thus, while the defendant apparently conceded, and the court implicitly agreed, that Missouri state court decisions could be considered in resolving the qualified immunity issue, the court indicated that decisions of non-forum state courts could also be considered.[46]

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41. Some courts do not articulate a standard which excludes a role for state decisional law, but engage in a qualified immunity analysis which excludes reference to it and seems oblivious to it. *See, e.g.*, Shabazz v. Coughlin, 852 F.2d 697 (2d Cir. 1988) (considering its own decisions and those of several other circuits; neither refering to state court decisions nor discussing their relevance); Neu v. Corcoran, 869 F.2d 662 (2d Cir. 1989), *cert. denied*, 493 U.S. 816 (1989) (same); Chinchello v. Fenton, 805 F.2d 126, 134 (3d Cir. 1986) (upholding qualified immunity because neither Supreme Court nor consensus of federal circuits clearly established the law; no reference to state court decisions). One commentator, writing two years after *Harlow* was decided, observed that the lower federal courts had adhered to "the extreme view that only Supreme Court decisions should be considered; others have searched diligently through all levels of the federal system from a variety of jurisdictions." Harlow v. Fitzgerald, Comment: *The Lower Courts Implement the New Standard for Qualified Immunity Under Section 1983*, 132 U. PA. L. REV. 901, 922 (1984). No mention was made of federal courts taking state decisional law into account.

42. 878 F.2d 1043 (8th Cir. 1989).

43. *Id.* at 1049. The suit challenged pretrial detention practices at a local correctional facility. The defendants apparently conceded that, in addition to the Eighth Circuit, decisions from courts with "direct jurisdiction over the institution" could be considered for the purpose of determining their qualified immunity. *Id.*

44. *Id.*

45. *Id.* Although the court rejected the full import of the defendants' argument, it stated that "because the defendants' reasoning does have some force, in deciding this appeal we have nevertheless been attentive to cases from within this circuit." *Id.*

46. In concluding that the defendants were not qualifiedly immune from suit with respect to the constitutional claims asserted by the plaintiff, the court cited decisions from the United States Supreme Court, its own cases, and the decisions of other federal circuit courts and numerous federal district courts. *Id.* at 1052–55. It cited no state court decisions. Moreover, a search of subsequent Eighth Circuit qualified immunity decisions suggests that the court seldom—and certainly not routinely or consistently—refers to or cites state court decisions. *See, e.g*, Johnson v. Hay, 931 F.2d 456 (8th Cir. 1991); Givens v. Jones, 900 F.2d 1229 (8th Cir. 1990); Tyler v. Barton, 901 F.2d 689 (8th Cir. 1990).

The Fourth, Sixth and Ninth Circuits have also explicitly included state court decisions as appropriate sources for determining whether defendants in section 1983 actions have violated clearly established law.[47] In *Wallace v. King*,[48] the plaintiffs sued police officers who had conducted searches allegedly in violation of the Fourth Amendment. The Fourth Circuit noted that neither it nor the Supreme Court had decided the precise issue raised in the complaint. Nonetheless, it concluded that the decisions of four other circuits established that the defendants' actions were unconstitutional and that the plaintiffs should be granted injunctive and declaratory relief.[49] In rejecting the plaintiffs' claim for damages, however, the court concluded that monetary liability was inappropriate

> where the controlling law had not been authoritatively decided by the Supreme Court, the appropriate United States Court of Appeals, or the highest court of the state, where the officers have acted in good faith, and where the searches were conducted in a reasonable manner, as shown by the evidence of this case.[50]

Similarly, in *Robinson v. Bibb*,[51] the Sixth Circuit included "the highest court in the state where the case arose" in its list of decisional law relevant to the qualified immunity determination.[52] And, in *Ward v. County of San*

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47. The First Circuit has demonstrated its willingness to consider state decisional law, although it does not appear to have formally announced a standard to that effect. In Cinelli v. Cutillo, 896 F.2d 650 (1st Cir. 1990), the court rejected a qualified immunity claim in a section 1983 suit seeking damages from police officers in Massachusetts for the violation of plaintiff's sixth amendment right to counsel. In addition to Supreme Court decisions dealing with the right to counsel, the court relied on a decision of the Massachusetts Supreme Judicial Court. It interpreted the state court decision to have "clearly outlined the contours of a defendant's constitutional rights in this respect for Massachusetts police officers." *Id.* at 655.

48. 626 F.2d 1157 (4th Cir. 1980), *cert. denied*, 451 U.S. 969 (1981).

49. *Id.* at 1161.

50. *Id.* The court's focus on the good faith of the defendants is consistent with the pre-*Harlow* qualified immunity standard established in such cases as Woods v. Strickland. 420 U.S. 308 (1975). *Wallace* was decided two years prior to Harlow, which eliminated the subjective (e.g. "good faith") component of qualified immunity analysis. In a more recent case, the Fourth Circuit indicated that it takes a more expansive view of the role of state decisional law than that suggested in *Wallace*. In Gooden v. Howard County, Md., 954 F.2d 960 (4th Cir. 1992) (en banc), the court upheld a qualified immunity defense in a section 1983 suit against police officers who took her into custody on the allegedly mistaken belief that she posed a danger to herself or others and therefore required a psychiatric evaluation. With respect to the plaintiff's Fourth Amendment claim, the court agreed that "the general right to be free from seizure unless probable cause exists was clearly established in the mental health seizure context." *Id.* at 968. In support of this conclusion, the court cited three federal court decisions; it also cited a decision of the District of Columbia Court of Appeals. *Id.* The latter decision would be equivalent to "the highest court of the state," which *Wallace* concluded was relevant to the clearly established law inquiry. Despite its conclusion that the general Fourth Amendment principle had been clearly established, however, the court found the police qualifiedly immune. It concluded that "[n]one of the few cases evaluating detentions by police for the purpose of emergency evaluations could possibly have given these defendants any clear indication that their conduct was unlawful because none of the circumstances really resembled the situation in which the officers found themselves in this case." *Id.* One of the two cases cited in support of this conclusion was a decision of a California intermediate court of appeals. *Id.* (citing People v. Triplett, 192 Cal. Rptr. 537 (1983)).

51. 840 F.2d 349 (6th Cir. 1988).

52. *Id.* at 352. The court concluded that the law had been clearly established by its own precedent; it cited no state court decisions.

In another case, the Sixth Circuit upheld a qualified immunity claim by noting that "controlling precedent in this circuit and in Michigan courts" specifically authorized the

Diego,[53] the Ninth Circuit stated that, in the absence of its own controlling precedent, "a court should look at all available decisional law including decisions of state courts, other circuits, and district courts to determine whether the right was clearly established."[54]

Even in the circuits which explicitly acknowledge a role for state decisional law in the qualified immunity determination, seldom are state court decisions viewed as dispositive. Indeed, only a few of the circuit court decisions surveyed even cite or discuss state cases.

C. Qualified Immunity Analysis in the State Courts.

Historically, most section 1983 litigation has taken place in the federal courts. In recent years, however, there appears to have been a growing inclination by civil rights and civil liberties lawyers to take seriously the option of litigating their clients' constitutional claims in state courts.[55] In some cases, the motivation for suing in state court may be based on the notion that federal courts, staffed increasingly by conservative judges appointed by the Reagan and Bush administrations, are unlikely, or at least no more likely than their state counterparts, to be sympathetic or responsive to individual rights claims. In other cases, the turn toward state courts may be, at least in part, coerced, the result of federal jurisdictional doctrines which either prohibit or restrict the exercise of federal judicial power. Whatever the reasons, state courts are increasingly being asked to decide federal constitutional issues in the context of section 1983 litigation. As a result, they are also being required to adjudicate the issue of qualified immunity.

In determining whether the law is clearly established for qualified immunity purposes, state courts would seem to face even more uncertainty than their federal counterparts. Not only are state courts confronted with the lack of United States Supreme Court guidance concerning the relevant methodology and sources for determining clearly established law, they must also resolve a set of complicated threshold questions. In federal constitutional cases, state courts are, of course, bound to follow the decisions of the United States Supreme Court. Where Supreme Court decisions do not resolve the clearly established law issue, conventional principles of precedent and stare decisis would suggest that lower state courts are bound by the normal hierarchical arrangement of judicial authority established in each state. Thus, a state trial court would be

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defendant to engage in the conduct that gave rise to the complaint. The court did not, however, cite the cases it had in mind. Washington v. Starke, 855 F.2d 346, 348 (6th Cir. 1988). While in recent cases, the Sixth Circuit has explicitly included state courts in the list of precedents that are relevant to the qualified immunity determination, *see, e.g.*, Wegner v. City of Covington, 933 F.2d 390, 392 (6th Cir. 1991), it has also failed to include state court decisions in that list. *See, e.g.*, Masters v. Crouch, 872 F.2d 1248, 1251–52 (6th Cir. 1989) (looking to the decisions of the Supreme Court, Sixth Circuit, other courts within the circuit, and "finally" to the decisions of other circuits), *cert. denied*, 493 U.S. 977 (1989); Ohio Civil Serv. Employees Ass'n v. Seiter, 858 F.2d 1171, 1175–76 (6th Cir. 1988) (same); Garvie v. Jackson, 845 F.2d 647, 649 (6th Cir.1988) (the issue is whether "the rights asserted were clearly established by the decisions of the Supreme Court or the courts of this federal circuit.").

53. 791 F.2d 1329 (9th Cir. 1986), *cert. denied*, 483 U.S. 1020 (1987). *Ward* is discussed more extensively *infra* notes 167–73 and accompanying text.

54. *Id.* at 1332. The Ninth Circuit has frequently cited the *Ward* case as setting the standard of where to look for clearly established law in qualified immunity cases. *See, e.g.*, Romero v. Kitsap County, 931 F.2d 624, 629 (9th Cir. 1991).

55. *See* STEINGLASS, *supra* note 14, at ch. 1.

bound to follow the decisions of the state supreme court and directly controlling intermediate appellate courts which have addressed the constitutional right at issue. But where there is no directly controlling state case law, the court must determine what effect, if any, to give to the decisions of the lower federal courts.

There is no federally prescribed rule governing the effect of lower federal court decisions on state courts. While principles of federalism, combined with the limited nature of the jurisdiction of federal courts, require federal courts to defer to state court interpretations of state law, no similar principle requires state courts to defer to the decisions of the lower federal courts interpreting federal law.[56] As a result, state courts are free to adopt their own policies on the matter: they may treat lower federal court decisions as dispositive,[57] persuasive,[58] or irrelevant[59] to the resolution of federal questions submitted to them for adjudication.[60] Thus, in section 1983 litigation, state courts are free to accord greater weight to their own precedents (and, conceivably, to the decisions of courts of other states) than they accord to the decisions of the lower federal courts.[61]

Notwithstanding the freedom of state courts to place determinative or substantial weight on state court decisions, analysis of recent state court qualified immunity decisions reveals that state courts frequently rely exclusively or predominately on the decisions of the lower federal courts.[62] When

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56. *See, e.g.*, United States *ex rel.* Lawrence v. Woods, 432 F.2d 1072 (7th Cir. 1970), *cert. denied*, 402 U.S. 983 (1971); Lockhart v. Fretwell, 113 S. Ct. 838, 846 (1993) (Thomas, J., concurring); William Schwarzer et al., *Judicial Federalism in Action: Coordination of Litigation in State and Federal Courts*, 78 VA. L. REV. 1689, 1746 (1992) (asserting that "[t]he overwhelming majority of state courts to address the question have held that they are not bound by lower federal court decisions of federal law). *But see Lockhart*, 113 S. Ct. at 850–51 (Stevens and Blackmun, JJ., dissenting) (suggesting that only an "idiosyncratic" state judge would refuse to follow the precedent of the local federal circuit); Yniguez v. Coleman, 939 F.2d 727, 736 (9th Cir. 1991) (speculating that Congress may have intended that "the federal courts ought to have the final word on questions of federal law.").

57. *Cf.* Seibring v. Parcell's Inc., 532 N.E.2d 1335, 1340 (Ill. App. Ct. 1988) (in deciding whether a section 1983 complaint stated a cause of action, the court, while noting that it is "obligated to follow only the decisions of the Illinois Supreme Court and of the United States Supreme Court," concludes that in the absence of such precedents "we choose to follow [United States Court of Appeals for the] Seventh Circuit decisions.").

58. *See, e.g.*, Alicia T. v. County of Los Angeles, 271 Cal. Rptr. 513 (1990) (in the absence of United States Supreme Court precedent, the decisions of the lower federal courts on federal questions are "merely persuasive"); *see also* Acker v. City of Huntsville, 787 S.W.2d 79 (Tex. Ct. App. 1990).

59. *But cf.* Yniguez v. Arizona, 939 F.2d 727, 736 (9th Cir. 1991) (expressing "serious doubts" about whether "state courts are free to ignore decisions" of the federal lower courts).

