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Qualified Immunity and Constitutional Avoidance

Jack M. Beermann*

The Roberts Court is beginning to make its mark in the area of constitutional torts.[1] In the 2008 Term, the Court decided six cases involving remedies under section 1983[2] and *Bivens*,[3] the two main avenues for asserting constitutional tort claims in federal court. The Court found in favor of official immunity in all three cases in which that was an issue,[4] it invalidated a state's attempt to substitute the state court of claims (with limited remedies) for general state court jurisdiction over a class of federal constitutional tort claims,[5] and it rejected supervisory constitutional tort liability against high level federal officials in a case related to the "war on terror."[6] These decisions follow familiar patterns

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[1] The term "constitutional torts" denotes civil rights cases brought to enforce federal constitutional provisions, and to a lesser extent federal statutes, against state and local officials primarily under statutes passed in the immediate aftermath of the Civil War and to enforce federal constitutional provisions against federal officials under *Bivens v Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 US 388 (1971). Constitutional tort ligitation is distinct from civil rights litigation under more recent statutes such as Title VII of the Civil Rights Act of 1964, 42 USC § 2000e et seq.

[2] Civil Rights Act of 1871, sec. 1, 42 USC § 1983. During the October, 2008, Term, the Court decided five cases that presented issues arising under § 1983, including immunities, jurisdiction and availability of the § 1983 action. See *Safford Unified School Dist No 1 v Redding*, 129 S Ct 2633 (2009) (school officials immune from damages for ordering and conducting strip search of student suspected of possession and distribution of ibuprofen); *Haywood v Drown*, 129 S Ct 2108 (2009) (New York may not limit jurisdiction over § 1983 claims to state court of claims where action is available against state, not individual defendants, and where complete remedies, including punitive damages, are not available) ; *Van de Kamp v Goldstein*, 129 S Ct 855 (2009) (supervisory prosecutors have absolute immunity from damages in case involving failure to inform prosecuting attorney of exculpatory evidence); *Fitzgerald v Barnstable School Committee*, 129 S Ct 788 (2009) (Title IX does not displace § 1983 remedy in case alleging lack of appropriate response to student-to-student sexual harassment); *Pearson v Callahan*, 129 S Ct 808 (2009) (officials are immune from damages in case involving warrantless search; rule requiring courts to address merits before reaching qualified immunity is overruled).

[3] The *Bivens* action against individual federal officials for damages resulting from constitutional violations was created by the Supreme Court in *Bivens*, 403 US 388. The Court decided only one *Bivens* case in the October, 2008, term. See *Ashcroft v Iqbal*, 129 S Ct 1937 (2009) (defendant in *Bivens* action must have been personally involved in alleged constitutional violation; supervisory liability not available).

[4] *Redding*, 129 S Ct 2633; *Pearson*, 129 S Ct 808; *Goldstein*, 129 S Ct 855. Although the Court has decided a fair share of cases rejecting immunity, overall the Court has made it difficult for constitutional tort plaintiffs to overcome official immunity.

[5] *Haywood v Drown*, 129 S Ct 2108 (2009). The Court had previously been wary of state attempts to disadvantage constitutional tort claims in state court. See *Felder v Casey*, 487 US 131 (1988) (rejecting application of state notice of claim statute in § 1983 case brought in state court).

[6] *Iqbal*, 129 S Ct 1937. The Court has rejected government agency and private entity liability under *Bivens*. See *FDIC v Meyer*, 510 US 471 (1994) (federal agency cannot be held liable under *Bivens*); *Correctional Services Corporation v Malesko*, 534 US 61 (2001) (private corporation cannot be held liable under *Bivens*). The *Iqbal* decision followed a long line of Second Circuit decisions that reject constitutional tort liability without the direct personal involvement of the defendant. See, for example, *Black v United States*, 534 F2d 524, 527-28 (2d Cir1976) (plaintiff in *Bivens* action must allege defendant's personal involvement

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and suggest that the Roberts Court is not likely to break with the general pattern of constitutional tort jurisprudence laid down by the Rehnquist Court. Perhaps the Term's most notable constitutional tort opinion was in one of the immunities cases, *Pearson v. Callahan*,[7] in which the Court overruled *Saucier v. Katz*,[8] and held that federal courts are no longer required to decide the merits of constitutional claims before determining whether a defendant is entitled to qualified immunity.[9]

Pearson is another entry in the Court's struggle to resolve a serious problem created by the standard for determining whether qualified immunity protects an official from damages liability in a constitutional tort case. Under current law, the qualified immunity is overcome only if the defendant violated a clearly established constitutional right of which a reasonable official in the defendant's position should have known. In some circumstances, repeated immunity findings can cause the law to stagnate. With regard to constitutional claims that are likely to be litigated only in the constitutional tort context, officials might repeatedly engage in the same conduct and successfully defend damages suits with qualified immunity, leaving the scope of constitutional rights undetermined. Some lower courts recognized this and decided to address the merits of the constitutional claims before determining whether any right violated was clearly established at the time of the violation.[10] Not only did the Supreme Court come to approve of this practice, in *Saucier* it held that federal courts were required to reach the constitutional merits before deciding on immunity.

While *Saucier* resolved the problem of constitutional stagnation, it raised a host of problems of its own. Most notably, it flew in the face of the well-established doctrine of constitutional avoidance, under which courts avoid deciding constitutional issues unless absolutely necessary.[11] The *Saucier* procedure violates the doctrine of avoidance because courts can usually determine whether any right alleged is clearly established without defining the contours of the right itself or even determining whether the alleged right exists. Whenever the defendant's qualified immunity defense prevails because the

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in deprivation of rights); *Colon v Coughlin*, 58 F3d 865, 873 (2d Cir 1995) (same rule applies in § 1983 actions).

[7] 129 S Ct 808 (2009).

[8] 533 US 194 (2001).

[9] For convenience, in this article I refer to the practice of deciding the constitutional claim before reaching qualified immunity as the "*Saucier* procedure," and I refer to the Court's now repudiated requirement that the issues be addressed in that order as "mandatory *Saucier*."

[10] *Egger v Phillips*, 710 F2d 292, 314 n 27 (7th Cir 1983) (en banc) ("Although the qualified immunity ground would constitute an adequate basis upon which to affirm the judgment below, we nevertheless consider it appropriate to address the merits of the First Amendment claim. Egger certainly has standing to raise that claim, and to dispose of the case solely on the ground that at the time of the alleged constitutional violation the right in question was not clearly established would leave the status of such a right in limbo.")

[11] See generally Thomas Healy, *The Rise of Unnecessary Constitutional Rulings*, 83 NC L Rev 847 (2005). The Supreme Court has embraced a strong form of constitutional avoidance in which courts interpret statutes to avoid not only actually unconstitutionality but any serious constitutional question. For an application this Term of the avoidance canon in statutory interpretation, see *In Northwest Austin Municipal Utility District No. 1 (NAMUDNO) v Holder*, 129 S Ct 2504 (2009). As Richard Hasen writes, "In *NAMUDNO* . . . the Court—without objection from single Justice—embraced a manifestly implausible statutory interpretation to avoid the constitutional question." Richard L. Hasen, *Constitutional Avoidance and Anti-Avoidance at the Roberts Court*, 2009 Supreme Court Review (forthcoming).

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right was not clearly established, the decision on the merits of the constitutional issue is irrelevant to the outcome of the case—regardless of whether a right was violated, the defendant prevails. Constitutional avoidance has numerous manifestations in US law,[12] and it was thus surprising that the Supreme Court would endorse, let alone mandate, what appeared to be a blatant violation of this bedrock principle.

The decision to overrule *Saucier* was no great surprise. Members of the Supreme Court had expressed the view that *Saucier* should be revisited and had asked the litigants in *Pearson* to brief the subject.[13] In addition to Members of the Court themselves, many federal judges had expressed unhappiness with the mandatory *Saucier* procedure and had created various exceptions to it in line with some of the bases for their discontent.[14] Most fundamentally, the *Saucier* procedure was tarred with the label "advisory opinion" which, while somewhat of an overstatement, captures the flavor of the problems associated with unnecessary constitutional decisionmaking in this context.

