

# As a judge, I have to follow the Supreme Court. It should fix this mistake.

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*This post has been updated.*

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George Floyd’s unconscionable killing has properly brought renewed attention to the Supreme Court’s doctrine of “qualified immunity,” which shields law enforcement officers from civil lawsuits alleging excessive force. The judge-made law of qualified immunity subverts the Civil Rights Act of 1871, which Congress intended to provide remedies for constitutional violations perpetrated by state officers. Eliminating the defense of qualified immunity would improve our administration of justice and promote the public’s confidence and trust in the integrity of the judicial system.

I am not alone in my concerns about qualified immunity. Commentators — and justices — from across the ideological spectrum rightly contend that this doctrine has wandered far afield from the text of the Civil Rights Act. That landmark statute, enacted during Reconstruction, allows individuals to bring civil actions against state actors — including state and local law enforcement officers — for violating their constitutional rights. But two lines of Supreme Court precedent have rendered qualified immunity an increasingly insurmountable obstacle to individuals seeking legal redress for violations of their constitutional rights.

First, the Supreme Court has ratcheted up the standard a plaintiff must meet to bring a claim by requiring the plaintiff to show that the violation of his or her constitutional rights was “clearly established.” This means a plaintiff must demonstrate that the law enforcement officer’s challenged conduct was virtually identical to the facts of a previous Supreme Court or Court of Appeals decision finding a constitutional violation. The slightest factual variations can render a constitutional right not “clearly established” — meaning that the officer faces *no* civil liability for the violation.

Second, the Supreme Court has allowed, and even encouraged, lower courts to dismiss cases once they determine that a law enforcement officer’s challenged conduct did not violate a “clearly established” constitutional right — without ever deciding whether the conduct did in fact violate the Constitution. As a consequence, there are few judicial decisions against which to measure whether a law enforcement officer’s conduct amounted to a “clearly established” violation of constitutional rights.

In effect, those who allege that police officers have used excessive force are trapped in a never-ending self-fulfilling prophecy: They cannot sue officers who harm them because the harmful conduct has never been “clearly established” as a constitutional violation in a factually similar case. But because so many cases are dismissed without addressing whether the challenged conduct was in fact a constitutional violation, it is rarely “clearly established” that there *was* a violation.

This cycle prevents plaintiffs from pursuing their claims, gives officers little guidance on the contours of individuals’ rights and excuses ever more egregious conduct from liability. There are, of course, other avenues for punishing police misconduct, including criminal prosecutions of officers, but criminal cases can be difficult to bring and win, and in any event civil lawsuits can add an important layer of consequence and deterrence.

Congress enacted the Civil Rights Act to deter the unlawful use of excessive force by law enforcement officers. It provides that police officers and other officials “shall be liable” for “the deprivation of any rights” secured by the Constitution. The Supreme Court’s creation and expansion of qualified immunity — and its ongoing refusal, thus far, to reconsider it — not only diminishes the law’s intended effect; it also harms individuals who are booted out of court before they can ever bring claims of excessive force before a jury.

And it strains the separation of powers. By creating a defense unmoored from the text, the Supreme Court has undermined Congress’s intent to provide remedies to those whose rights have been violated.

When the judiciary effectively nullifies congressional legislation specifically designed to provide a remedy to those who have been subjected to constitutional violations, it necessarily moves our society closer to a Hobbesian state ungoverned by predictable rules. Violence and looting are neither constitutionally protected nor morally acceptable. But when the judiciary strips individuals’ constitutional rights of legal protection — when, for example, law enforcement officers can take lives unjustifiably, without legal consequence — it can be expected that the public will take matters into its own hands.

In my work as a judge, I follow the decisions of the Supreme Court because judges apply the law as it is, not as they believe it should be. The Framers embodied that concept by carefully and thoughtfully drafting each of the Constitution’s 7,600 words with the intention and expectation that the judiciary — the branch constitutionally entrusted and *obligated* to interpret the Constitution — would give effect to each and every one. We, as judges, must uphold that obligation. When we fail to do so, our communities bear the consequences.