60. For discussions of the varying approaches adopted by different state courts, *see generally*, Scwarzer et al., *supra* note 56, at 1746–48; Comment, *The State Courts and the Federal Common Law*, 27 ALB. L. REV. 73 (1963); Note, *Authority in State Courts of Lower Federal Court Decisions on National Law*, 48 COLUM. L. REV. 943 (1948). For a discussion of the matter in the context of section 1983 litigation in the state courts, see STEINGLASS, *supra* note 14, § 5.4.

61. State courts are required to give no greater or lesser weight to the decisions of federal courts in the federal district or circuit in which they lie than to the courts of other federal circuits. *See, e.g.*, Acker v. City of Huntsville, 787 S.W.2d 79 (Tex. Ct. App. 1990); STEINGLASS, *supra*, note 14, § 5.4.

62. For purposes of this article, research on this issue was confined largely to the decisions of state supreme courts.

United States Supreme Court decisions are viewed as not dispositive of the issue,[63] state courts frequently turn directly to the federal circuit and district courts to determine whether the constitutional right asserted by the plaintiff was clearly established.[64] Those state courts that do cite their own state's decisions generally seem to do so after citing to United States Supreme Court authority[65] or in circumstances where the nature of the federal constitutional claim requires special reference to state law sources.[66] Few state court qualified immunity decisions appear to rely exclusively or even primarily upon state court decisions in making qualified immunity determinations.[67]

III. EXPLAINING THE FAILURE TO TAKE STATE DECISIONAL LAW SERIOUSLY

Why do federal and state courts so seldom rely upon, or give significant attention or weight to, state court decisions in their qualified immunity analysis? One possible explanation may be that, at least when compared to federal precedents, the body of state court decisions involving federal constitutional claims is quite thin and undeveloped. Although civil rights claimants have begun to turn increasingly to state courts for the adjudication of their federal rights,[68] this phenomenon is of relatively recent vintage.[69] Aside from decisions involving the assertion of claims by state criminal defendants, the state courts have simply not yet had the opportunity to develop as rich and full a body of federal constitutional jurisprudence as have the lower federal courts.[70] Thus, state cases relevant to the determination of the section 1983 defendant's

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63. In some cases, state courts have found decisions of the United States Supreme Court to be dispositive of the qualified immunity issue. *See, e.g.*, Walt v. Alaska, 751 P.2d 1345 (Alaska 1988); Richardson v. Chevrefils, 552 A.2d 89 (N.H. 1988) (Souter, J.); Steplight v. Belpulsi, 601 N.E.2d 656 (Ohio Ct. App. 1991).

64. *See, e.g.*, Torner v. Reagan, 437 N.W.2d 553 (Iowa 1989); Dobos v. Driscoll, 537 N.E.2d 558 (Mass. 1989), *cert. denied*, 493 U.S. 850 (1989).

65. *See, e.g.*, Moresi v. Louisiana, 567 So.2d 1081 (La. 1990); Livingood v. Meece, 477 N.W.2d 183 (N.D. 1991).

66. *See, e.g.*, Leydens v. City of Des Moines, 484 N.W.2d 594 (Iowa 1992) (for due process analysis, state constitution, as interpreted by state supreme court, created liberty interest in carrying handgun where state licensing requirements had been satisfied).

67. Research for this Article discovered only one such case. *See* Murphy v. City of Reynoldsburgh, 1991 WL 150938 (Ohio Ct. App. Aug. 8, 1991) (relying exclusively upon State v. Freeman, 414 N.E.2d 1044 (Ohio 1980) for conclusion that police officers were entitled to qualified immunity in section 1983 suit alleging Fourth Amendment violation.).

68. For discussions of the increasing utilization of state courts in section 1983 litigation, see Susan N. Herman, *Beyond Parity: Section 1983 and the State Courts*, 54 BROOKLYN L. REV. 1057 (1989); Steven H. Steinglass, *The Emerging State Court § 1983 Action: A Procedural Review*, 38 U. MIAMI L. REV. 382, 385–87 (1984).

69. It was not until 1980 that the Supreme Court clearly concluded that state courts had jurisdiction to adjudicate section 1983 cases. *See* Martinez v. California, 444 U.S. 277 (1980). And while the Court has noted that "[v]irtually every state has expressly or by implication opened its courts to § 1983 actions and there are no state court systems that refuse to hear § 1983 cases," Howlett v. Rose, 496 U.S. 356, 378 n.20 (1990), some state courts have refused to exercise jurisdiction in section 1983 cases until quite recently. *See, e.g.*, Poling v. Goins, 713 S.W.2d 305 (Tenn. 1986) (overruling 1969 state supreme court decision holding that state courts had no jurisdiction in section 1983 cases).

70. Even though it is now clear that state courts can entertain section 1983 actions, *see id.*, some states have still had relatively little experience in doing so. *See* STEINGLASS, *supra* note 14, § 2.7 at 2–25 n.83 (noting that it was not until 1990 that Virginia had a reported state court section 1983 decision.).

qualified immunity motion may simply be less available to the parties and the courts.

Relatedly, attorneys who litigate section 1983 cases in federal court may simply be less likely to bring relevant state decisional law to the attention of federal judges. Federal courts have long been the preferred fora, at least from the perspective of plaintiffs' lawyers, for section 1983 litigation.[71] Even if state decisional law were regarded, in theory, as entitled to the same weight as federal decisions in qualified immunity analysis, civil rights lawyers might be less inclined to cite or rely upon it. Especially with respect to older and more experienced lawyers who recall the days when the federal courts were more open and hospitable to civil rights claimants, there may still be a tendency to view federal court decisions as the most logical and fruitful sources of favorable precedent. Thus, state decisional law might be more easily overlooked or discounted than available federal precedents.

Finally, it is possible that federal courts simply have been unwilling to consider state court decisions as primary or important sources for determining the meaning of federal — and especially federal constitutional — law. To be sure, the suggestion that state courts are entitled to less respect than their federal counterparts runs directly contrary to the notions of parity and comity that underlie much of the Supreme Court's contemporary jurisdictional doctrine.[72] But several reasons might explain the reluctance of many federal judges to take the prevailing assumption of parity[73] as seriously as the Supreme Court seems to have intended. First, while more than half of the federal judges now sitting were appointed by the Reagan and Bush Administrations,[74] many judges appointed by Presidents Carter and Johnson remain on the bench. These latter judges are more likely to reflect the more activist view of the federal courts normally associated in the past with Democratic administrations. They can also be expected to believe that the federal courts play a more central role in the enforcement of federal rights than the parity principle contemplates.[75] Consequently, they may be less willing or likely to place significant weight on

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71. *See generally* Neuborne, *supra* note 11.

72. *See, e.g.*, Allen v. McCurry, 449 U.S. 90, 105 (1980) (rejecting the notion that there is a universal right to litigate a federal claim in federal court in view of "this Court's emphatic reaffirmation ... of the constitutional obligation of the state courts to uphold federal law, and its expression of confidence in their ability to do so"); Stone v. Powell, 428 U.S. 465, 493 n.35 (1976) (narrowing the scope of federal habeas jurisdiction and noting that "we are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights [in state courts]").

73. For efforts to provide empirical support for the assumption of parity, see Michael E. Solimine & James L. Walker, *State Court Protection of Federal Constitutional Rights*, 12 HARV. J.L. & PUB. POL'Y. 127 (1989); Michael E. Solimine & James L. Walker, *Constitutional Litigation in the Federal and State Courts: An Empirical Analysis*, 10 HASTINGS CONST. L.Q. 213 (1983).

74. *See Bush and the Judiciary*, N.Y. Times, July 1, 1992 at A1 (noting that President Bush has appointed 150 federal judges and that Reagan-Bush appointees constitute 60 percent of the total).

75. *See, e.g.*, Leaman v. Ohio Dep't of Mental Retardation & Dev. Disabilities, 825 F.2d 946, 958–60 (6th Cir.) (en banc) (Judges Keith and Jones, both Carter appointees, dissenting from en banc decision embodying narrow interpretation of section 1983; stating that "[i]f this Circuit continues to follow the path it has started upon, there will be nothing left to § 1983."), *cert. denied*, 487 U.S. 1204 (1988).

state court interpretations of federal law in the context of section 1983 litigation.

Second, even if all federal judges take seriously the principle of parity, the often subtle influence of institutional psychology might nonetheless incline them to discount the potential precedential weight of state court decisions.[76] Some years ago, Professor Neuborne observed that "although intangible, an elite tradition animates the federal judiciary, instilling elan and a sense of mission in federal judges...."[77] Neuborne referred to this "elite tradition" in the context of arguing that federal judges were more likely than state judges to rigorously enforce constitutional rights. But this same sense of tradition — in part defined by a sense of esprit and even elitism which has long characterized the federal judiciary — might also influence a federal judge's attitude toward the authoritativeness of the decisions of his or her state counterparts.[78] And this might especially be true where the turf on which the state courts is operating is not exclusively, or even primarily, their own.[79]

It is difficult to discern why state courts seldom rely upon or even consider their state decisional law in their qualified immunity analysis. Indeed, there is seldom any explicit recognition of possible theoretical or practical consequences flowing from the choice of law issue. Several possible explanations for this phenomenon are worth considering. First, as suggested earlier, the Supreme Court has offered little guidance on the general question of how and from where clearly established law is determined, and it has never indicated its view on the role of state decisional law in the overall analysis. Second, as noted earlier with respect to qualified immunity analysis in the federal courts[80] civil rights lawyers may continue to consider state court precedents in constitutional cases to be either anomalous or less authoritative than lower federal court decisions. Thus, even though lawyers may be turning more frequently to state courts in section 1983 cases, they may be less likely to focus on and bring to the courts' attention state case law in their qualified immunity

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76. This discussion, of course, assumes a case where directly controlling decisions of the federal courts—for example, a circuit court decision that is binding on the district courts within that circuit—do not dispose of the qualified immunity issue and the judge is free to look beyond those decisions to determine whether the law is clearly established.

77. Neuborne, *supra* note 11, at 1124. *See also* Michael Wells, *Behind the Parity Debate: The Decline of the Legal Process Tradition in the Law of Federal Courts*, 71 B.U. L.REV. 609, 613 (1991) (referring to federal judges as "heirs to a distinguished tradition of enforcing constitutional rights").

78. It may be the case that those federal judges who have sat on state courts prior to their "elevation" to the federal bench can, at least initially, be expected to be more sensitive, and even deferential, to state courts than their colleagues who have come from different professional backgrounds. *See, e.g.*, Sandra D. O'Connor, *Trends in the Relationship Between the Federal and State Courts From the Perspective of a State Court Judge*, 22 WM. & MARY L. REV. 801, 810 (1981) (Justice O'Connor, prior to her appointment to the Supreme Court, noting that state judges would welcome congressional action to limit the scope of section 1983). But for many of these judges, prior state court allegiances might well be vitiated by the socialization and acculturation process that attends membership in the federal judiciary, with its tradition of primacy in the protection of federal civil rights.

79. In situations where federal courts have jurisdiction to adjudicate issues as to which the state courts have plenary authority—for example, the determination of state law in the context of federal diversity jurisdiction or the exercise of pendent jurisdiction—any inclination to disparage the work of state courts will most likely be counterbalanced by the realization that the final word on the meaning of state law rests with the states.

80. *See supra* note 70 and accompanying text.

disputes. Third, even if lawyers consider lower federal and state court precedents to be of equal weight, the fact remains that the availability of federal precedents is likely to be much greater. To the extent that plaintiffs with due process, first amendment, eighth amendment and similar claims have historically preferred to litigate those claims in federal court, state courts, and particularly state supreme courts, have not yet had the opportunity to create a body of federal constitutional decisions, unreviewed by the United States Supreme Court, which could form the basis of qualified immunity determinations. Thus, state court reliance primarily on federal court decisions, and their failure to work out an analytical structure for determining the relative weight to be accorded to federal and state court decisional law, may be attributable largely to the sheer predominance of federal precedents.

Finally, the existence of a degree of jurisdictional false consciousness should not be discounted. It should not be surprising if state court judges, long "deprived" of the opportunity of being called upon with any frequency to adjudicate federal constitutional issues in the non-criminal context, have not yet adjusted to the notion that their own decisions have the same status, and are entitled to the same precedential respect, as the decisions of the lower federal courts.[81] Once state courts have more time to adapt to the Supreme Court's parity-and-comity driven jurisdictional doctrines which really do take state court adjudication of federal rights seriously, they may become more willing to rely upon their own federal constitutional decisions.

IV. SOME POTENTIAL CONSEQUENCES OF FAILING TO TAKE STATE DECISIONAL LAW SERIOUSLY

The failure to take seriously state decisional law in section 1983 qualified immunity analysis can have a number of important consequences. First, it could well result in a regime where the outcome of constitutional litigation would be dependent upon whether the suit is brought in federal or state court. Second, it might challenge, and perhaps even undermine the validity of one of the primary principles that has grounded much of the Supreme Court's recent jurisdictional doctrine: the principle that state courts are full and equal partners with the federal courts in the interpretation and enforcement of federal rights. These issues will be examined in turn.