Justice Alito's opinion for the Court in *Pearson* summarized the costs and benefits of the *Saucier* procedure, with a much more extensive discussion of its costs than its benefits. Even after recognizing all the costs of the *Saucier* procedure, the Court did not mandate its abandonment. Rather, the Court left the issue to the lower courts to determine whether to follow it in any particular case: "[T]hose courts should have the discretion to decide whether that procedure is worthwhile in particular cases."[15]

In light of all the problems it found with the procedure and the criticism it had drawn from so many federal judges, the Court's discomfort with the mandatory *Saucier* procedure is understandable. However, by leaving the decision whether to reach the constitutional merits to the standardless and apparently unreviewable discretion of the lower courts, what the *Pearson* Court put in place is deeply problematic, perhaps even worse in principle than the mandatory *Saucier* procedure. In *Pearson* itself, after announcing that the *Saucier* procedure was no longer mandatory, the Court jumped immediately to the issue of whether the right alleged in *Pearson* was clearly established, without any discussion of whether it should reach the constitutional merits in the particular case. This appears to be the procedure the Court intended because in *Safford Unified School Dist. No. 1 v. Redding*,[16] decided a few months after *Pearson*, the Court followed the *Saucier* procedure without commenting on why it found it appropriate to

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[12] In addition to the straightforward avoidance canon under which courts interpret statutes to avoid constitutional issues, there are several doctrines in the justiciability family that are designed to avoid deciding constitutional issues. The best example is Pullman abstention under which federal courts stay proceedings when resolution of state law issues in state court might moot a federal constitutional controversy. See *Railroad Commission of Texas v Pullman*, 312 US 496 (1941).

[13] *Pearson v Callahan*, 128 S Ct 1702, 1702-03 (2008) (Mem) ("In addition to the questions presented by the petition, the parties are directed to brief and argue the following question: 'Whether the Court's decision in *Saucier* v Katz, 533 US 194 (2001) should be overruled?'")

[14] Respected Circuit Judge Pierre Leval even published a law review article attacking mandatory *Saucier*. See Pierre N. Leval, *Judging under the Constitution: Dicta about Dicta*, 81 NYU L Rev 1249 (2006).

[15] *Pearson v Callahan*, 129 S Ct 808, 821 (2009).

[16] 129 S Ct 2633 (2009) (finding search of student for drugs was unreasonable but holding that right was not clearly established).

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reach the constitutional merits in that case while also finding that the right violated in that case was not clearly established at the time of the conduct.

Leaving the decision whether the court should reach the constitutional merits before determining whether a right is clearly established to the standardless, unreviewable discretion of the court is arguably worse than mandating that they do it every time or that they never do it. This new regime invites strategic behavior by courts and litigants who, in each case, are left to determine whether it would be beneficial to reach the merits or try to influence whether the merits are reached. Judges who believe strongly in the doctrine of constitutional avoidance will be in a quandary watching their colleagues shape constitutional law through merits decisions in qualified immunity cases. While plaintiffs must always address the constitutional merits—since they can prevail only if constitutional rights are found to exist and found to be clearly established—without a governing standard, defendants have no way of judging whether the court in any particular case is likely to reach the merits. Risk aversion may lead them to address the merits even when they are confident that any right is not clearly established, but the uncertainty may give them the opposite incentive, especially if they think they would lose on the merits and their failure to address the merits might contribute to judicial reluctance to reach them. Finally, it seems inconsistent with fundamental principles of judicial behavior to leave the determination of whether to make an "unnecessary" decision of constitutional law to the unconstrained discretion of individual judges.

This article proceeds as follows. Part I lays out the basics of constitutional tort immunities and the *Saucier* procedure. Part II describes and analyzes the *Pearson* decision and concludes that the Court should have established standards to govern the decision of whether to reach the merits in qualified immunities cases or at least explained why it did not reach the merits in *Pearson*. Part III proposes considerations that should govern the decision of whether to reach the merits going forward. Part IV concludes.

I. Constitutional Tort Immunities and the *Saucier* Rule

A brief introduction to the basics of the constitutional tort immunities is necessary before moving on to explaining and analyzing the *Saucier* rule and *Pearson*. As part of the Civil Rights Act of 1871, Congress provided that "[e]very person who, under color of" state law deprives "any citizen of the United States or other person within the jurisdiction thereof . . . of rights, privileges, or immunities secured by the Constitution and laws . . . shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."[17] This statute, together with its jurisdictional counterpart, provides an action in federal court against state and local officials who violate federal constitutional and statutory rights.

It was not until the 1950s that a significant volume of cases was brought under this and related provisions, and the Court ruled early on that the words "every person . . . shall be liable" were not intended by Congress to override the immunities that government

[17] Civil Rights Act of 1871, codified at 42 USC § 1983.

officials had traditionally enjoyed under the common law.[18] The first decision recognizing immunity involved the absolute immunity of legislators;[19] the next recognized the absolute immunity of judicial officers and the qualified immunity of those exercising executive functions.[20] The Court later extended the immunities it recognized in section 1983 cases to *Bivens* cases, the judicially created damages action against federal officials for violating constitutional rights.

The importation of common law immunities into section 1983 and *Bivens* has necessitated a common law-like process of elaboration of the immunities, sometimes under the influence of the preexisting common law but often conducted exclusively in light of contemporary policy concerns.[21]

A. Absolute Immunity

One issue that has been elaborated with attention to the common law roots of the immunities is the determination of whether a particular official is protected by an absolute, as opposed to qualified, immunity from damages suits. The Court has generally refused to extend absolute immunity beyond its common law moorings,[22] but it has constructed a doctrine to adapt the common law scope of absolute immunity to the contemporary government structure. It has done so by adopting a functional approach to absolute immunity which, in two distinct respects, determines whether an official enjoys absolute, as opposed to qualified, immunity.

The first aspect of the functional approach is that the Court has held that, regardless of title or position in government, officials exercising the functions that the common law protected with absolute immunity will receive absolute immunity from constitutional tort damages. This means that, for example, in additional to actual judges, Executive Branch officials such as administrative law judges receive absolute judicial immunity when they engage in the judicial function.[23] The second aspect of the functional approach strips officials of absolute immunity, again regardless of title or position in government, when

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[18] *Tenny v Brandhove*, 341 US 367, 376 (1951). The basic principle under which the immunities were recognized is that the Court presumes that Congress intended the general language of this statute, 42 USC § 1983, to incorporate well-established common law doctrines including immunities, principles of causation and similar doctrines. However, the Court has failed to apply this principle in a coherent fashion, and has only selectively honored instructions from Congress on the matter. See Jack M. Beermann, *A Critical Approach to Section 1983 with Special Attention to Sources of Law*, 42 Stan L Rev 51 (1989).

[19] *Tenny*, 341 US 367.

[20] *Pierson v Ray*, 386 US 547, 553-55 (1967).

[21] The policy bases underlying official immunities relate primarily to the public interest in allowing public officials to take official action free from concern over liability and potentially expensive and time-consuming litigation. A secondary consideration is fairness to public officials who, because of their official duties, must engage in conduct that is likely to provoke litigation. See generally Ronald A. Cass, *Damage Suits Against Public Officers*, 129 U Pa L Rev 1110 (1981). Relatedly, immunity means that public officials are not distracted from their official duties by the necessity of defending lawsuits based on their official conduct.

[22] *Sheuer v Rhodes*, 416 US 232 (1974) (finding no common law basis for extending absolute immunity to high level state executive officials including governor).

[23] See *Butz v Economou*, 438 US 478 (1978).

they engage in a function not traditionally protected by absolute immunity. So, for example, a judge enjoys only qualified immunity when sued over administrative functions such as hiring and firing.[24]

This second aspect of the functional approach to absolute immunity has given rise to difficult cases and fine distinctions.[25] For example, due to its close association with the judicial process, the Court has extended absolute immunity to the prosecutors, but it has made clear that not everything a prosecutor does in the course of her job is considered within that function for immunity purposes. Thus, when a prosecutor engages in an investigatory function, the prosecutor is protected only by qualified immunity. In principle this may appear simple, but it is not always so easy to distinguish prosecutorial from investigatory functions.[26]

This Term's decision in *Van de Kamp v. Goldstein*[27] illustrates how difficult it can be to discern the boundary between a protected function and an administrative function to which absolute immunity does not apply. In *Goldstein*, an exonerated criminal defendant sued supervisory officials in the Los Angeles County district attorney's office, alleging that their failure to institute a system for sharing exculpatory information with lower level prosecutors violated his well-established constitutional right to that information before trial.[28] The plaintiff also claimed that line prosecutors were inadequately trained concerning their obligation to turn over exculpatory evidence. To avoid absolute judicial

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[24] See *Forrester v White*, 484 US 219 (1988).

[25] The best example of how difficult it is to distinguish between functions that are protected by absolute immunity and those that receive only qualified immunity is *Bogan v Scott-Harris*, 523 US 44 (1998). In that case, a discharged city employee sued the mayor and members of the city council alleging race discrimination in her termination, which occurred after the plaintiff complained that another, well-connected, city employee had used racial slurs against her. She argued that firing her was an administrative function and thus the members of the city council and the mayor were not protected by absolute legislative immunity. Because the city council had accomplished the discharge by voting to abolish the plaintiff's position, the Court held that the firing was a legislative action. The Court was unwilling to look behind the legislative form of the decision.

[26] The following pair of Court decisions perhaps best tests and illustrates the limits of the prosecutorial function. In *Kalina v Fletcher*, 522 US 118 (1997), the Court held unanimously that prosecutors are not absolutely immune from damages for making false statements in a warrant application, on the ground that preparing the warrant application is an investigatory function not sufficiently connected with the judicial function to give rise to absolute immunity. In *Burns v Reed*, 500 US 478 (1991), the Court held that prosecutors are absolutely immune from damages claims arising from their presentation in court of the factual and legal bases in support of the issuance of a warrant. In Burns, the Court also decided that prosecutors are not absolutely immune from damages for giving unconstitutional advice to police regarding the investigation, in that case concerning whether to hypnotize the suspect in a criminal investigation and whether the police had probable cause to make an arrest. It would be perfectly understandable if, in light of these two decisions, prosecutors are somewhat confused about which of their activities are protected by absolute immunity.

[27] 129 S Ct 855 (2009).

[28] See *Giglio v United States*, 405 US 150 (1972). Goldstein was convicted of murder based largely on the false testimony of a jailhouse informant. The defense was not informed that the witness had received favorable treatment in exchange for his testimony. Goldstein alleged that the supervising officials in the prosecutor's office failed to provide this information to the prosecutor who actually prosecuted the case and failed to adequately train and supervise the lower level prosecutors in the office. See *Goldstein*, 129 S Ct at 860.

immunity, the plaintiff argued that the construction and operation of an information-sharing system to ensure that line prosecutors are aware of exculpatory information was an administrative aspect of a supervisory prosecutor's job, more like administration and investigation than actual presentation of the case to the court. Although the District Court and Court of Appeals held that the defendants were not absolutely immune, it is likely that the plaintiff's argument appeared to the Supreme Court to be nothing more than an ingenious attempt to avoid the line prosecutor's absolute immunity from damages for failing to reveal the exculpatory information as required by law.[29] The Court assumed for the sake of argument that the plaintiff was challenging administrative aspects of the supervising prosecutors' duties, but held that even so, the defendants were entitled to absolute immunity:

> [P]rosecutors involved in such supervision or training or information-system management enjoy absolute immunity from the kind of legal claims at issue here. Those claims focus upon a certain kind of administrative obligation-a kind that itself is directly connected with the conduct of a trial.[30]

This refinement of the functional approach should be generalizable across the range of absolute immunity functions. Simply characterizing a function as administrative is no longer enough to strip an official such as a judge or legislator of absolute immunity. For example, while judges do not receive absolute immunity from damages when sued over hiring and firing of court personnel, they now have an argument in favor of absolute immunity for matters connected to the conduct of a trial, such as record keeping, production of trial transcripts and the like. The *Goldstein* analysis may thus expand the range of cases understood as within the function that receive absolute immunity. *Goldstein* points toward an understanding of the judicial function as including matters like the scheduling of hearings, preservation of evidence, supervision of court reporters and so on, basically anything that has a "direct[] connect[ion] to the conduct of a trial." This may have always been implicit in the Court's understanding of the absolute immunity functional approach, but now it is explicit.

B. Qualified Immunity and the Development of *Saucier*

1. Qualified Immunity Basics

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[29] The parties argued over whether prosecutors' offices are required to establish administrative systems to ensure that all prosecutors in the office are aware of exculpatory evidence. In the Giglio decision, which also involved a failure to share information regarding promises made to a prosecution witness, the Court stated: "To the extent this places a burden on the large prosecution offices, procedures and regulations can be established to carry that burden and to insure communication of all relevant information on each case to every lawyer who deals with it." 405 US at 154. The plaintiff in *Goldstein* argued that the establishment of an information sharing system was an independent constitutional obligation of an administrative nature. See Brief for Respondent in *Van de Kamp v Goldstein*, 129 S Ct at 16-17. The defendants characterized this argument as "a guarantee of boot-strapped constitutional claims for all aspects of purported prosecutorial misconduct." See Reply Brief for Petitioners at 20. Their point, which ultimately prevailed at the Court, was that the information management system argued for by the plaintiff was inseparably connected to decisions concerning the manner in which cases are tried, which is the very function protected by absolute immunity. Id.

[30] 129 S Ct at 861-62.

Officials whose functions are not within the scope of absolute immunity are protected by qualified immunity. The basis for this immunity is the same as the basis for absolute immunity: At the time section 1983 was enacted, all executive branch officials exercising discretion were protected by a qualified immunity, known also as good faith immunity.[31] The earliest statement of the qualified immunity focused on a good faith belief in the constitutionality of executive action, stating that police officers would be immune from damages liability for an unconstitutional arrest if they "reasonably believed in good faith that the arrest was constitutional."[32] The process of delineation and elaboration of the qualified immunity ultimately crystallized in 1975 into a two-pronged standard: a government official not entitled to absolute immunity would nonetheless be immune unless "he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [victim], or if he took the action with the malicious intention to cause a deprivation of constitutional rights[.]"[33] On the first prong, the Court explained that officials should know their actions would violate constitutional rights only with regard to "clearly established constitutional rights[.]"[34] On the second prong, it is not a matter of generalized ill will, but rather malice focused on the official's attitude toward the plaintiff's rights.[35]

This two-pronged formulation of the qualified immunity standard[36] lasted only seven years. It soon became apparent to the Court that the subjective element of the immunity allowed too many insubstantial claims to go to trial. This was because allegations of malicious intent were difficult to rebut on a motion to dismiss or summary judgment. The plaintiff could easily raise a disputed factual issue by claiming (perhaps falsely) that the defendant made statements or took actions consistent with an evil intent or ill will toward the plaintiff's rights, allegations that were likely to be found unproven at trial. In 1982's *Harlow v. Fitzgerald*,[37] the Court eliminated "malicious intention" prong of the immunity, which meant that civil rights defendants[38] not protected by absolute immunity are liable in damages only if they violate clearly established constitutional rights of which a reasonable official should have known. This change dramatically expanded the

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[31] See *Pierson v Ray*, 386 US 547 (1967); Thomas Healy, cited in note x at 872-77.
[32] *Pierson*, 386 US at 557.
[33] *Wood v Strickland*, 420 US 308, 322 (1975).
[34] Id.
[35] See *Scheuer v Rhodes*, 416 US 232, 247-248 (1974); *Wood*, 420 US at 316-18.
[36] This standard provided the civil rights plaintiff with two ways of overcoming the immunity--the defendant was liable if he or she acted with malicious intent to violate the plaintiff's rights or if he or she violated a clearly established constitutional right. Because immunity was an affirmative defense, the burden of pleading entitlement to immunity was on the defendant. See *Gomez v Toledo*, 446 US 635 (1980). However, once the defendant claimed immunity, the plaintiff would attempt to overcome the immunity by arguing that the defendant acted maliciously or violated clearly established rights or both.
[37] 457 US 800 (1982).
[38] Harlow was an action brought against federal officials under the Supreme Court's decision in *Bivens* which created a cause of action against federal officials parallel to the section 1983 claim against state and local officials. In *Harlow*, the Court specifically stated that the immunities in *Bivens* actions and section 1983 actions are the same. *Harlow*, 457 US at 818 n 30.