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81. In this respect, a similar sense of false consciousness may help explain the extent to which state courts continue to rely upon the United States Supreme Court's interpretations of the Federal Constitution for guidance in the interpretation of state constitutions. Although state courts are free to strike out on their own in adopting constitutional methodologies and doctrines which diverge from those adopted by the Supreme Court, *see generally* William J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 989 (1977), many (although certainly not all) refuse to do so. *See, e.g.*, Morris v. Savoy, 576 N.E.2d 765 (Ohio 1991) (applying federal equal protection and due process methodology to state constitutional analysis of tort reform legislation). For general discussions of the influence of federal constitutional analysis on state constitutional interpretation, see James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761 (1992); Barry Latzer, The *Hidden Conservatism of the State Court "Revolution,"* 74 JUDICATURE 190 (1991).

A. A Two-Track System for the Adjudication of Federal Rights

One consequence associated with the failure to seriously consider state decisional law in section 1983 qualified immunity analysis is the possibility of a two-track system of standards for determining questions of liability and remedy in section 1983 actions. Under such a system, the outcome of a section 1983 action case would vary, depending upon whether it is filed in state or federal court.

This can be illustrated by considering several cases. In Case 1, a plaintiff brings a section 1983 action against a police officer in federal court alleging the violation of Fourteenth Amendment rights. Assume that the defendant files a motion to dismiss or for summary judgment asserting a defense of qualified immunity claiming that there is no clear support for the constitutional claim advanced by the plaintiff. In considering the defendant's motion, the district court confronts the following jurisprudential landscape: (1) there is no decision of the United States Supreme Court that can fairly be construed as dispositive; (2) there is a dispositive decision (or a line of decisions) of the federal court of appeals of the forum circuit which, fairly construed, provides strong support for the existence of the Fourteenth Amendment right asserted by the plaintiff.

In this situation, the district court is bound to follow the law of its own circuit and, in all likelihood, will reject the qualified immunity defense.[82] In a system in which the federal court could not, or does not, take state decisional law into account, this outcome would not change even if the court discovered the existence of a state court decision which contradicted, or at least appeared inconsistent with, the circuit court decision referred to above. Even if the state case was decided by the supreme court of the state in which the parties resided, conventional principles of judicial organization and precedent would have the district court, at least in federal question cases, follow the circuit court's decision.[83]

Now, consider Case 2. Here, the same section 1983 action described in Case 1 is filed in a state court located within the same federal circuit. In response to the defendant's assertion of qualified immunity, the court discovers, as in Case 1, that there is no controlling decision of the United States Supreme Court. But the court discovers the decision of the state's supreme court[84] which it believes undermines the plaintiff's claim that the right in question was clearly established. The court, again as a matter of judicial organization and the doctrine of precedent, would normally follow that decision and uphold the qualified immunity defense. This would be true even if the defendant brought

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82. Of course, the opposite ruling would be required if the controlling circuit precedents established that the defendant's conduct did not violate clearly established law.

83. A circuit court might, despite the general rule prevailing in the circuits that binds one panel to follow a prior panel's decision unless reversed or modified by the court en banc, *see e.g.*, Nichols v. McCormick, 929 F.2d 507, 510 n.5 (9th Cir. 1991), feel somewhat freer than a district court to discount the authoritativeness of its own decisions in the face of conflicting decisions outside the circuit. But it should be the exceptional circumstance—for example, where each of the numerous decisions outside the circuit reached a contrary conclusion—where a circuit should entertain the possibility that its own precedents were not binding on the district courts within the circuit.

84. The analysis would be the same where the decision is that of any state court whose decision is, as a matter of state law, binding upon the trial court. For discussion of the role of the decisions of intermediate state appellate courts in qualified immunity analysis, *see infra* note 123.

to its attention the decision of the federal circuit court which, for purposes of Case 1, established an adequate foundation for the plaintiff's claim.[85]

The outcomes of Cases 1 and 2 — at least on the question of monetary liability — would differ, and differ predictably. And the difference would be attributable to the identity of the forum in which the suits were filed. This result may seem somewhat anomalous; it reflects a system in which forum shopping is encouraged and in which inconsistent resolutions of federal law are to be expected.[86]

To be sure, the possibility that state and federal courts might not decide a particular constitutional case in precisely the same way may be an unavoidable byproduct of a federal judicial system in which the two courts have concurrent jurisdiction to resolve particular claims. One need not endorse the view that all law is hopelessly subjective, that law is never neutral, or that law can never be determinate[87] to accept the notion that any two judges will sometimes or even

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85. In both of the scenarios discussed in the text, the defendant might offer two arguments to support qualified immunity notwithstanding the existence of directly controlling authority supporting the plaintiff's position. First, it could be argued that the very fact that the federal and state court decisions have come to conflicting conclusions about the meaning of the constitutional provision at issue (here, the Fourteenth Amendment) necessarily requires a decision for the defendant. That is, the defendant could maintain that a constitutional right cannot be viewed as clearly established when two different courts cannot agree upon its requirements in a particular factual context.

The defendant could find some support for this position. Some federal courts have granted qualified immunity where the relevant cases upon which the parties rely are conflicting. *See* Kinports, *supra* note 4, at 145 nn.131–32 (citing cases). And there have been suggestions in some cases that a circuit court can uphold qualified immunity even in the face of its own precedents which would indicate a contrary result. *See* Zeller v. Donegal Sch. Dist. Bd. of Educ., 517 F.2d 600, 608–09 (3rd Cir. 1975) (en banc) (Rosenn, J., concurring and dissenting) (concluding, in a pre-*Harlow* case, that defendants were qualifiedly immune notwithstanding prior circuit precedent suggesting that plaintiff advanced a constitutionally cognizable interest). *Cf.* Affiliated Capital Corp. v. City of Houston, 735 F.2d 1555, 1568–70 (5th Cir. 1984) (en banc) (granting immunity in antitrust action to defendant official notwithstanding a string of cases, one of which decided by own circuit, indicating liability), *cert. denied*, 474 U.S. 1053 (1986). But, as a general matter, a district court will be reluctant to refuse to give effect to the decisions of its own circuit, even where conflicting authority outside the circuit is available. And the same should be true of a state court, faced with conflicting decisions of its supreme court and a local federal court.

The second argument that the defendant might advance in the hypothetical cases under discussion is that, notwithstanding the binding nature of the directly controlling federal or state court decision, the existence of the conflicting, and non-controlling, decision should bring the case within *Harlow's* exception to qualified immunity. In *Harlow*, the Court indicated that even if the law was clearly established, a defendant could still be qualifiedly immune if there were "extraordinary circumstances" and the defendant "can prove that he neither knew or should have known of the relevant legal standard." *Harlow*, 457 U.S. at 819. The Court has not provided any standards for determining when this exception can be satisfied. However, if the defendant could establish that she believed that her conduct was constitutional based upon advice of counsel, which advice in turn was reasonably based upon the non-directly controlling (state or federal) decision, a court might be reluctant to impose liability. Kinports, *supra* note 4, at 622–25 (discussing the effect of advice of counsel on qualified immunity analysis.).

86. For a discussion of the generally unfavorable view the Supreme Court and the lower federal courts have taken of federalstate forum shopping and an argument that a broad condemnation of forum shopping may be undeserved, see Note, *Forum Shopping Reconsidered*, 103 HARV. L. REV. 1677 (1990).

87. For general discussions of these issue, see, for example, Kent Greenawalt, *How Law Can Be Determinate*, 38 UCLA L. REV. 1 (1990); Lawrence Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462 (1987).

frequently reach different decisions after a good faith effort to struggle with the same set of legal materials. And given the real possibility that state and federal judges might tend to give somewhat different weight to state and federal decisional law — even in a system where both were presumptively entitled to equal weight — it should not be surprising that state and federal courts would at least occasionally reach a different outcome in the same case. Ordinarily, it would be reasonable to assume that any systemic interest in the uniform interpretation of federal law could be achieved through ultimate Supreme Court review.

But a federal court's systematic refusal or reluctance to take state decisional law seriously would be much more problematic.[88] In Cases 1 and 2, the federal court would always decide the qualified immunity issue differently from the state court. The same would be true — and perhaps even more troublesome — in a third example, Case 3. Like Case 1, Case 3 is a section 1983 action filed in federal court. In considering a defense of qualified immunity, the court confronts the following legal landscape: (1) no controlling Supreme Court decision and no controlling decision of the local federal circuit court; (2) one or more state supreme court decisions (from the state in which the parties resided) supporting the defendant's claim that the conduct complained of did not violate the plaintiff's constitutional rights as clearly understood at the time that the conduct took place; (3) one or more decisions of federal courts outside the circuit which support the plaintiff's argument against immunity. Now, assume that the extra-circuit federal court decisions would be considered sufficient, taken on their own, to support the plaintiff's claim that the law was clearly established.[89] Assume further that if the trial judge credited the state decisions, she would find the defendant qualifiedly immune. In this situation, the federal court decisions do not, by their own force, bind the trial judge. While she may accord those decisions persuasive weight, she is not required to follow them. Nor, of course, is she bound, as a matter of precedent, stare decisis or judicial federalism, to follow the state court decisions.

If the judge in Case 3 refuses to seriously consider the state court decisions, either because her federal circuit does not regard them as appropriate sources for determining whether the law is clearly established, or because she does not believe they merit serious consideration, she will deny qualified immunity.[90] Had the suit been brought in state court,[91] however, immunity would have been granted. But unlike Case 1, the two-track system established — where the difference in outcome necessarily (or at least with a reasonable degree of predictability) follows from the identity of the (state or federal) forum — cannot reasonably be attributed to conventional notions of judicial

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88. Arguably, the same problem arises where a state court refuses to seriously consider lower federal court precedents in its qualified immunity analysis. Considerations of comity and federalism, however, may not impose the same constraints on state courts that they impose on federal courts. This issue is discussed further in *infra* Section V.

89. This, of course, assumes that the district court sits in a federal circuit which accepts the proposition that extracircuit precedent can clearly establish the law.

90. The outcome, of course, would be the opposite if the state court precedents cut against qualified immunity and the (extra-circuit) federal precedents support it.

91. The same general analysis would apply in a Case 4, where (1) the section 1983 suit was filed in state court, and (2) there is no directly controlling state supreme (or other appellate) court decision.

organization, stare decisis, and the like. There is no general rule of federal jurisdiction or principle of judicial federalism which precludes a federal court from following state court decisions where they do not conflict with directly controlling federal precedent.[92] Indeed, such a practice would seem to come into serious tension with the basic framework of adjudication derivable from recent Supreme Court pronouncements about the proper relationship between federal and state courts.

B. Comity, Federalism, and Respect for State Court Decisionmaking

The original constitutional design clearly contemplated the prospect that state courts would play a significant, if not primary, role in the adjudication of federal rights.[93] And, indeed, for at least the first century of our post-Constitution experience, most federal questions were adjudicated in the state courts.[94] But the post-Civil War constitutional amendments and civil rights legislation altered this situation. They expanded the range of federal rights enforceable against the states and expanded the role of federal courts in the enforcement of those rights.[95]

While the enhanced role of the federal courts in the enforcement of federal law diminished the concomitant role of the state courts, it did not eliminate it. State courts remained available to parties who asserted federal rights, and were presumed competent to adjudicate them[96] unless Congress established federal jurisdiction as exclusive.[97] But a number of developments coalesced to make the federal courts more attractive places to obtain the adjudication of federal rights than their state counterparts. First, the Supreme Court began to expand the range and scope of constitutional rights. Second, the Court began to take a more expansive interpretation of section 1983, thus offering plaintiffs a

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92. Similarly, there is no general principle of federal law which precludes state courts from following lower federal court precedents. And in a case where available federal decisions do not conflict with directly controlling state precedents, it is difficult to see, in the context of section 1983 litigation, what argument would recommend a state law rule precluding state court consideration of lower federal court authority.

93. The fact that Article III of the Constitution did not mandate, but instead authorized, Congress to create inferior federal courts is generally thought to signify the understanding, if not the expectation, that state courts would be available to entertain federal constitutional claims. *See* MARTIN H. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 7–8 (2d ed. 1990) (discussing "Madisonian Compromise" and its assumption concerning the competence of state courts to adjudicate federal rights); Martin H. Redish & Curtis E. Woods, *Congressional Power to Control The Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis,* 124 U. PA. L. REV. 45, 52–56 (1975) (same). For an influential discussion of the importance, indeed the centrality, of state courts in the constitutional design, see Hart, *supra* note 16.

94. *See generally.* Lawrence Gene Sager, *Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts,* 95 HARV. L. REV. 17 (1981).

95. For good, general discussions, see, for example, Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law,* 74 VA. L. REV. 1141, 1161–62 (1988); *Developments in the Law, Section 1983 and Federalism,* 90 HARV. L. REV. 1133 (1977); Gene Nichol, *Federalism, State Courts, and Section 1983,* 73 VA. L. REV. 959 (1987).