immunity defense[39] and made it more likely that the defendant would prevail before trial, which was the stated motivation for the change.[40]

2. Development of the *Saucier* Procedure

Soon after the elimination of the subjective element of the immunity, a serious side-effect was recognized, namely that repeated successful interposition of the immunity defense in similar cases could stunt the development of the law and allow government officials to violate constitutional rights with impunity. This would happen when a civil rights damages suit against potentially immune defendants was the only way that a constitutional issue was likely to be litigated.[41] In such situations, the expanded immunity made it less likely that the court would reach the merits of the constitutional claim because the defendant could prevail merely by showing that any right alleged was not clearly established at the time of the conduct involved in the case.[42] This could cause prolonged uncertainty over the constitutionality of a course of official conduct, either allowing a pattern of possibly unconstitutional conduct to persist over a long period of time or causing insecurity and perhaps unnecessary settlements if government officials are unsure about the legality of their conduct. As the Seventh Circuit put it soon after *Harlow*, the inability to reach the merits due to the immunity defense "would leave the status of . . . a right in limbo."[43]

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[39] This policy-based expansion of the qualified immunity defense in section 1983 cases points up the lack of true connection to the common law of immunities. The touchstone of the common law qualified immunity was good faith. In fact, even now, more than 25 years after the elimination of the subjective element of the qualified immunity, it is still sometimes referred to as "good faith immunity." See, for example, *Harrison v Ash*, 539 F3d 510, 517 (6th Cir 2008). When the Court eliminated the good faith element of the qualified immunity in Harlow, it severed the connection between the immunity and its common law roots, leaving the legitimacy of applying the immunity in section 1983 cases open to serious question. See Beermann, *A Critical Approach*, cited in note x at 66-69. Because the *Bivens* action was created by the Court, the application of official immunities in *Bivens* cases raises no legitimacy question.

[40] Since Harlow, the Court has characterized qualified immunity as immunity from suit, not just immunity from damages. See *Mitchell v Forsyth*, 472 US 511 (1985).

[41] For example, claims alleging excessive force in making arrests, like *Saucier*, are unlikely to arise anywhere but in a damages suit, while claims alleging illegal searches arise frequently in criminal proceedings at suppression hearings. Around the same time as it decided Harlow, the Court tightened up on the standard for injunctive relief in civil rights cases, making damages actions the only way some claims are likely to be litigated. See *Los Angeles v Lyons*, 461 US 95 (1983).

[42] The effects of the change were significant for the very reason that the Court was motivated to eliminate the subjective element of the immunity in *Harlow*. Before *Harlow*, plaintiffs were much more likely to get past a motion to dismiss based on qualified immunity by arguing that the defendant acted with malicious intent. The motion to dismiss would have also raised the constitutional issue, both directly on the merits and on whether the rights alleged were clearly established. The denial of the motion based on a live allegation of malicious intent would have included a determination that the plaintiff had alleged a constitutional violation. Otherwise, the motion to dismiss would have been granted on the merits, without regard to immunity. See Thomas Healy, cited in note x at 873-74.

[43] *Egger v Phillips*, 710 F2d 292, 314 n 27 (7th Cir 1983) (en banc).

The Seventh Circuit,[44] and other lower courts, resolved this problem by addressing the merits of constitutional claims before deciding whether the defendant is immune because of the lack of clearly established rights.[45] The Supreme Court ultimately agreed that in order to avoid the specter of repeated rulings that a right was not clearly established without ever determining whether the underlying right actually exists, it is appropriate to address the constitutionality of government official action before addressing whether any rights recognized are clearly established enough to overcome the immunity.[46]

This was, in my view, a surprising development given the usual expressed judicial reluctance to make unnecessary constitutional rulings. Despite this apparent inconsistency with the well-established norm of constitutional avoidance, not only did the Supreme Court approve of this sequencing of the issues, ultimately it required it. The movement in favor of this sequencing of the issues reached its apex in *Saucier v. Katz*'s pronouncement in 2001 that federal courts are required to address the constitutional issue before determining whether any rights recognized are clearly established.[47] In *Saucier*, the Court explained that this sequencing was necessary to clarify constitutional law:

> In the course of determining whether a constitutional right was violated on the premises alleged, a court might find it necessary to set forth principles which will become the basis for a holding that a right is clearly established. This is the process for the law's elaboration from case to case, and it is one reason for our insisting upon turning to the existence or nonexistence of a constitutional right as the first inquiry. The law might be deprived of this explanation were a court simply to skip ahead to the question whether the law clearly established that the officer's conduct was unlawful in the circumstances of the case.[48]

Although there was some disagreement on the Court on the proper resolution of the Fourth Amendment issues in *Saucier*, no disagreement with the mandatory sequencing element of the decision was expressed in that case.

3. Criticisms of the *Saucier* Procedure

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[44] See *Egger*, 710 F2d at 314 n 27. This appears to be the first case in which a Court of Appeals determined that after Harlow it was appropriate to reach the merits of a constitutional claim before deciding whether any rights found to exist were clearly established.

[45] *Garcia v Miera*, 817 F2d 650, 657 n 8 (10th Cir 1987).

[46] The first time the Court applied this procedure, it did so as a matter of logic in decisionmaking, stating that "[a] necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is 'clearly established' at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all." *Siegert v Gilley*, 500 US 226, 232 (1991). There is language in Siegert implying that this order of decision is normatively desirable, but it is unclear if that is what the Court was really saying. In the next case, however, *County of Sacramento v Lewis*, 523 US 833, 841 n5 (1998), the Court made clear that "to escape from uncertainty . . . the better approach is to determine the right before determining whether it was previously established with clarity." Justices Breyer and Stevens expressed misgivings about applying the procedure to "difficult and unresolved" constitutional questions. Id at 859 (Stevens concurring in the judgment); id at 858-59 (Breyer concurring).

[47] *Saucier v Katz*, 533 US at 201 (2001).

[48] Id.

The momentary unanimity on the Court for making *Saucier* mandatory did not put an end to the controversy over the practice.[49] Rather, once it was mandatory, the level of criticism from lower court judges and commentators increased substantially. It came under attack on both principled and practical bases.[50] The attacks were aimed both at the general practice of reaching the constitutional question before resolving the immunity issue, and at the Court's determination in *Saucier* to make that sequencing mandatory.

As a general matter, the most obvious problem with the *Saucier* procedure is that it is inconsistent with the general norm against dicta,[51] and the related, even stronger, norm against the unnecessary determination of constitutional issues.[52] Critics went so far as to label decisions on constitutional merits when the defendant's immunity defense prevailed as "advisory opinions"[53] which federal courts are firmly prohibited from rendering under Article III of the Constitution.

The argument that the procedure violates of the principle of constitutional avoidance should be obvious: if a right is not clearly established, then regardless of whether it exists, the defendant will win the case, making determination of the constitutional merits unnecessary to the outcome.[54] There is an underlying feeling that the *Saucier* procedure is a liberal creation designed to facilitate the creation of new constitutional rights and that more generally, constitutional avoidance is a substantively conservative doctrine designed to prevent the development of new, politically liberal, constitutional rights. But this is not necessarily true. Constitutional avoidance is just as likely to prevent a court from making a conservative ruling as it is to prevent a court from making a liberal ruling. As is discussed below, the "violation" of the principle of constitutional avoidance in the *Saucier* procedure has resulted, by and large, in a proliferation of findings that constitutional rights alleged to be clearly established enough to overcome qualified immunity actually do not exist at all.

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[49] For example, in *Scott v Harris*, 550 US 372 (2007), Justice Breyer called for the Court to overrule *Saucier* and give courts discretion over whether to decide the constitutional merits in qualified immunity cases, stating that "lower courts should be free to decide the two questions in whatever order makes sense in the context of a particular case." He noted that the First Circuit had criticize the requirement in *Dirrane v Brookline Police Dept*, 315 F3d 65, 69-70 (1st Cir 2002), calling mandatory *Saucier* "an uncomfortable exercise" when the facts of the case are not fully developed.

[50] Thomas Healy describes lower court reactions to the *Saucier* procedure, both before and after the Court made it mandatory. See Healy, cited in note x at 850, 879-882.

[51] See Leval, cited in note x. Judge Leval builds his critique of the *Saucier* procedure around the notion that the determination of the constitutional merits is dicta when it does not affect the outcome of the case.

[52] The classic formulation of the doctrine of constitutional avoidance is contained in Justice Brandeis's concurring opinion in *Ashwander v Tennessee Valley Auth*, 297 US 288, 347 (1936) (Brandeis concurring). See Thomas Healy, cited in note x. The doctrine of constitutional avoidance has many manifestations, one of which is the practice of construing a statute to avoid the possibility of unconstitutionality. See, for example, *Industrial Union Dept, AFL-CIO v American Petroleum Institute* (*The Benzene Case*), 448 US 607 (1980) (plurality opinion), Hasen, cited in note x.

[53] Healy, cited in note x.

[54] Although the argument that the procedure violates the principle of constitutional avoidance may be obvious, it is not necessarily correct. As noted, the Court initially stated that it is logically necessary to the determination of whether a right is clearly established to first decide whether a right exists at all. See *Siegert v Gilley*, 500 US at 232. If that is true, then there is no violation of the principle of avoidance.

Whether merits decisions in cases in which the defendant is found to be immune are advisory opinions is debatable. On the one hand, these rulings are rendered in cases involving actual controversies in which a real plaintiff is seeking an actual remedy, damages, from a real defendant. They do not look like the classic advisory opinion in which a court is asked to make a ruling outside the context of an actual case or controversy within the meaning of Article III.[55] On the other hand, when a court delineates the contours of a constitutional right and also finds that the right was not clearly established at the time the conduct occurred, arguably the court is giving advice on how it will decide the next case, advising officials and lower courts on proper future actions without a case before it in which the decision is necessary. To put the Article III issue somewhat differently, if the plaintiff does not have standing to seek an injunction against the challenged conduct, then the plaintiff also lacks an Article III interest in procuring an enforceable ruling concerning the defendant's future actions.[56] In sum, while rulings under the *Saucier* procedure might not technically be advisory, they may transgress Article III's limitations on judicial power.

Thomas Healy has made the most direct attack on *Saucier* as violating the ban on advisory opinions. He builds his argument on two bases, first that the decision on the constitutional merits can never affect the outcome of the case and second, because of the posture of the immunities issue, the constitutional arguments will never be argued vigorously in these cases.[57] While his argument is interesting and creative, in my view it ultimately fails to establish that application of *Saucier* entails advisory opinions.[58]

Healy's two arguments depend on the same, and in my view erroneous, basis, that arguing whether a right is clearly established involves only analyzing precedent while establishing that a right exists involves additional sources such as "the text and structure of the document, the original understanding of the framers, and the ethos of American

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[55] As is well known, the Justices of the Supreme Court declined, early on, to render advice to the President, proclaiming that rendering advisory opinions would be inconsistent with separation of powers and outside the scope of the judicial power. See Henry P. Johnston, *Correspondence and Public Papers of John Jay* 486-89 (1981) reprinted in David Currie, *Federal Courts: Cases and Materials* 10 (3d ed. 1982). See Michael L. Wells, *The "Order-of-Battle in Constitutional Litigation*, 60 SMU L Rev 1539, 1541 n 22 (2007). Some state constitutions allow their courts to render dvisory opinions, subject to limitations and under specified procedures. See generally Jonathan D. Persky, Note, *"Ghosts that Slay": A Contemporary Look at State Advisory Opinions*, 37 Conn L Rev 1155 (2005).

[56] Compare *Los Angeles v Lyons*, 461 US 95 (1983) (standing to seek damages remedy does not confer standing to seek injunctive relief).

[57] See Healy, cited in note x at 902-03, 910-15.

[58] Because the Court intends rulings on the constitutional merits to be binding in future litigation, no one claims that the *Saucier* procedure violates the classic example of an advisory opinion, when another branch of government is free to ignore or revise a judicial pronouncement. See *Hayburn's Case*, 2 US (2 Dall) 408 (1792); *Muskrat v United States*, 219 US 346 (1911). *Muskrat* involved an Act of Congress which purported to affect property shares of American Indians. The statute granted the Court of Claims and the Supreme Court jurisdiction to determine the validity of the act. That judgment might, in turn, affect the outcome of other proceedings concerning the rights of claimants. The Court characterized this jurisdiction to determine the validity of the Act of Congress without an actual controversy between the parties as impermissible jurisdiction to render advisory opinions. See *Muskrat*, 219 US at 363. In *Muskrat*, the Court employed the canon of avoidance and construed the relevant statute not to grant the forbidden jurisdiction.

democracy."[59] In Healy's view, because the plaintiff has to show only that the right violated was clearly established, the plaintiff's case does not depend on the actual existence of the right.[60] I have to admit that I find Healy's analysis here puzzling. It ignores the basic fact that unless the defendant has violated the Constitution, the plaintiff will lose the case. The plaintiff thus must establish both that the defendant violated the Constitution and that that any right violated was clearly established at the time of the violation. Healy may be correct that the plaintiff's arguments in immunities cases may be more focused on precedent, but that is because the plaintiff is making a very strong claim about the state of the law, that the right is clear enough to overcome qualified immunity. Healy does not attempt to show systematically that arguments in immunities cases ignore constitutional principles in favor of case analysis, and it is my sense that any attempt to show that would fail, because even in immunities cases, parties argue the constitutional merits in traditional terms.[61]

Ironically, although it is often argued that the defendant has less of an incentive to argue the constitutional issues because the defendant can prevail on immunity grounds without winning the constitutional arguments, in Healy's terms the defendant is likely to be a better litigant, because the argument that no right exists at all can be built on the sources Healy claims are irrelevant to the determination of whether any right that does exists is clearly established. A defendant could conceivably concede that precedent appears to point in the direction of the existence of a clearly established right, but still prevail by showing that the even miniscule extension of precedent in the direction sought by the plaintiff would be inconsistent with the text, framers' intent or the "ethos of American democracy."

Sam Kamin answers Healy's charge by proposing that before deciding whether to reach the merits in an immunities case, federal courts "peek" at the merits to determine whether the plaintiff has a colorable claim that the right exists and is clearly established.[62] If the plaintiff's claim meets a minimal standard of plausibility, Kamin argues that addressing it is not an advisory opinion because there is a chance its resolution will be necessary to the outcome of the case. The problem with Kamin's solution, which on its face seems practical, is that the determination whether the plaintiff has a colorable claim would be just as advisory in Healy's terms as a full blown decision on the merits. For the reasons stated below, in my view even if the plaintiff has no colorable claim, the court's decision finding it so is not an advisory opinion.

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[59] Healy, cited in note x at 912.
[60] Healy, cited in note x at 902-03.
[61] In both *Pearson* and *Safford*, the two cases this Term in which the Court found in favor of defendants on qualified immunity grounds, the parties fully argued the constitutional merits in ways that appear indistinguishable from how they would have argued the merits had the cases arisen in a non-immunities context. In both cases, the questions upon which the Court granted review clearly separated the merits issues from the immunities issues. The constitutional arguments may be abbreviated by the need to devote space in briefs to immunities arguments, but that can happen in many other situations in which the Court reviews multiple issues, constitutional and non-constitutional, in the same case.
[62] See Sam Kamin, *An Article III Defense of Merits-First Decisionmaking*, 15 Geo Mason U L Rev 53, 92 (2008).

The basic difference between an advisory opinion and a decision on the merits under the *Saucier* procedure is simple. In cases decided under *Saucier*, the plaintiff is arguing to the court for a damages remedy from the defendant. In order to receive that remedy, the plaintiff must establish that the defendant violated the Constitution and that the right violated was clearly established. If the plaintiff does not prevail on both of those matters, the court must rule against the plaintiff and refuse to grant the damages remedy against the defendant. This is not advisory, it is the decision of an actual case or controversy within the meaning of Article III.[63] An advisory opinion involves the resolution of a legal issue outside the context of an actual Article III case or controversy. The argument that the *Saucier* procedure entails advisory opinions depends on equating all dicta with advisory opinions, which would call into question well-established practices such as the inclusion in opinions of alternative holdings, the resolution of the merits in harmless error cases and the flexible mootness doctrine which allows courts to decide moot cases that are "capable of repetition yet evading review."[64]

The arguable violation of the more general norm against dicta is two-fold. The first aspect of this norm is that courts should address only those issues necessary to the decision of the case before them and should not include extraneous discussions.[65] The second aspect of the norm against dicta is that dicta do not constitute binding precedent.[66] In cases in which the defendant is immune, the only reason for the *Saucier* procedure is to delineate the scope of constitutional rights to apply in future cases, i.e. to specify the scope of clearly established rights. In *Saucier*, the Court instructed lower federal courts to both formulate *and to follow* dicta, and presumably government officials are supposed to treat pronouncements on the scope of rights as authoritative. This is a clear violation of the second aspect of the traditional norm against dicta, that courts are not bound by dicta, only by the aspects of prior decisions that were necessary to the outcome of those cases.[67]

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[63] If the plaintiff seeks an additional remedy such as an injunction or declaratory judgment, Article III standing principles may come into play.