96. *See, e.g.*, Robb v. Connolly, 111 U.S. 624, 637 (1884) ("Upon the State courts, equally with the courts of the Union, rests the obligation to guard, enforce, and protect every right granted or secured by the Constitution of the United States.").

97. On the nature and significance of exclusive federal jurisdiction, see Michael E. Solimine, *Rethinking Federal Exclusive Jurisdiction,* 52 U. PITT. L. REV. 383 (1991).

federal cause of action for alleged official misconduct that had previously been actionable, if at all, only under state law in state court.[98] Third, the Court adopted expansive views of standing, justiciability, and related doctrines, thereby lowering potential access barriers to the federal forum. By the time the Warren Court came to an end in 1969, the federal courts offered a hospitable, and on most accounts, a quite sympathetic forum for the vindication of federal rights.

With the advent of the Burger Court, however, things began to change. The Court began increasingly to adopt what Professor Fallon has called a Federalist Model of judicial federalism.[99] According to this model, "state courts are constitutionally as competent as federal courts to adjudicate federal issues and to award remedies necessary to vindicate federal constitutional norms."[100] Thus, all things considered, there is no reason, as a matter of jurisdictional doctrine, why federal courts should be preferred to state courts for the adjudication of federal rights.[101] As long as state courts are open to litigation of federal constitutional claims,[102] they will be presumed to be competent, conscientious, and appropriately sensitive to constitutional principles.

These "federalist" assumptions have had an enormous influence on the shaping of modern jurisdictional doctrine. They have given rise to very strong notions of comity and respect for state court decision making — so strong that the Court sometimes seems to prefer state adjudicatory processes for fear that to do otherwise would embarrass or even compromise the integrity of state courts. Thus, federal courts have been forbidden from enjoining certain state court proceedings because of the respect for state court functions demanded by "Our Federalism".[103] Similarly, the Court has rejected the argument that federal courts have broad authority to relitigate federal claims previously submitted to state courts;[104] in doing so, it has relied on the desire "to promote the comity between state and federal courts that has been recognized as the

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98. *See, e.g.*, Monroe v. Pape, 365 U.S. 167 (1961). Similarly, and at about the same time, the Court adopted a broad interpretation of federal habeas corpus jurisdiction. *See, e.g.*, Fay v. Noia, 372 U.S. 391 (1963).

99. See Fallon, *supra* note 95, at 1151–57.

100. *Id.* at 1153.

101. Of course, this does not mean that one party or the other might not prefer to litigate in federal, as opposed to state, court and that this choice should not be respected. *See* Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233 (1988) (advocating a litigant choice principle which would, as a general matter, respect the litigants' decision to proceed in federal or state court); Chemerinsky, *supra* note 11.

102. The principle of parity and the notion that federal courts should defer to or otherwise respect the constitutional decisions of state courts presumes that the state courts are open to the adjudication of federal rights and that they will provide a reasonable opportunity for the parties to fully and fairly present their claims. *See, e.g.*, Stone v. Powell, 428 U.S. 465 (1976) (Fourth Amendment claims may be relitigated in a federal habeas corpus proceeding only on a showing that the habeas petitioner did not have a "full and fair" opportunity to have the claim considered in state court); Younger v. Harris, 401 U.S. 225 (1972) (as a general rule, federal court may not enjoin ongoing state court criminal proceedings where those proceedings offer the federal plaintiff an opportunity to raise his constitutional claims.).

103. Younger v. Harris, 401 U.S. 37, 44 (1971); *see also* Trainor v. Hernandez, 431 U.S. 434, 446 (1977) (refusing to interfere with state proceedings for reasons of comity and federalism); *see generally* Martin H. Redish, *The Doctrine of* Younger v. Harris*: Deference in Search of a Rationale*, 63 CORNELL L. REV. 463 (1978).

104. *See* Allen v. McCurry, 449 U.S. 90 (1980).

bulwark of the federal system.[105] And concerns for the integrity of state court adjudication of federal constitutional rights have provided strong impetus for the Court's recent decisions narrowing the scope of federal habeas corpus jurisdiction.[106]

While the assumptions of the federalist model have been subjected to continuing criticism,[107] it is quite clear that the model is firmly entrenched in the Supreme Court. It seems equally clear that any approach to section 1983 qualified immunity analysis which fails to respect the integrity of state courts as coequal partners with the lower federal courts in interpreting the meaning of the federal Constitution cannot easily be reconciled with prevailing federalist assumptions.[108]

V. TOWARD A ROLE FOR STATE DECISIONAL LAW

The goals of minimizing unnecessary discrepancies between section 1983 liability determinations in state and federal courts and of harmonizing qualified immunity analysis with the prevailing notions of judicial federalism would seem to require a much more self-conscious and systematic account of state decisional law than has heretofore been developed. While I will not here attempt to develop a comprehensive scheme for integrating state decisional law into the clearly established law inquiry, some general propositions may be worth considering.

I start with the presumption that state court decisions constitute a fully authoritative source for determining the scope and content of federal constitutional rights and that they have status equal to that of the decisions of the federal courts of appeals and the federal district courts. While some may continue to harbor reservations about the conscientiousness of state court judges and their preparedness to entertain constitutional claims, and while skepticism may persist in some quarters about the competence, or the relative competence,

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105. *Id.* at 96.

106. *See, e.g.*, Teague v. Lane, 489 U.S. 288, 308 (1989) (plurality opinion) (recognizing the role of comity in determining the proper scope of federal habeas jurisdiction); Stone v. Powell, 428 U.S. 465, 493 n.35 (1976) (narrowing scope of federal habeas corpus jurisdiction in Fourth Amendment, exclusionary rule cases and noting that there is "no reason why the fact that a man is a federal judge should make him more competent, or conscientious, or learned with respect to [Fourth Amendment claims] than his neighbor in the state courthouse") (quoting Paul Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 509 (1963)); *see generally* Gary Peller, *In Defense of Federal Habeas Corpus Relitigation*, 16 HARV. C.R.-C.L. L. REV. 579, 663–69 (1982); Larry Yackle, *Explaining Habeas Corpus*, 60 N.Y.U. L. REV. 991, 1027–29 (1985).

107. *See, e.g.*, Martin Redish, *Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and "The Martian Chronicles,"* 78 VA. L. REV. 1769, 1825–28 (1992); Yale Rosenberg, *Kaddish for Federal Habeas Corpus*, 59 GEO. WASH. L. REV. 363, 374 (1991) (criticizing recent Supreme Court decisions narrowing the scope of federal habeas jurisdiction, claiming those decisions effect a "basic alteration in federal-state relations.").

108. *Cf.* Wright v. West, 112 S. Ct. 2482, 2497 (1992) (O'Connor, J., joined by Blackmun and Stevens, JJ., concurring in the judgment) (referring to "the maxim" that "federal courts should 'give great weight to the considered conclusions of a coequal state judiciary,' ... just as they do to persuasive, well-reasoned authority from district or circuit courts in other jurisdictions.") (citation omitted).

of state court judges to fairly adjudicate such claims,[109] the Supreme Court has, as a general matter, effectively foreclosed the incorporation of such concerns into legal doctrine.[110] To the extent that the Court assumes that state and federal judges are full partners with respect to their capacity and commitment to fairly interpret and apply federal law, it would be incongruous to treat state court decisions as either inappropriate or inferior sources for the determination of the meaning of that law.

Moreover, a failure to consider state court decisions as fully legitimate sources for the clearly established law inquiry in section 1983 qualified immunity analysis might raise serious anomalies in the enforcement of federal rights. section 1983 actions are brought against state and local officials who are frequently subject to the scrutiny and supervision of state courts. Just as state court interpretations of state law are fully binding on state officials, so are their federal constitutional decisions.[111] There is no apparent reason why these officials should not be expected and entitled to look to state courts for guidance in determining their duties to the citizens they serve under both state and federal law. Thus, where a state court with direct authority over the jurisdiction in which public officials work has determined that a particular course of conduct will or will not give rise to federal civil rights liability, those officials should be able to (and presumably will[112]) look to that decision as at least relevant to the standard to which their behavior should conform.[113] Federal courts which refuse to take state decisional law seriously in their qualified immunity analysis do more than risk compromising the integrity of state judicial authority; they also deprive the parties to the litigation of a legitimate reliance interest in state court decisions as a measure of their constitutional rights and duties.

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109. *See, e.g.*, Barry Friedman, *A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction*, 85 NW. U. L. REV. 1, 38–39 n.201 (1990) (discounting parity claims; expressing view that state courts cannot show same "sensitivity to federal constitutional claims challenging state action as can federal courts"); Michael Wells, *Behind the Parity Debate: The Decline of the Legal Process Tradition in the Law of Federal Courts*, 71 B.U. L.REV. 609, 614 n.21 (1991) (stating that "as a group, state courts seem less sympathetic" than federal courts to federal constitutional claims).

110. *See, e.g., supra* notes 98–105 and accompanying text. This does not mean, however, that the Court has not been willing to account for the possibility that state courts may not, in individual cases, fail to take federal constitutional claims seriously. *See, e.g.*, Stone v. Powell, 428 U.S. 465 (1976) (Fourth Amendment claim may be asserted on federal habeas corpus where petitioner can show there was no full and fair opportunity to litigate same in state court.).

111. Of course, state court decisions in federal constitutional cases are subject to direct review in the Supreme Court, and, in criminal cases, to collateral review in federal habeas corpus proceedings.

112. This is not to say that all or even most state officials have actual knowledge of the legal standards against which their conduct is likely to be tested. Conversations I have had with state and local government lawyers suggests a wide degree of variation in the frequency, sophistication and comprehensiveness of legal advice routinely communicated to law enforcement officers. Under current qualified immunity analysis, however, whether the defendant can claim immunity is ordinarily not determined by the legal knowledge actually possessed by a given defendant, but rather by whether the official, as an objective matter, should have known of the plaintiff's clearly established right. *See, e.g.*, Alvarado v. Zayas, 816 F.2d 818 (1st Cir. 1987); *see generally* Kinports, *supra* note 30, at 607–631.

The same is true for section 1983 adjudication in state courts. As previously noted,[114] state courts seem no more enthusiastic than federal courts about a role for state decisional law in qualified immunity analysis. Although a failure of state courts to take their own federal constitutional decisions seriously would not raise federalism and comity concerns,[115] it would have the same potentially adverse effect on the parties' reliance interests discussed above.[116]

While state court decisions, as a general proposition, should be accorded full legitimacy in qualified immunity analysis, the weight they should be assigned will vary in different litigation contexts. In some contexts, they should be given relatively little weight; in others, they may well prove dispositive. This can be illustrated through several examples.

Section 1983 Actions in Federal Court. First, consider a section 1983 action in federal court where the district court discovers a decision from its own circuit which it believes clearly establishes the law in the plaintiff's favor.[117] Conventional assumptions derived from the doctrine of precedent would require the district court to follow its circuit's precedents.[118] Assume, however, that the court discovers a decision of the supreme court of the state in which the district court sits and in which the parties reside and that this decision, if followed, would strongly support immunity. What weight, if any, should the district court give to the state court's decision?

One's first instinct (and, I suspect, the intuitive response of many federal judges) might be to assume that any influence properly attributable to the state court's decision should not overcome the normal gravitational force imposed by

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113. Of course, private citizens and others protected by the Constitution also have a legitimate expectation that state decisional law will be regarded as relevant to a determination of their rights and duties.

114. *See supra* notes 61–66 and accompanying text.

115. It is hard to see how a state court's deference to lower federal court decisions vis-a-vis its own could be viewed as having direct adverse comity and federalism implications in the sense relevant to the parity debate. That debate has been concerned with the respect owed by one judicial system to the other, not the respect owed by one system to itself. Of course, a reluctance by state courts to give serious consideration to their own decisions might have the effect of reconfirming old attitudes that state courts play at best a secondary role in the enforcement of federal rights. *See* Neuborne, *supra* note 11.

116. Of course, if both the federal and state courts followed the explicit and advertised practice of ignoring or marginalizing state decisional law, no reliance interest would suffer. But, as suggested earlier, no court has explicitly adopted such a practice (while several federal courts have explicitly indicated a legitimate place for state decisional law in qualified immunity analysis.) *See supra* notes 37–54 and accompanying text.

117. Whether particular decisions clearly establish the law will depend upon such factors as their timing, their factual similarity to the case at hand, the generality or specificity at which the principles upon which they rely are based, and so on. *See* Kinports, *supra* note 30, at 140–56.

118. It is possible that a federal circuit could take the position that even its own precedent could not clearly establish the law in the face of decisions contrary to its precedents from other circuits. This position is suggested in *Benson v. Allphin*, 786 F.2d 268, 275 n.16 (7th Cir. 1986), where the court noted that "if there is a conflict in the circuits, one must await the definitive resolution by the Supreme Court." But unless a circuit explicitly takes such a position, it is likely that most district courts will be reluctant to either ignore or discount the binding effect usually attributed to the decisions of their court of appeals.

In any event, where the forum circuit's precedents are not contradicted by those of other circuits, there is no reason why a district court would not defer to the decisions of its circuit which it believes dispose of the law in one or the other party's favor. *See, e.g., Benson*, 786 F.2d at 276–79 (finding that forum (Seventh) circuit precedent clearly established that defendants were entitled to qualified immunity on two claims.).

the doctrine of precedent: the requirement that an inferior court is obliged to follow the decisions of courts superior to it in the relevant judicial hierarchy. Were this instinct to prevail, the district court would essentially ignore the decision of the state court and reject the immunity defense. But such a result would be deeply problematic. It would entail the proposition (or might be perceived as entailing the proposition[119]) that the state court's decision has no value or integrity as a source of constitutional meaning for the parties in question.[120]

What role or weight should the federal court attribute to the state court decision? Several approaches are possible. First, the district court could defer to the state court's interpretation of the right in question. But such deference would be no more justified than according the state court's decision no weight at all. It would not only result in a radical departure from traditional notions of precedent and the vertical allocation of authority within the federal court system, but it would also impute a preeminence to state court constitutional interpretation which itself would be difficult to square with the parity thesis.

A second possibility would be for the district court to consider itself free of the normal constraints associated with the doctrine of precedent and to independently scrutinize both its circuit's precedent and the state court decision. Its goal would be to determine which opinion best reflects or captures the correct resolution of the constitutional claim at issue.[121] Such an approach, however, would suffer from two difficulties. First, it would put the district court in the rather unseemly position of evaluating the work product of its court of appeals, thus reversing the normal relationship between appellate and inferior courts. Second, it would imply that qualified immunity depends on a public official's

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119. The requirement that federal courts defer to state court decisionmaking has been based, in part, on the assumption that failure to do so would imply state court incompetence (or worse) to adjudicate federal rights. Whether a federal court was actually motivated by such a belief, or whether the parties actually interpreted federal court action as disrespectful, has generally not been dispositive. See Martin H. Redish, *The Doctrine of* Younger v. Harris*: Deference in Search of a Rationale,* 63 CORNELL L. REV. 463, 479–84 (1978).

120. Of course, it could be argued that it is the doctrine of precedent, not any disrespect for state courts, that compels a federal district court to defer to its circuit's decisions even in the face of substantively conflicting decisions of the state courts. But this argument would presuppose the notion that the requirements of precedent are absolute and unaffected by principles of comity and federalism which, at least in part, are constitutionally informed. *See, e.g.*, Younger v. Harris, 401 U.S. 37, 44–45 (1971); Fair Assessment in Real Estate v. McNary, 454 U.S. 100, 119 (1981) (Brennan, J., concurring) (referring to comity as encapsulating "policy with roots in the Constitution and our federal system of government."); *see generally* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 201–08 (2d ed. 1988) (discussing the constitutional dimensions of the federalism and comity principles which have animated recent considerations of the appropriate scope of federal jurisdiction.). Why the nature and consequences of the doctrine of precedent should not be affected by these principles is not readily apparent.

121. Under this approach, the district court might analyze the circuit and state court decisions in light of the decisions of other federal and state courts outside the circuit. If one or the other were supported or opposed by the overwhelming weight of extra-circuit authority, this fact could be expected to significantly influence the district court's decision. If extracircuit decisions were split on the issue, the district court might be inclined to conclude that the plaintiff's claim could not be found clearly established. *See* Kinports, *supra* note 30, at 145 ("Most courts of appeals conclude that a constitutional right is not clearly established if the relevant cases in the defendant's own jurisdiction or in other jurisdictions are conflicting.") (citations omitted.).

responsibility and capacity to evaluate the decisions of two authoritative courts and to successfully determine which of those decisions a subsequent court might find the more persuasive. Whatever the qualified immunity inquiry requires of public officials, it is clear that it does not require them to be constitutional scholars.[122]

A third approach to the dilemma posed to the district court by conflicting decisions of its circuit and the relevant state supreme court seems much more appropriate than the two discussed above:[123] The court should reach the same conclusion that most courts have reached when faced with conflicting decisions of the federal courts within their own circuit: find that the law was not clearly established and that the defendant is qualifiedly immune.[124] According to the Supreme Court, a main function of qualified immunity is to minimize the "social costs"[125] entailed by permitting damage actions against public officials performing discretionary functions where the officials' actions "could reasonably have been thought consistent with the rights they are alleged to have

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122. *See, e.g.*, Ward v. County of San Diego, 791 F.2d 1329, 1332 (9th Cir. 1986) ("we do not ... require of most government officials the kind of legal scholarship normally associated with law professors and academicians"), *cert. denied*, 483 U.S. 1020 (1987).

123. The hypothetical case under discussion—and it indeed appears to be hypothetical, given the apparent absence of any reported case which matches its description—assumes that the state court decision in question was decided by the supreme court of the state in which the district court is located and the parties reside. (Few reported section 1983 cases are between parties of diverse citizenship.) Such a decision would be certain to be regarded as authoritative in all the courts of the state (subject, of course, to United States Supreme Court review) and could reasonably be regarded as authoritative by state residents concerned with determining their federal rights and obligations (especially by residents or public officials contemplating the possibility of suing or being sued in state court under section 1983).

Where the relevant state court decision is not that of the state supreme court, but that of an intermediate state court of appeals or even a state trial court, the weight it should accorded in the district court's qualified immunity analysis will be reduced. *Cf.* Geri J. Yanover, *Ascertaining State Law: The Continuing Erie Dilemma*, 38 DEPAUL L. REV. 1 (1988) (discussing these issues in the context of the *Erie* doctrine). As a theoretical matter this is true because lower court decisions will be accorded less authority by the state's own judicial structure: the "lower" the court, the less weight will it be accorded. As a practical matter, it seems unrealistic to believe that a federal judge would be inclined to treat a lower state court's constitutional decisions as equivalent to either the decisions of her own circuit court or the state's highest court. *Cf.* Neuborne, *supra* note 11, at 1118–19 (noting that parity assessments are more difficult when one compares the decisions of federal district courts and state appellate courts than when comparing federal and state trial courts; assumption is that the lower the state court's position, the less competent it will be to fairly adjudicate the federal claim); Solimine & Walker, *supra* note 11, at 226 (same).

This does not mean, however, that the constitutional decisions of inferior state courts should be routinely ignored. The Supreme Court's faith in the integrity and competence of state courts has quite clearly not been limited to the states' highest courts. Cases like Younger v. Harris, 401 U.S. 37 (1971), speak of the need for federal courts to accord proper respect to state (judicial) institutions as a whole, not just to the state's repository of ultimate judicial authority. Moreover, a decision by a state appellate court (and, to a lesser extent, state trial courts) for the judicial district within which a public official works will normally be considered a relevant, and at least a provisionally binding, source for determining the legal standards to which the public official should conform.

124. *See, e.g.*, Colaizzi v. Walker, 812 F.2d 304, 309 (7th Cir. 1987) (granting qualified immunity based upon conflicting decisions from the Seventh Circuit); O'Hagan v. Soto, 725 F.2d 878, 879 (2d Cir.1984) (per curiam) (finding Sixth Amendment case law within Second Circuit in conflict and granting qualified immunity).

125. Anderson v. Creighton, 483 U.S. 635, 638 (1987).

violated."[126] Where an official relies, or could reasonably rely,[127] upon a state court decision which constitutionally authorizes particular conduct, a federal court's rejection of qualified immunity based solely on a contrary opinion by its circuit would be inconsistent with the accommodation of the competing interests that has been struck by the Supreme Court.[128]

Imagine now a second federal court section 1983 action where the issue of qualified immunity is raised. In this case, the district court finds no federal court decisions which would bind it as a matter of precedent. However, the court discovers a federal constitutional decision of the forum state supreme court which it believes strongly supports the plaintiff's claim of clearly established law.[129] What weight should the court assign the decision in question?

The principles of comity and judicial federalism discussed earlier would, I believe, preclude the district court from refusing to seriously consider the state court decision as a legitimate source of clearly established law. To ignore or discount that decision would imply that state courts are not fully competent to adjudicate federal claims. Absent extraordinary circumstances — for example, where the federal court can reasonably conclude that the decision is seriously defective[130] — the decision should be given weight approximating that

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126. *Id. See also* Mitchell v. Forsyth, 472 U.S. 511, 528 (1985) (stating that immunity is appropriate unless "the law clearly proscribed the actions" the defendant took).

127. *Harlow* and its progeny make clear that the qualified immunity inquiry is an objective one. *See, e.g.*, Davis v. Scherer, 468 U.S. 183, 191 (1984). It focuses on whether a defendant, faced with circumstances similar to those of the defendant before the court and in light of the legal authorities extant at the time the defendant acted, reasonably should have known that her conduct was unlawful. A defendant need not have actual knowledge of a decision which the plaintiff claims clearly established the law. Neither should the defendant be required to have actual knowledge of a decision upon which he relies to show that the law was not clearly established. The question of whether and how a defendant's special or superior knowledge of the state of the law should affect his immunity is discussed in Kinports, *supra* note 4, at 607–18.

128. There may be circumstances where a plaintiff could plausibly argue that the defendant should not reasonably have been able to rely upon a state court decision authorizing conduct like that which the plaintiff is challenging. For example, where the state court decision is not only inconsistent with the forum circuit decision supporting the plaintiff's position, but is also contradicted by a consensus of decisions from other (federal and/or state) courts to the same effect, the persuasiveness of the defendant's claim to immunity under a standard which asks whether her action was objectively reasonable would be seriously diminished. The same would be true if the defendant had received legal advice that, notwithstanding the state court's suggestion to the contrary, the course of conduct at issue in the litigation would be unconstitutional. *See, e.g.*, Cunningham v. City of Oakland, 804 F.2d 1066, 1069 (8th Cir. 1986) (finding that public officials would not be entitled to qualified immunity where they had been advised by city attorney that their action would be illegal).

Would the same result obtain where the plaintiff relies upon the state court decision and claims that the (conflicting) forum circuit decision so deviates from other relevant precedents that it should be disregarded? The plaintiff's argument here would seem less plausible than the one described above. For while the doctrine of precedent may not always require reflexive and unconditional adherence to the decisions of higher courts, it still has its claims. Principles of comity and judicial federalism may preclude a district court from ignoring otherwise authoritative decisions of a state court even in the face of conflicting decisions from its own circuit. They do not require the district court to reject the decisions of its circuit court.

129. The problem of what weight to accord the state court decision would be the same if the decision in question supported the defendant's claim to immunity.

130. The decision might be considered radically defective if it emerged from a state court process which failed to provide the parties a full and fair opportunity to present or otherwise develop their arguments. *Cf.* Stone v. Powell, 428 U.S. 465 (1976) (precluding federal habeas corpus review of state court convictions in Fourth Amendment cases where the habeas petitioner

which the district court would accord to the decisions of its own circuit. This does not necessarily mean that the district court should feel "bound" to follow the state court decision; it might, for example, conclude that the decision is so inconsistent with the decisions of other (state and federal) courts that the defendant could not, as an objective matter, have reasonably relied upon it as a basis for determining her constitutional duties.[131] But the court should not treat the decision as irrelevant to the qualified immunity issue.[132]

A recent case which seems to embody the approach suggested above is *Cinelli v. Cutillo*.[133] There, the plaintiff brought a section 1983 action in federal court against a number of defendants, including two police detectives. The plaintiff alleged that the individual defendants violated his Sixth Amendment right to counsel, based upon remarks the defendants allegedly made to the plaintiff, including comments disparaging the utility of the plaintiff exercising his right to legal representation. In rejecting the defendants' claim to qualified immunity, the court cited several Supreme Court decisions establishing the general right of a criminal defendant to representation.[134] It then went on to rely upon a (much more recent) decision of the Massachusetts Supreme Judicial Court, which had dismissed an indictment "because of disparaging remarks by federal agents about defense counsel and the suggestion that he would not keep defendant out of jail.[135] While the court observed that the state supreme court decision and the case before it were not factually identical, it found that the decision "clearly outlined the contours of a defendant's constitutional rights in this respect for Massachusetts police officers."[136] The court apparently found it unnecessary to cite other case law to support the plaintiff's claim; it thus accorded the state supreme court the same status it presumably

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had a full and fair opportunity to have the constitutional claims adjudicated in state court). It might also be considered defective if it was based upon clearly specious reasoning.

131. As noted earlier, these kinds of considerations would probably be inappropriate were the district court considering whether it should follow a decision of its circuit. *See supra* notes 82–83 and accompanying text.

In a case where the defendant relied upon the state court decision in support of the argument that the law was not clearly established in the plaintiff's favor, the district court might discount the force of the decision in the (highly improbable) event that the defendant had received legal advice which contradicted the decision. *See supra* note 84.

132. Several federal courts have suggested that absent controlling Supreme Court decisions to the contrary, qualified immunity should be granted where no forum circuit precedent supports the plaintiff's claim of clearly established law. *See, e.g.*, Knight v. Mills, 836 F.2d 659 (1st Cir. 1987); *see generally* Kinports, *supra* note 30, at 141–42. To the extent that such an approach would preclude reliance upon state court decisions within the circuit, it would conflict with the analysis proposed in this article.