[64] See Healy, cited in note x at 866-68, 891-95, 897-905, 915-20 (discussing mootness, alternative holdings and harmless error).

[65] The dicta/holding distinction has been recently characterized as follows: "A holding consists of those propositions along the chosen decisional path or paths of reasoning that (1) are actually decided, (2) are based upon the facts of the case, and (3) lead to the judgment. If not a holding, a proposition stated in a case counts as dicta." Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 Stan L Rev 953, 961 (2005). Decisions on the constitutional merits when the defendant is found to be immune are arguably dicta under this definition because they do not "lead to the judgment."

[66] See generally Michael C. Dorf, *Dicta and Article III*, 142 U Penn L Rev 1997 (1994). The reasons against writing and following dicta are directly implicated by the *Saucier* procedure. The main reason against deciding issues that are not directly presented by the case is that the parties may not have addressed the issue at all, or with the same care as issues that are more likely to affect the outcome of the case. This can lead to erroneous and ill considered opinions, which also is why dicta should not constitute binding precedent. In qualified immunity cases, the plaintiff must address the constitutional merits because the plaintiff can prevail only if the right exists. The defendant, however, can prevail regardless of the constitutional merits, if it is determined that any right that may exist was not clearly established at the time of the conduct. However, as discussed below, defendants often have strong incentives to address the merits even when they expect to prevail on qualified immunity grounds.

[67] Justice Scalia has stated that these decisions are not dicta since they are intended to create clear law "and make unavailable repeated claims of qualified immunity." *Bunting v Mellen*, 541 US 1019, 1023-24 (2004)

While the *Saucier* procedure may thus appear to violate general principles regarding dicta, it may not be inconsistent with the norms that have been established and applied by the Supreme Court. It is not always clear what actually constitutes dicta and whether it is always improper to treat dicta as authoritative.[68] The Court appears willing to provide state and federal courts with guidance with what, on a strict view, would be considered dicta. This may be owing to the limited number of cases the Court can review as compared with the thousands of state and federal courts that must look to the Court for guidance on the requirements of federal law. Along these lines, it has been noted that the Court sometimes labels as holdings what in traditional understandings would be viewed as dicta.[69] The Court has also justified reaching an issue not even raised by the parties when it made sense in light of the need for rational development of the law.[70] And the Court often provides alternative holdings, which raises the question of which is an actual holding and which is dicta. All of these tendencies are related to a felt need for the Court to provide guidance. Thus, although under traditional understandings many of the Court's practices may appear to violate norms against dicta, these practices may be consistent with general practices at the Supreme Court.

In a concurring opinion in a case in which the Court followed the *Saucier* procedure and ruled against a civil rights claim on the constitutional merits, Justice Breyer offered some additional criticisms of the *Saucier* procedure and suggested that the procedure should not be mandatory.[71] He raised three familiar criticisms of *Saucier*, first that it "wastes judicial resources," second that when a court finds a right to exist but then holds that it was not clearly established at the time of the conduct, it "may immunize an incorrect constitutional ruling from review" and third that "some areas of law are so fact dependent

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(Scalia, dissenting from denial of certiorari). He is obviously correct in terms of the intent of the courts issuing the opinions, but it is more accurate to state that this is an authorized violation of the traditional rules against dicta rather than a situation not involving "mere dictum."

[68] See Dorf, cited in note x at 2049. Dorf argues that "a coherent understanding of the rule of law requires that the holding/dictum distinction turn on whether a principle is essential to the rationale of a case, not just its result, and that such a distinction provides a workable framework for implementing the design of Article III."

[69] Lisa M. Durham Taylor, *Parsing Supreme Court Dicta to Adjudicate Non-Workplace Harms*, 57 Drake L Rev 75 (2008).

[70] In *Middlesex County Sewerage Authority v National Sea Clammers Assn*, 453 US 1, 19 (1981), the Court, on its own, raised and rejected § 1983 as a basis for finding a private right of action in that case even though the plaintiff had not raised it. The resolution of an issue not raised by the parties is arguably dicta since even if a party attempted to raise it at a late stage in the litigation, the Court could avoid addressing it on the ground that it was waived. Despite this curious lineage, Sea Clammers' resolution of this issue quickly became an important precedent for determining when § 1983 provides a basis for a private right of action against state and local violators of federal statutes. This illustrates both that the Court consciously writes what is traditionally thought of as dicta and treats it in some circumstances as authoritative.

[71] *Scott v Harris*, 550 US 372, 387 (2007) (Breyer concurring). Justice Breyer first expressed reservations about the *Saucier* procedure in *Brosseau v Haugen*, 543 US 194, 201-02 (2004) (Breyer concurring). Notably, he was joined in that brief concurrence by Justices Ginsburg and Scalia. After Scott, he made the argument against the mandatory *Saucier* procedure at greater length in Morse v Frederick, 551 US 393, 425-33 (2007) (Breyer concurring). Much of the discussion in that opinion was why the Court should not have reached the constitutional issue in the particular case, but it also contains general criticisms of the mandatory *Saucier* procedure. See id at 430-32.

that the result will be confusion rather than clarity." He also noted that the *Saucier* procedure "frequently" violates the doctrine of constitutional avoidance[72] but he did not go so far as to attack opinions rendered under *Saucier* as advisory or as improper dicta. In fact, he did not advocate abandoning the *Saucier* procedure, rather he advocated flexibility.

Although Justice Breyer attacked the mandatory aspect of the *Saucier* procedure, two of his criticisms apply to all or virtually all cases in which the Court reaches the constitutional issue before determining that the defendant is immune. In all cases, judicial resources are wasted if waste is defined as reaching issues that do not affect outcome of the particular of the case. Further, under current practice all such rulings are immune from review—if all defendants prevail on immunity grounds, as prevailing parties they cannot appeal.[73] And the doctrine not only "frequently" violates the doctrine of constitutional avoidance, it always does, at least whenever the court finds in favor of immunity. In short, the only criticism that Justice Breyer made that would allow a substantial portion of cases to continue to be decided under the *Saucier* procedure is the one raising the fact-dependent nature of some constitutional claims.

Related to the family of criticisms that the *Saucier* procedure results in the unnecessary resolution of constitutional issues is that contrary to the general expectation in the adversary system, the constitutional issues in the case will not be fully litigated by the parties.[74] There are strong reasons to doubt, however, that this is a serious problem in the qualified immunity area. To the contrary, in most cases, both parties are very likely to fully argue the constitutional merits even in cases in which government official defendants are likely to be found immune.

The first thing to recognize in this regard is that plaintiffs will always address the constitutional merits. As discussed above, in order to prevail in a claim for damages against a potentially immune official, the plaintiff must establish that the defendant violated clearly established constitutional rights. If the defendant did not violate the plaintiff's constitutional rights, the plaintiff cannot prevail.

It is true that an individual defendant can prevail simply by showing that any rights that the plaintiff alleges were violated were not clearly established at the time of the violation. But there are reasons to believe that in most cases, the defendant is likely to address the merits of the underlying rights. The first is the simple reason that to show that any rights alleged are not clearly established, the defendant must address the state of constitutional

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[72] *Scott*, 550 US at 387-88.

[73] Pam Karlan focused on this aspect in her critique of the *Saucier* procedure. See Pamela S. Karlan, *The Paradoxical Structure of Constitutional Litigation*, 75 Fordham L Rev 1913, 1922-27 (2007).