133. 896 F.2d 650 (1st Cir. 1990).

134. *Id.* at 655 (citing, inter alia, Miranda v. Arizona, 384 U.S. 436 (1966) and Gideon v. Wainwright, 372 U.S. 335 (1963)).

135. *Id.* (citing Commonwealth v. Manning, 367 N.E.2d 635, 636 (Mass. 1977)).

136. *Id.* It is unclear from the *Cinelli* opinion whether the court would have viewed the Supreme Court decisions it cited as, by themselves, clearly establishing the plaintiff's constitutional right. Although the court did not discuss the requirement of Anderson v. Creighton, 483 U.S. 635 (1987), that plaintiffs rely upon precedents which establish the claimed right in a "particularized" sense, *id.* at 640, *Anderson* strongly suggests that the Supreme Court cases cited by the court would have fallen short of defeating the defendants' claim to immunity.

would have accorded its own cases[137] or those of other federal courts[138] in determining the existence of clearly established law.

A third possible scenario might face a district court, one in which the role of state decisional law is more difficult to specify. In this situation, there are no decisions of either the forum federal circuit or the forum state supreme court which the district court believes dispose of the qualified immunity issue. However, one or both parties bring to the court's attention[139] one or more non-forum state court decisions which they claim support their position on qualified immunity.

The absence of any clearly dispositive case law has created perhaps the most difficult dilemma for courts undertaking qualified immunity analysis. Where there is no relevant case law at all, it is almost surely the case that a court will find the defendant qualifiedly immune.[140] Frequently, however, the parties will cite (or the court will otherwise discover) case law which, although subject to some arguable factual or legal distinction from the case at bar[141] provides plausible support for their position. Although there are no bright-line rules here, most courts will consider these cases as relevant to their inquiry.[142] But while most federal courts will at least be open to the possibility that extra-circuit federal decisions can clearly establish the law,[143] their willingness to

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137. *See, e.g.*, Newman v. Commonwealth of Massachusetts, 884 F.2d 19, 24–25 (1st Cir. 1989) (relying on two First Circuit decisions in finding that the alleged conduct of defendants violated plaintiff's due process rights), *cert. denied*, 493 U.S. 1078 (1990).

138. *See, e.g.*, Mendez-Palou v. Rohena-Betancourt, 813 F.2d 1255, 1258 (1st Cir. 1987) (looking to "considerable body of case law from circuit courts of appeal and district courts" as "primary guideposts" for resolving qualified immunity issue).

139. Of course, federal courts may discover potentially relevant state court decisions through their own research.

140. One commentator has noted that "a violation of clearly settled law surely does not exist where neither the Supreme Court nor any circuit court, district court, or state court has rendered a prior decision in an analogous case. SHELDON H. NAHMOD, 2 CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 at 134 (3d ed. 1991).

141. The Supreme Court's immunity doctrine requires, in most cases, an inquiry into the lawfulness of the defendant's conduct in light of the information possessed by, and the facts confronting, the defendant at the time she acted. Anderson v. Creighton, 483 U.S. 635, 641 (1987). The question is whether, in light of this information and these facts, the defendant could reasonably have known that her conduct was unlawful. While this does not require that the plaintiff cite a case that is factually indistinguishable from the case at bar, *id.* at 640, it does require reference to case law that is sufficiently analogous to put the defendant on notice that her conduct would violate the plaintiff's rights. *See, e.g.*, Hilliard v. City and County of Denver, 930 F.2d 1516, 1518 (10th Cir. 1991), *cert. denied*, 112 S. Ct. 656 (1991).

142. See NAHMOD, *supra* note 140, at 134–35 ("there are numerous situations where violations of clearly settled law can be found even though the Supreme Court and the particular circuit have not addressed the issue, and even though no court with jurisdiction over the institution whose conduct is challenged has ruled that the conduct is unconstitutional.") (citations omitted). At least one circuit has explicitly held that the absence of clearly dispositive Supreme Court or forum circuit decisions will not foreclose further inquiry. *See* Cleveland-Perdue v. Brutsche, 881 F.2d 427, 431 (7th Cir. 1989) ("The presence of a controlling precedent is not, however, a sine qua non of a finding that a particular right has been clearly established."), *cert. denied*, 498 U.S. 949 (1990).

143. *See, e.g.*, Morfin v. Albuquerque Pub. Sch., 906 F.2d 1434, 1439 (10th Cir. 1990) ("In the absence of contemporary Tenth Circuit precedent directly concerning the issue, we may look to the law of other circuits when deciding whether or not a right was clearly established"). Some federal circuit courts have been quite willing to place heavy reliance upon the decisions of other circuits. *See, e.g.*, K.H. v. Morgan, 914 F.2d 846, 852 (7th Cir. 1990) (stating that there is "no reason to think" that another circuit's decision would not be followed in Seventh Circuit).

rely upon or even to seriously consider "non-dispositive"[144] state court decisions is less clear.[145] Occasionally, courts have explicitly excluded lower state court decisions from consideration. For example, in *Wallace v. King*,[146] a pre-*Harlow* case, the Fourth Circuit stated that qualified immunity should apply "where the controlling law had not been authoritatively decided by the Supreme Court, the appropriate United States Court of Appeals, or the highest court of the state...."[147] This position was subsequently adopted by the Sixth Circuit.[148] More commonly, however, the refusal to consider state court decisions is reflected in the absence of citations to lower state courts in qualified immunity discussions.[149] While there are exceptions,[150] relatively few reported decisions of the federal circuits place major emphasis or importance on (or, for that matter, even cite) non-dispositive state court decisions.

What weight (if any) should federal courts give to the constitutional decisions of non-dispositive state courts in resolving questions of a section 1983 defendant's qualified immunity? In general, I believe that the principles of comity and judicial federalism which have informed much of the Supreme Court's recent decisions in the area of federal jurisdiction[151] would require a federal court to give the same weight to the decisions of non-dispositive state

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Other courts have indicated that only rarely should extra-circuit decisions be sufficient to settle the qualified immunity issue. *See, e.g.*, Ohio Civil Serv. Ass'n v. Seiter, 858 F.2d 1171, 1177–78 (6th Cir. 1988) (only in "extraordinary case" can decisions other than the Supreme Court, the Sixth Circuit, or the district court itself clearly establish the law).

144. I use "non-dispositive" to refer to state court decisions which would not normally be considered binding precedents on the defendant as a matter of state law. These would include decisions of lower courts of the forum state and decision of the courts of other states (including other states' highest courts).

145. Of course, as I have suggested earlier in this Article, many federal courts seem unwilling to seriously consider any state court decisions in their qualified immunity analysis. *See supra* note 41. Their willingness to consider lower state court decisions, whether from the state within which the parties work or reside or from other states, is even less clear.

146. 626 F.2d 1157 (4th Cir. 1980), *cert. denied*, 451 U.S. 969 (1981).

147. *Id.* at 1161 (emphasis added). The *Wallace* opinion does not necessarily suggest a particular bias against the decisions of lower state courts. It can also be read to suggest that only Supreme Court or Fourth Circuit precedent can clearly establish the law. The Fourth Circuit seems since to have abandoned this narrow view of qualified immunity. *See, e.g*, Collinson v. Gott, 895 F.2d 994, 999–1000 (4th Cir. 1990) (considering the decisions of other circuits in determining qualified immunity); Lopez v. Robinson, 914 F.2d 486, 491 (4th Cir. 1990) (same); Gooden v. Howard County, Maryland, 917 F.2d 1355 (4th Cir. 1990) (same), *rev'd. en banc*, 954 F.2d 960 (4th Cir. 1992).

148. Robinson v. Bibb, 840 F.2d 349, 351 (6th Cir. 1988) (citing *Wallace); see also* Eugene D. v. Karman, 889 F.2d 701, 706 n.6 (6th Cir. 1989), *cert. denied*, 496 U.S. 931 (1990). The Sixth Circuit's position on the role of state decisional law has not been consistent. The court has in some cases been willing to consider state decisional law—arguably including lower state court decisions. *See* Washington v. Starke, 855 F.2d 346, 348 (6th Cir. 1988) (court considers unspecified "controlling precedents in this circuit and in Michigan courts.").

149. Of course, the failure of federal courts to cite state case law in their opinions does not necessarily mean these courts have consciously concluded that (lower) state court cases constitute an inappropriate source for qualified immunity decisionmaking. As previously discussed, *see supra* notes 67–78 and accompanying text, there are other plausible explanations for the phenomenon.

150. *See, e.g.*, Warlick v. Cross, 969 F.2d 303 (7th Cir. 1992) (considering cases from Florida, Colorado, California, Illinois, New Hampshire, and Michigan); Good v. Dauphin County Social Services, 891 F.2d 1087, 1093–94 (3rd Cir. 1989) (considering decisions from the District of Columbia, Oregon, and California); *see also* Ward v. County of San Diego, 791 F.2d 1329 (9th Cir. 1986), *cert. denied*, 483 U.S. 1020 (1987), discussed at *infra* notes 167–72 and accompanying text.

151. *See supra* Section IV–B.

courts that they would accord to the decisions of non-dispositive federal courts. If a federal court is willing to consider the decisions of other federal circuits,[152] it should be willing to give equivalent consideration to the decisions of the highest courts, and perhaps even the intermediate appellate courts, of the states.[153] Similarly, if a federal court is willing to consider decisions of federal district courts,[154] it should be willing to accord equivalent consideration to state trial court — and certainly state intermediate appellate court[155] — decisions.

This does not mean that the existence of one, or even a few, non-dispositive state court decisions supporting the plaintiff's claim to clearly established law should result in the defeat of the defendant's claim to qualified immunity.[156] Just as federal courts have been reluctant to conclude that one federal

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152. For cases indicating the extent to which the federal circuits are willing to consider the decisions of other circuits, *see supra* note 32. In this Article, I take no position on the questions of whether and the extent to which federal courts should consider the decisions of other circuits in deciding questions of qualified immunity. However, most federal courts regard other circuit court decisions as, to at least some degree, relevant to the qualified immunity determination. And it is difficult to imagine a jurisprudential theory which would exclude them. *See* Kinports, *supra note* 30, at 142.

153. The discussion in the text assumes that state supreme courts are at least functionally equivalent to federal circuit courts with respect to the authoritativeness of their federal constitutional decisions. In terms of the Supreme Court's current conception of judicial federalism, neither the Article III status of the circuit courts, nor the fact that they have effectively been the final arbiters of federal questions in recent decades (given the low percentage of their decisions which are accepted for review by the Supreme Court), would support an assumption that they speak with greater wisdom or authority than, at the very least, state supreme courts about the meaning of the Constitution.

Whether state intermediate appellate courts should be considered functionally equivalent to federal circuit courts is a more difficult question. The Supreme Court has stated that it is "unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States." Stone v. Powell, 428 U.S. 465, 493 n.35 (1976). The Court has apparently been unwilling to make distinctions between state appellate courts with respect to their competence to adjudicate federal rights. While the supremacy of the United States Supreme Court in constitutional interpretation would require according its decisions more weight than the decisions of state supreme courts, there may be no equivalent reason to support the notion that federal circuit court decisions are superior to those of state intermediate appellate courts. Practically speaking, however, I suspect that federal circuit courts (and, for that matter, federal district courts) will be reluctant to treat federal circuit and state intermediate appellate court decisions as fungibly authoritative interpreters of federal law.

154. Several circuits have explicitly approved reference to district court decisions. *See, e.g.*, Ohio Civil Serv. Employee's Ass'n v. Seiter, 858 F.2d 1171, 1175–77 (6th Cir. 1988); Johnson-El v. Schoemehl, 878 F.2d 1043, 1049 (8th Cir. 1989); Greason v. Kemp, 891 F.2d 829, 833 (11th Cir. 1990). Some courts, however, have expressed reservations about the role of district court decisions in qualified immunity analysis. *See, e.g.*, Muhammad v. Wainwright, 839 F.2d 1422, 1425 (11th Cir. 1987) ("[A] district court opinion, particularly from outside the circuit, cannot, in and of itself, settle the law."); Hawkins v. Steingut, 829 F.2d 317, 321 (2d Cir. 1987) (noting that "a district court decision does not 'clearly establish' the law even of its own circuit, much less that of other circuits.").

155. However one compares state intermediate appellate and federal circuit court decisions, *see supra* note 154, it would be difficult to maintain, given the Supreme Court's assumptions about parity and judicial federalism, that federal courts should accord more weight to a non-dispositive federal district court decision than to a similar state intermediate appellate court decision. *Cf.* Neuborne, *supra* note 11, at 1118 and n.51 (criticizing the Supreme Court's general assumption of parity but conceding parity between state appellate and federal district courts).