[74] The need to ensure adversary presentation of issues was the primary basis upon which standing doctrine was built. *Flast v Cohen*, 392 US 83, 101 (1968) ("[I]n terms of Article III limitations on federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.") Later, the Court substituted separation of powers as the primary basis of standing doctrine. See *Allen v Wright*, 468 US 737, 752 (1984) ("More important, the law of Art. III standing is built on a single basic idea-the idea of separation of powers.")

law in the subject area of the case. This is usually if not always going to take the defendant fairly close to the constitutional merits, which means that the marginal cost of going all the way to the merits themselves is not likely to be very high, at least in a substantial proportion of cases. Further, if the defendant is not certain that the court is going to agree that the rights alleged are not clearly established, the defendant has an incentive to address the merits, which the defendant is likely to do given the low marginal cost of doing so. The cases in which the defendant has no incentive to address the merits are the rare cases in which the plaintiff is irrationally litigating a hopeless case with no real hope of achieving a remedy.

There are also a substantial number of cases with non-immune defendants in which, barring settlement, the constitutional merits will be litigated at some time anyway. These include cases with local government entities as defendants and cases with private party defendants. Local governments and private parties have no immunities.[75] Further, the merits will be reached in cases in which the plaintiff has a claim for injunctive relief, since qualified immunity does not protect against injunctions. In these cases, since the merits are subject to litigation at some stage, perhaps there is less of a need to address the merits at the early stage of considering official immunities, but if the court postpones such consideration, the other defendants might settle, perhaps even to avoid a ruling on the merits, thus frustrating the law development purpose of the *Saucier* procedure.

Relatedly, in many cases, individual defendants are represented by government attorneys, and the government entity may be intimately involved in the litigation of the defense.[76] These entities have an incentive to litigate the merits to establish the contours of constitutional constraints on official conduct especially because, as an empirical study has shown, the *Saucier* procedure has evolved into a method for clearly establishing that no constitutional violation has occurred. [77] This is a significant benefit to government

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[75] *Owen v City of Independence*, 445 US 622 (1980); *Richardson v McKnight*, 521 US 399 (1997). Some courts have recognized a common law good faith defense for private defendants. Sheldon Nahmod, The Emerging Section 1983 Private Party Defense, 26 Cardozo L Rev 81 (2004) (discussing private parties' good faith defense in § 1983 cases). This defense seems inconsistent with the Supreme Court's rejection of immunities for private defendants under civil rights laws, but the Court in Richardson did leave open the possibility of a good faith defense. See *Richardson v McKnight*, 521 US at 413-14; Jack M. Beermann, *Why Do Plaintiffs Sue Private Parties under Section 1983?* 26 Cardozo L Rev 9, 25 n 55 (2004) (describing inconsistency between § 1983 immunities jurisprudence and recognition of good faith defense for private defendants).

[76] See George A. Bermann, *Integrating Governmental and Officer Tort Liability*, 77 Colum L Rev 1175, 1188-89 (1977) (discussing statutes requiring indemnification of officials and requiring government to provide officials with legal defense by government attorneys). For example, New York law specifically requires local governments to represent and indemnify New York City employees sued under federal civil rights laws. See McKinney's General Municipal Law § 50-k 2. See also David F. Hamilton, *The Importance and Overuse of Policy and Custom Claims: A View from One Trench*, 48 DePaul L Rev 723, 730-31 (1999) (discussing indemnification of city employees in civil rights cases).

[77] See Nancy Leong, *The Saucier Qualified Immunity Experiment: An Empirical Analysis*, 36 Pepperdine L Rev 667 (2009). Leong found that after Siegert, "the percentage of claims for which the court found no constitutional right existed increased dramatically, from 65.7% pre-Siegert to 89.1% in 2006-2007." Id at 689. Leong found that the percentage of rulings that a right existed decreased over time as the courts became more likely to reach the constitutional merits in immunities cases. See id at 689-93. Another study that looked at a narrower group of cases found a similar increase in constitutional rulings in favor of

entities that no longer face uncertainty and the prospect of defending damages actions in areas of unclear law. As Nancy Leong has described the results of her study of the *Saucier* procedure:

> In the aggregate, these data indicate that the Supreme Court's move toward mandatory sequencing has had a lopsided influence on the articulation of new constitutional law. Courts now avoid fewer constitutional questions, and as a result, generate more constitutional law. But the new constitutional law--law that would not have been made before Siegert and *Saucier*--uniformly denies the existence of plaintiffs' constitutional rights.[78]

This may explain why two of the Court's more liberal members, Justices Stevens and Breyer, were among the more vocal opponents of mandatory *Saucier*.[79]

For these reasons, it is likely that both parties will fully argue the constitutional merits in a very high proportion of cases even when the defendant has a strong likelihood of prevailing on qualified immunity grounds.

Another related problem with the *Saucier* procedure is that when the defendant prevails on immunity grounds, under current practice the defendant cannot appeal an unfavorable ruling on the constitutional merits. This is not a serious problem if the case ends at the district court level (with an unappealed immunity finding) because a district court ruling

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defendants, but it also found an increase in rulings favorable to plaintiffs, as compared with cases in which previously the constitutional merits would not have been reached at all. See Paul Hughes, *Not a Failed Experiment: Wilson-Saucier Sequencing and the Articulation of Constitutional Rights*, 80 U Colo L Rev 101 (2009). Hughes's data indicate that under mandatory *Saucier*, the articulation of a positive right went way up from 3 or 4 percent of the cases to 19 percent of the cases while negative constitutional rulings went up also, to 78 percent of all cases from 35 percent in the pre-*Saucier* period. Given this high likelihood of success even under Hughes's data, it is surprising that state governments, in briefs amicus curiae, have overwhelmingly supported making *Saucier* optional. See Scott v Harris, 550 US 372 (2007), Brief Amicus Curiae for the States of Illinois, Alabama, Alaska, Arizona, Arkansas, California, Colorado, Georgia, Hawaii, Idaho, Indiana, Massachusetts, Michigan, Mississippi, Montana, New Hampshire, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia and Wyoming, and The Commonwealth of Puerto Rico, as Amici Curiae in Support of Petitioner. See also Wells, cited in note x 1559-60.

[78] See Leong, cited in note x at 692-93.

[79] Thomas Healy argues that the *Saucier* procedure was designed to benefit civil rights plaintiffs and that is why "the more liberal members of the Court--and perhaps even Kennedy--have embraced the Siegert/*Saucier* approach." Healy, cited in note x at 881. Healy ignores the fact that two of the more liberal members of the Court, Justices Stevens and Breyer were among the first who expressed misgivings about mandatory *Saucier*, while the more conservative members of the Court were largely silent about the procedure. After Healy wrote, even Justice Ginsburg expressed a willingness to reexamine mandatory *Saucier*. See Scott, 550 US at 386 (Ginsburg concurring) ("were this case suitable for resolution on qualified immunity grounds, without reaching the constitutional question, Justice Breyer's discussion would be engaging). Perhaps the liberal members of the Court recognized that the effect of mandatory *Saucier* was to deny the existence of rights rather than clearly establish new ones to facilitate future damages awards. This may be one of those areas in which the liberals and conservatives agreed initially on a doctrine due to differing views on how it would work out in the long run. In this case, the conservatives were largely correct.

on the merits is insufficient to create clearly established rights.[80] The plaintiff in such a case may take the case to the Court of Appeals, at which time the constitutional merits are subject to litigation on appellate review even if the defendant is found to be immune. It is here that the problem arises—the whole point of the *Saucier* procedure is to allow decisions by the Courts of Appeals and the Supreme Court to create clearly established law even when the defendant in the case is found to be immune. Decisions on the constitutional merits against an immune defendant may be binding and unappealable.

For several reasons, the problem of potentially unappealable decisions by Courts of Appeals on the constitutional merits is more theoretical than real. First, the likelihood that any case would be accepted for review by the Supreme Court is so low that as a practical matter this procedural quirk does not significantly increase the likelihood that a defendant will be subject to law created at the Court of Appeals level. Second, procedural innovations could ameliorate the problem further. Government entities concerned with the potential liability of their employees could be allowed to intervene and even seek declaratory relief, which would allow them to appeal an adverse ruling on the constitutional merits. Along the same lines, Justice Scalia has proposed that defendants who prevail on immunity but lose on the constitutional merits be allowed to seek review in the Supreme Court.[81] Such review is likely to be financed by government entities since individual defendants have little incentive to seek review after they have prevailed on immunity grounds.