156. Neither should an isolated state court decision be adequate to support the defendant's claim to immunity in the face of other authority (e.g., relevant federal court precedent) strongly pointing the other way.

decision, or even scattered decisions, from outside the forum circuit are sufficient to defeat qualified immunity,[157] they will be at least as reluctant to conclude that state court decisions of similar quantity or quality will dispose of the matter.[158] Given the policy assumptions underlying the Supreme Court's modern qualified immunity doctrine,[159] it is just as inappropriate to hold a public official accountable for violating a right that has been recognized by one, or only a few, non-dispositive state court decisions, whether from within or outside the forum state, as it is to impose liability for violating a standard articulated by only scattered decisions of the federal courts.[160] But, and this is the crucial point, whether the cases upon which the parties rely are state or federal cases should make no difference. If a court is prepared to conclude that a certain number (and type) of federal decisions are sufficient to clearly establish the right asserted by the plaintiff,[161] an equivalent number (and type) of state court decisions should also suffice.[162]

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157. *See* Kinports, *supra* note 30, at 143 n.122 (citing cases).

158. For example, in Warlick v. Cross, 969 F.2d 303 (7th Cir. 1992), the court was confronted with a qualified immunity defense to a Fourth Amendment claim surrounding the plaintiff's arrest for possession of cocaine. The (Illinois) plaintiff relied upon a decision of a Florida court of appeals holding that several negative field tests for cocaine (the confiscated substance turned out to be baking soda) vitiated the existence of probable cause. The Seventh Circuit, however, cited a decision of the Colorado Supreme Court which held that probable cause could exist despite a negative field test if other factors supported the probable cause finding. The court granted qualified immunity on this claim, concluding that "[o]ne court decision recognizing the right will not fulfill [the plaintiff's] burden, particularly where another court has disagreed." Id. at 309.

159. *See generally* PETER W. LOW & JOHN C. JEFFRIES, JR., CIVIL RIGHTS ACTIONS: SECTION 1983 AND RELATED STATUTES 42–46 (1988).

160. *Cf.* Lojuk v. Johnson, 770 F.2d 619, 628 (7th Cir. 1985), *cert. denied*, 474 U.S. 1067 (1986) ("[a] reasonable government official cannot necessarily be expected to recognize the significance of a few scattered cases from disparate areas of the law for a right that is just evolving."). In *Lojuk*, the Seventh Circuit concluded that plaintiff's reliance upon "one district court case ... one (ninth) circuit court case ..., and several other decisions that are distantly related, at best", *id.* at 631, was inadequate to clearly establish the right in question. The court's analysis strongly suggests that it would have reached the same conclusion even if one (or perhaps even several) of the cases upon which the plaintiff relied had been more directly on point.

161. Some courts have concluded that in the absence of binding Supreme Court or forum circuit precedent, a consensus of available precedents must support the plaintiff's position. *See, e.g.*, Chinchello v. Fenton, 805 F.2d 126, 134 (3rd Cir. 1986) (granting qualified immunity because "this is not a case in which there is a Supreme Court case or a consensus among the circuits endorsing the legal norm that the defendant official is alleged to have violated.").

162. A recent case which appears to reflect the sort of serious consideration of state decisional law suggested here is Warlick v. Cross, 969 F.2d 303 (7th Cir. 1992). Among the constitutional claims advanced by the plaintiff in *Warlick* was a Fourth Amendment claim that the defendant police officer had no probable cause to arrest him for possession of marijuana (for the court's analysis of the defendant's qualified immunity with respect to a separate claim involving the possession of cocaine, *see supra* note 158). The plaintiff argued that two intermediate Illinois appellate court decisions and an intermediate appellate court decision from California clearly established that the existence of hand-rolled cigarettes alone did not create probable cause for arrest. *Id.* at 309. With this argument the court agreed. However, the court then cited several other state cases, including decisions from California, New Hampshire, and Michigan to the effect that where the presence of hand-rolled cigarettes was combined with other evidence that the cigarettes contained a controlled substance, probable cause could be established. *Id.* at 309–10. The court found that such corroborating evidence existed in the case under review and granted qualified immunity.

The court in *Warlick* cited no federal court decisions with respect to the probable cause issue. Its analysis implied the view that state court decisions alone could dispose of the clearly

Among the federal circuits, the Ninth Circuit has adopted an analysis which seems to approximate the one suggested above. Two cases illustrate the Ninth Circuit's approach. In *Bilbrey v. Brown*,[163] the court confronted the question whether defendant school officials were entitled to qualified immunity in a section 1983 action by the parents of children who were subjected to a warrantless search on school grounds. The court noted that there were no dispositive precedents of its own or of the Supreme Court concerning school searches.[164] However, it noted that "[b]efore this case arose, many courts, including the Oregon Court of Appeals, had generally held that student searches are subject to Fourth Amendment standards."[165] The court conceded that there was "some uncertainty" concerning precisely how much protection the Fourth Amendment extended in these circumstances, but it concluded that the available case law at the time of the search "fairly well established" that "reasonable cause" for a search was required.[166]

A second, more recent decision of the Ninth Circuit is even more illuminating. In *Ward v. County of San Diego*,[167] the plaintiff's section 1983 action alleged that a strip search to which she was subjected by the defendants violated her Fourth Amendment rights. The circuit court reiterated the qualified immunity standard articulated in a prior case: absent "binding precedent, a court should look at all available decisional law including decisions of state courts, other circuits, and the district courts to determine whether the right was clearly established."[168] The court proceeded to "survey the legal landscape" that existed at the time the plaintiff was strip searched to determine whether fourth amendment law had been clearly established in her favor. It analyzed decisions of the Supreme Court, the First Circuit, three federal district courts (outside the Ninth Circuit[169]), and the Illinois Supreme Court and concluded that these decisions, taken together, required the conclusion that "the law ... was sufficiently clear to subject (the defendant) to liability for civil damages under 42 U.S.C. § 1983."[170]

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established law issue, and that non-forum state decisions were to be taken seriously in qualified immunity determinations.

163. 738 F.2d 1462 (9th Cir. 1984).

164. *Id.* at 1466.

165. *Id.* In addition to citing State v. Walker, 528 P.2d 113 (Or. 1974), the court cited decisions of the Fifth Circuit and three district court decisions outside the Ninth Circuit. It also cited a New York trial court decision which held that a school principal was acting as a private citizen when conducting a search.

166. *Bilbrey*, 738 F.2d at 1466. While the court's decision strongly implies that the defendants would not be entitled to qualified immunity under Harlow v. Fitzgerald, 457 U.S. 800 (1982), it apparently did not decide the question in light of the defendants' failure to raise the "uncertainty of the law issue" in the trial court. *Id.* at n.6. The court remanded the case to the trial court for a determination of whether the defendants were entitled to a substantive defense based on the alleged reasonableness of their conduct.

167. 791 F.2d 1329 (9th Cir. 1986), *cert. denied*, 483 U.S. 1020 (1987).

168. *Id.* at 1332 (citing Capoeman v. Reed, 754 F.2d 1512, 1514 (9th Cir. 1985)).

169. Curiously, the court also considered relevant the fact that the district court whose decision it was reviewing had earlier "found the law sufficiently clear to [grant the plaintiff's] motion for a preliminary injunction against [the defendant's] policy of strip searches." *Id.* at 1333.

170. *Id.* The court also cited a Ninth Circuit case, decided some three years after the plaintiff's cause of action arose, which had directly held that the kind of strip search to which the plaintiff was subjected was unconstitutional. *Id.* at 1333 (citing Giles v. Ackerman, 746 F.2d 614 (9th Cir. 1984)). It believed this decision was relevant because it was "harbinged" by the strip search cases decided before the plaintiff's cause of action arose.

The defendant in *Ward* had argued that he was "shielded from liability" by a California state trial court decision, decided nine months before the plaintiff was strip searched, which had upheld the constitutionality of a strip search policy imposed on custodial detainees. The Ninth Circuit first distinguished the decision in question based upon its special factual context.[171] Even assuming that this decision wasn't fairly distinguishable on its facts, however, the court concluded that it would not be enough to counterbalance the case law supporting the plaintiff's position: "In light of contrary authority from federal courts, the decision by the California Superior Court did not *ipso facto* vindicate the [defendant's] policy."[172]

The analysis articulated and applied in these Ninth Circuit decisions takes an appropriately "global" approach to the clearly established law problem. It considers all case law beyond its own and the Supreme Court's decisions — decisions which would bind it on the basis of conventional notions of precedent and stare decisis — to be relevant to qualified immunity determinations.[173] Moreover, it appears to embody no hierarchy for determining the weight to be assigned available case law. Decisions of state courts appear to be entitled to the same consideration as the decisions of federal courts. The Ninth Circuit's apparent refusal to elevate federal court decisional law over comparable decisions from state courts reflects the respect for state court adjudication of federal questions which the Supreme Court's modern conception of judicial federalism seems to require.

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171. *Id.*

172. *Id.* The Illinois Supreme Court decision cited by the court had upheld a strip search incident to custodial arrest. Unlike the facts in *Ward*, the police had reason to suspect that the custodial detainee possessed a weapon and contraband. People v. Seymour, 416 N.E. 2d 1070 (Ill. 1981). While the Ninth Circuit discounted the California trial court decision upon which the defendant relied because of "contrary authority from federal courts," there is nothing in its analysis that suggests that it would have considered state court decisions directly supporting the plaintiff's position as entitled to less credit or weight than federal court decisions.

173. Neither *Bilbrey* nor *Ward* nor any other Ninth Circuit decision I have found directly addresses how the court would deal with the first type of case discussed in this section of the article — a case where the court is confronted by a Ninth Circuit precedent strongly supporting the position of one party and a decision of the highest court in which the parties live and/or work which strongly points in the opposite direction. The court has, however, articulated guidelines which suggest how it might resolve this situation.

In Capoeman v. Reed, 754 F.2d 1512 (9th Cir. 1985), the court concluded that "the relevant decisional law" favored the plaintiff's position that a requirement by defendant prison authorities that he cut his hair violated his clearly established first amendment rights to religious liberty. *Id.* at 1514–15. Nonetheless, the court found the defendants qualifiedly immune. It reasoned that where "there are relatively few cases on point, and none of them are binding, an additional factor that may be considered in ascertaining whether the law is 'clearly established' is a determination of the likelihood that the Supreme Court or this circuit would have reached the same result as the courts which had previously considered the issue." *Id.* at 1515. It noted that there was no consensus in the available case law concerning the appropriate level of scrutiny to apply to prisoners' free exercise claims, and concluded that "it was not clear at the time in question what standard the Ninth Circuit would have applied." *Id.*

This analysis suggests that, absent Supreme Court precedent clearly indicating what position the Court would take on an issue — precedent which, in itself, might well resolve the qualified immunity question — the Ninth Circuit would regard its own position, whether explicitly embodied in or clearly implied by its past decisions, as determinative. If so, the court might be inclined to place little weight on a state supreme court decision which conflicted with its actual or nascent position on an issue. For reasons outlined earlier, *see supra* notes 123–28 and accompanying text, such a position should be regarded as problematic.

Section 1983 Actions in State Court. My primary focus in this article has been on the ways in which the federal courts do and should take state decisional law into account in determining whether a section 1983 defendant is entitled to qualified immunity. As I suggested earlier, however, section 1983 plaintiffs, whether by choice or as the result of recent Supreme Court decisions which have imposed restrictions on access to federal court, have (and by all accounts will continue to) increasingly turned to state courts to vindicate their federal rights.[174] How state courts engage in qualified immunity decision making will thus have important consequences for our overall system for the administration and enforcement of civil rights and liberties.[175]

Although there are, to date, considerably fewer qualified immunity decisions from the state, as opposed to the federal, courts, preliminary evidence suggests that state courts are no more likely to place major importance on state decisional law than are their federal counterparts. I have already suggested several reasons which may help to explain this phenomenon. Now, I want briefly to suggest the role that state decisional law should play in a state court's section 1983 qualified immunity decision making. In some respects, that role is quite similar to the role that I have argued state decisional law should play in a federal court's deliberations. In other respects, though, state courts may have greater discretion than do federal courts in their consideration of state decisional law.

First, consider a case where a state trial court discovers a decision of its supreme court, or an appellate court whose decision would be binding upon it as a matter of precedent, which it believes disposes of the qualified immunity issue in favor of the plaintiff. It also discovers a decision of the local federal circuit[176] — a decision which would be regarded as dispositive if the suit had been filed in federal court — and that this decision, if followed, would require that it grant qualified immunity.

What weight should the court give to these decisions? Normally, conventional understandings of the doctrine of precedent would require the trial court to follow the decision of its appellate court and deny qualified immunity.[177] Should the presence of the federal circuit decision change this result?

The response to these questions should be influenced by somewhat different considerations than were applicable to the most closely analogous federal court section 1983 action discussed earlier in this section — the case where a federal court is faced with its own circuit's precedent favoring the plaintiff and a state supreme court decision favoring the defendant. In that case, I argued that the federal court would be precluded by the Supreme Court's principles of comity and judicial federalism from ignoring the state court precedent; I suggested that these principles would, when considered in light of the policies that underlie the doctrine of qualified immunity, require the court to find the defendant immune.

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174. *See* Steinglass, *supra* note 67.

175. For a general discussion of the importance of state courts as a resource for the enforcement of federal rights, *see* Althouse, *supra* note 11.

176. I assume the absence of any dispositive decisions of the United States Supreme Court.

177. Similarly, if the matter is under consideration by the state's supreme court, the doctrine of stare decisis would normally require it to follow its own past decisions.

In the case under consideration, the state court need not be influenced by principles governing federal jurisdiction as developed by the Supreme Court. Those principles, by definition, pertain to and are binding upon the inferior federal, and not the state, courts.[178] Moreover, those principles have been influenced by, and in large part have been responsive to, the Court's understanding of state sovereignty and the limited nature of the jurisdiction of Article III courts.[179] The Court has been concerned about adjusting the boundaries of federal jurisdiction to ensure that federal courts are appropriately solicitous of the prerogatives of the states; it has not been as concerned with the question of whether and the extent to which state courts must be respectful of federal court authority.

Thus, while federal law may preclude a state court from discriminating against a federal claim[180] and from refusing to give res judicata effect to a federal court's judgment,[181] it does not require a state court to follow, or even to seriously consider, the constitutional decisions of the lower federal courts.[182] This is not to say that, as a matter of good government, state courts might not decide to adopt a respectful attitude toward the decisions of their colleagues on the federal bench. Nor is to deny that state courts might find it convenient to follow the decisions of federal courts, or that there may be sound policy reasons for state courts to take serious account of federal court precedents in their adjudication of federal rights.[183] But a state court which refused to follow a decision of the local federal circuit, or any other lower federal court, would not be acting unlawfully.[184]

Accordingly, the effect of the federal circuit court's decision in the case under consideration should be determined solely by resort to the law governing the doctrine of qualified immunity. Since the Supreme Court has not indicated

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178. This is not to suggest that the law of federal jurisdiction has no consequences for the state courts. In a system where federal and state courts have concurrent jurisdiction over a large number of cases, any expansion or contraction of the jurisdiction of one will inevitably have an effect on the kind and number of cases filed in or retained by the other.

179. For general discussions, *see* Ann Althouse, *How to Build a Separate Sphere: Federal Courts and State Power*, 100 HARV. L. REV. 1485 (1987); Akhil Amar, *Of Sovereignty and Federalism*, 96 YALE. J. 1425 (1987).

180. *See* PAUL M. BATOR ET. AL., THE FEDERAL COURTS AND THE FEDERAL SYSTEM 495–500 (3d ed. 1988).

181. *See* CHARLES A. WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 4468 (1981).

182. This conclusion flows, in part, from the fact that the inferior federal courts have no general power to review the decisions of the state courts. *See, e.g.*, Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923); District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983).

183. *See, e.g.*, Owsley v. Peyton, 352 F.2d 804, 805 (4th Cir. 1965) ("Though state courts may for policy reasons follow the decisions of the Court of Appeals whose circuit includes their state, ...they are not obliged to do so."). Such policy reasons might include avoiding the potential asymmetry in federal law that might result if state and federal courts resolve similar or identical issues differently. While the United States Supreme Court could resolve this problem by reviewing conflicting state or federal court decisions, the Court's limited resources seriously constrain its power to do so. A state court might also be inclined to follow federal decisions in order to ameliorate any uncertainty that might otherwise face state law enforcement officials in deciding what conduct is legally permissible. For general discussion of the various positions that state courts have taken on the relevance of federal decisions, *see* STEINGLASS, *supra* note 14, at §§ 5–27 to 5–30.

184. This assumes that the federal decision in question is not entitled to res judicata effect.

where the principles underlying qualified immunity require a court to look for clearly established law,[185] the trial court is largely on its own.[186] If the conflicting state supreme court and federal court decisions are the only relevant precedents available, the court could reasonably defer to its supreme court, whose decisions it would normally regard as binding. Since the defendant could reasonably be charged with notice of the supreme court's decision, it would not be unfair to hold her accountable for failing to conform her conduct to its requirements. In this case, that decision would require the rejection of the defendant's qualified immunity motion.[187]

In other cases, a state court should also have more flexibility than its federal counterpart. Where the court discovers no binding and dispositive state court precedent concerning the constitutional right asserted by the plaintiff, the court should be free to consider all decisional law, state and federal, equally relevant in resolving the immunity issue. For example, if the court discovers a decision of the local federal circuit which would normally be viewed as dispositive had the action been brought in federal court, it is free to accord that decision whatever weight it chooses; it can treat the decision as entitled to greater weight than the decisions of other federal or state courts,[188] or it can refuse to follow it because it finds the decision to be poorly reasoned, less persuasive than the decisions of other courts which have addressed the issue, and so on.[189] In a case where the state court finds no clearly dispositive case

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185. *See supra* section II-A and accompanying text.

186. While a number of federal circuits have formally articulated standards governing eligible sources for clearly established law, *see supra* note 34 and accompanying text, few state supreme courts appear to have promulgated an explicit standard for the courts of their states. Among those state courts which have identified such a standard, some simply adopt the standard applied by the local federal circuit. *See, e.g.*, Murphy v. City of Reynoldsburg, 1991 WL 150938 (Ohio App. 1991) (adopting standard articulated in Robinson v. Bibb, 840 F.2d 349 (6th Cir. 1988)).

187. This is not to say that the trial court would be clearly wrong if it failed to give determinative weight to the decision of its supreme court. Federal courts confronted with conflicting federal case law, or even the decisions of courts whose judges have been divided, have concluded that qualified immunity was appropriate. *See* Kinports, *supra* note 30 at 144. As a matter of "pure" qualified immunity doctrine, it might be plausible to conclude that a conflict between a (local) state supreme court and a (local) federal circuit precludes a finding that the law was clearly established. On this question, this article takes no position.

But while it may be unfair to subject an official to suit and potential liability for violating a standard as to which there has been some disagreement among numerous courts around the country, it seems more reasonable to hold the official accountable for a standard established by authoritative state courts of appeal — even where a local federal court has decided the issue differently. Regardless of how the state trial court resolves the issue, however, the important point is this: unlike a federal court confronted with inconsistent precedents of its circuit and the local state supreme court, the state court's decision can (and should) be made on the basis of the court's best understanding of the law of qualified immunity. Its decision need not be influenced by the comity and federalism concerns that necessarily constrain a federal court's resolution of the matter.

188. *Cf.* Seibring v. Parcell's Inc., 532 N.E.2d 1335, 1340 (Ill. App. Ct. 1989) ("In cases premised on alleged section 1983 violations as to which there are no pertinent Illinois Supreme Court or United States Supreme Court decisions, we choose to follow Seventh Circuit decisions to the extent they conflict with decisions of Federal courts of appeals for other circuits or Federal District Court decisions").

189. A federal court confronted with no binding federal precedent but which discovers a dispositive state supreme court decision is in a different position. As I have argued earlier, that court would be required to give serious consideration to the state court decision; the decision would presumptively be entitled to authoritative status. Although the court need not view itself as

law, state or federal, it is free to give whatever weight it chooses to any decisional law it regards as relevant. It is even free, as a federal district court is not, to give preferential weight to the decisions of one system over the other.[190]

The analysis suggested above would not eliminate the possibility that federal and state courts would occasionally, or even frequently, reach different conclusions about qualified immunity in the same case. Given the complexities of constitutional interpretation and the dynamics of the judicial process, it is unlikely that any methodology could do that. And to the extent that federal district courts would be required to give more serious consideration to the decisions of local state appellate courts than would state courts be required to give to the decisions of the local federal circuit, there will be some cases where a party might be able to predict that one court or the other would be more or less likely to resolve the immunity issue in its favor.[191] But under the proposed analysis, the number and variety of cases where the choice of forum would predictably be outcome determinative of the qualified immunity issue would surely be less than under a system resembling the one we actually seem to have — a system where federal district courts are either required or permitted to ignore state decisional law completely.

Moreover, the proposed analysis would fit more harmoniously within the model of judicial federalism that has been adopted by the Supreme Court. According to that model, federal courts are no longer presumed to be the preferred forum for the adjudication of federal rights. State courts share equal authority (and bear equal responsibility) for determining the meaning and requirements of federal law. To refuse to accord state decisional law the same authoritative status that has been traditionally accorded the decisions of the lower federal courts would be damaging to the integrity of state courts and would undermine the assumption of parity that the Supreme Court has proclaimed.

VI. CONCLUSION

Modern qualified immunity doctrine has turned out to be as complicated as it is controversial. With little guidance provided by the Supreme Court, it has spawned satellite litigation that has resulted in delay in the enforcement civil rights and liberties as well as diminution of the protection accorded to the

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bound by that decision, it would be acting inappropriately were it to ignore or discount it. *See supra* notes 103-132 and accompanying text.

190. Although a state court is free to give greater weight to the decisions of, for example, the courts of other states than it is willing to give the decisions of the lower federal courts, it is not clear why it would decide to do so. Perhaps a court might be inclined to rank another state's supreme court's decisions as more authoritative than, say, the decisions of federal district courts. Such a preference might be based on the notion that constitutional judgments of the highest court of a state are simply "worth more" than the decisions of a single district judge. Or perhaps particular state supreme courts have acquired a reputation for being especially thoughtful or prestigious and thus entitled to special consideration.

191. Of course, under the proposed analysis both federal and state courts would be encouraged to respect the role of state decisional law as a fully legitimate source for determining constitutional meaning. As, and to the extent that, litigants continue to turn to state courts in section 1983 litigation and state appellate courts increasingly become the final voices in constitutional cases (given practical limitations on the reviewing power of the Supreme Court), respect for state court decisions may tend to enhance uniformity in qualified immunity adjudication.

public officials who have been its intended beneficiaries.[192] As far as I can tell, no court has yet grappled — at least not with any significant degree of self-consciousness or specificity — with the problem addressed in this article: the role of state decisional law in qualified immunity determinations.[193]

This may be attributable to a number of factors. I strongly suspect that a significant part of the explanation lies in the fact that few section 1983 litigants think of state court decisions as fruitful, or perhaps even relevant, sources for constitutional principles and simply do not bring them to the attention of state and federal judges. Up until recently, this might not have been surprising: Relatively few state courts were called upon to adjudicate federal constitutional rights in noncriminal contexts and not many civil rights lawyers equated state courts with the vigorous enforcement of individual rights.

This attitude may soon become a thing of the past. As federal courts become less willing to play an activist role in the development of constitutional rights, state courts become increasingly attractive alternatives for constitutional litigation.[194] Indeed, given the recent trend in the Supreme Court's federal jurisdiction doctrines, state courts may well become the only viable forum for much section 1983 litigation. Unless these conditions change quickly — and there is no indication that they will — state courts will become a (if not the) principal forum for constitutional litigation. They will then have to be taken seriously as authoritative generators and enforcers of constitutional norms. When this comes to pass, litigants will increasingly rely upon state precedents in their arguments about the clearly established law issue and courts will be forced to directly confront the proper role of state decisional law in qualified immunity analysis.

For some, however, old habits and ways of thinking about the proper roles of state and federal courts die hard. Memories of federal court leadership and state court obstructionism in the enforcement of federal rights may still be strong, and the assumption of federal and state court parity that animates much of the Supreme Court's recent work may still be difficult to accept.[195] But as long as the assumption of parity (with its underlying conceptions of comity and

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192 *See* Harold Lewis Jr. & Theodore Y. Blumoff, *Reshaping Section 1983's Asymmetry*, 140 U. PA. L. REV. 755, 782–83 (1992).

193. As I have noted, several federal circuits have explicitly acknowledged that state decisional law should play some role in determining whether the defendant violated clearly established law. *See supra* notes 42–54 and accompanying text. But none of these courts has attempted to work out or prescribe specific theories or methodologies that would govern the consideration of state court decisions.

194. The attractiveness of state courts as a forum for section 1983 litigation may be enhanced by the apparently increasing willingness of state courts to take an independent stance towards their own constitutions. To the extent that state courts interpret state constitutional provisions protecting individual rights more expansively than they are permitted to interpret analogous provisions of the federal Constitution, more attorneys will pursue state constitutional claims. *See, e.g.*, Phylis Bamberger, *Boosting Your Case With Your State Constitution*, 72 A.B.A. J. 49, March 1, 1986 at 49; Mark Curriden, *The Changing Faces of Southern Courts*, A.B.A. J., June 1993, at 68. In some cases, it may be more desirable to join these state claims with section 1983 claims and submit both to the state courts for resolution than it would be to assert them in a section 1983 action in federal court.

195 *See, e.g.*, Friedman, *supra* note 109. *See also* Thomas B. Marvel, *The Rationales for Federal Question Jurisdiction: An Empirical Examination of Student Rights Litigation*, 1984 WIS. L. REV. 1315, 1338, 1354–64; Redish, *supra* note 107 at 1825–28.

judicial federalism) prevails, the failure of courts — particularly the federal courts — to take state decisional law seriously in their qualified immunity decision making will remain an anomaly in section 1983 jurisprudence.