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[80] See *Thomas v Roberts*, 323 F3d 950, 954 (11th Cir 2003) (only decisions by US Supreme Court, state supreme court and Court of Appeals for the Eleventh Circuit can create clearly established rights in the Eleventh Circuit); Ted Sampsell-Jones, *Reviving Saucier: Prospective Interpretations of Criminal Laws*, 14 Geo Mason U L Rev 725, 752 (2007) ("In general, when adjudicating the existence of 'clearly established law,' courts look only to published in-circuit precedent.") But see *Ohio Civil Service Employees Assn v Seiter*, 858 F2d 1171, 1177 (6th Cir 1988) (suggesting that District Court can create binding precedent for itself).

[81] *Bunting v Mellen*, 541 US 1019, 1023-24 (2004) (Scalia dissenting from denial of certiorari). Justice Scalia noted that in two prior cases the Court had "entertained . . . appeals on collateral issues by parties who won below." Id at 1024. Justice Scalia cites two examples of such of appeals, only one of which is really analogous to allowing an immune defendant to appeal an unfavorable ruling on the constitutional merits. In the first example, *Deposit Guaranty Nat Bank v Roper*, 445 US 326 (1980), the Court allowed plaintiffs to appeal the denial of class certification even after they had received complete relief on the merits of their claims because class certification might allow them to shift litigation costs to other members of the class. Justice Scalia is correct that the class certification issue is collateral to the merits of the case, but the plaintiffs in Roper had a concrete interest in pursuing class certification, similar to the interest a victorious civil rights plaintiff has in appealing the denial of attorneys' fees. In the second example, *Electrical Fittings Corp v Thomas & Betts Co*, 307 US 241 (1939), the Court allowed a victorious defendant to appeal a decision on the validity of a patent. The defendant was sued for patent infringement and the Court held that although the patent was valid, the defendant had not infringed it. The defendant appealed, hoping to establish the invalidity of the patent. The Court of Appeals dismissed the appeal on the ground that that the defendant had been victorious in the trial court. The Supreme Court reversed, holding that the interest in amending the decree was sufficient to allow the defendant to seek review. This is very similar to the interest defendants in immunity cases have in attacking an unfavorable decision on the constitutional merits, except that the government employers of the immune individual defendants in constitutional tort cases might be the real parties in interest. Perhaps the best solution to the problem of unappealable unfavorable decisions on the merits would be to allow government entities to intervene to litigate the merits. It would have to be made clear that by intervening, the government entity is not subjecting itself to damages awards as a non-immune defendant.

In recognition of these and additional problems with the *Saucier* procedure, the lower federal courts identified several situations in which they would not reach the constitutional merits when the case could be resolved in favor of the defendant on immunity. Many of these were presented as exceptions to *Saucier*'s requirement that the court reach the constitutional merits before addressing qualified immunity. These included cases in which the federal constitutional issue depended in some way on an uncertain issue of state law,[82] cases in which the constitutional issue depended on unsettled factual questions,[83] cases in which the constitutional issue is about to be decided in a setting in which its resolution does not violate the rule of constitutional avoidance, [84] and more generally cases that for some reason or other would be of little precedential value[85] perhaps because the issue was about to be decided by a higher court.[86]

These lower court decisions appeared, at the time, contrary to the Court's views on the *Saucier* procedure. The Court had made it clear that the normal procedure in immunity cases was to decide the constitutional merits before determining whether any right violated was clearly established at the time of the violation.[87] The Court went so far as to characterize the determination of whether a right actually existed as a "necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff [was] 'clearly established' at the time the defendant acted[.]"[88]

Even in the period before *Saucier* explicitly made the procedure mandatory, the Court had come down strongly in favor of clarity in the law governing potential damages actions against government officials, and was apparently unconcerned with the costs of deciding "difficult" issues of constitutional law. In one pre-*Saucier* case, the Court rejected an argument from Justice Stevens that it should not reach the constitutional merits because the issue was "both difficult and unresolved."[89] The Court replied with the standard reason for reaching the merits, namely that officials need guidance, and given the uncertainty over whether an issue will actually arise in a context in which immunity is not available, the better course is to decide the constitutional merits when they are presented in a damages action to which immunity might apply.[90]

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[82] See *Ehrlich v Town of Glastonbury*, 348 F3d 48, 58 (2d Cir 2003); *Hatfield-Bermudez v Aldanondo-Rivera*, 496 F3d 51, 60 & n6 (1st Cir 2007).
[83] *Dirrane v Brookline Police Dept*, 315 F3d 65, 69 (1st Cir 2002).
[84] *Koch v Town of Brattleboro*, 287 F3d 162,166 (2d Cir 2002).
[85] *Egolf v Witmer*, 526 F3d 104, 113 (2008) (Smith concurring).
[86] *Motley v Parks*, 432 F3d 1072, 1078 (2005).
[87] See, for example, *Siegert v Gilley*, 500 US 226 (1991); *County of Sacramento v Lewis*, 523 US 833 (1998).
[88] Siegert, 500 US at 232.
[89] See *County of Sacramento v Lewis*, 523 US at 859 (Stevens concurring in the judgment). Justice Breyer expressed agreement with Justice's Stevens's position in the case, but he also concurred in the majority opinion which reached the constitutional merits. See id at 858-60 (Breyer concurring). Justice Stevens argued that the Court should reach the constitutional question in immunity cases only "when the answer to the constitutional question is clear." Id. The argument ignores the value of clarifying the law in order to prevent future use of the immunity defense.
[90] See *Lewis*, 523 US at 842 n.5:

Lower courts certainly were made to understand that the Supreme Court wanted them to decide the constitutional issues. Perhaps the failure to do so was very unlikely to be reviewed by a higher court, but at least in the pre-*Saucier* period, the lower courts would have felt an obligation to reach the constitutional issue or have a good explanation for not doing so.

Fourth Amendment claims present an intriguing case as to whether they are especially suited for resolution under *Saucier* or especially ill-suited for such resolution. It has been argued both ways. In favor of deciding Fourth Amendment issues in immunities cases is that "*Saucier* usefully encourages development of Fourth Amendment law away from the exclusionary rule's thumb on the scales,"[91] and that deciding Fourth Amendment questions outside of the exclusionary rule context prevents confusion over two distinct objective reasonabless inquiries present in immunities law and Fourth Amendment exclusionary rule doctrine.[92] The first argument depends on the notion that courts are less likely to find a Fourth Amendment violation when such a finding would entail suppression of evidence. This assertion is unproven, but perhaps courts are most likely to find a Fourth Amendment violation when it has no remedial consequence, i.e. when there is no damages award due to immunity and no exclusion of evidence consequent on the finding. Note also that this argument depends on a view favoring expansion of Fourth Amendment rights.

> [I]f the policy of avoidance were always followed in favor of ruling on qualified immunity whenever there was no clearly settled constitutional rule of primary conduct, standards of official conduct would tend to remain uncertain, to the detriment both of officials and individuals. An immunity determination, with nothing more, provides no clear standard, constitutional or nonconstitutional. In practical terms, escape from uncertainty would require the issue to arise in a suit to enjoin future conduct, in an action against a municipality, or in litigating a suppression motion in a criminal proceeding; in none of these instances would qualified immunity be available to block a determination of law. . . . But these avenues would not necessarily be open, and therefore the better approach is to determine the right before determining whether it was previously established with clarity.

[91] Brief of Respondent at 56, *Pearson v Callahan*, 129 S Ct 808 (2009). It has been argued generally that immunizing defendants increases the likelihood of more generous constitutional rights because courts can create the rights without punishing a sympathetic government official defendant. John M.M. Graebe, *Mirabile Dictum!: The Case for "Unnecessary" Constitutional Rulings in Civil Rights Damages Actions*, 74 Notre Dame L Rev 403, 432 (1999); John C. Jeffries, *The Right-Remedy Gap in Constitutional Law*, 109 Yale L J 87, 90 (1999). It should be noted, however, that the empirical studies discussed above appear to refute this. At least in the *Saucier* context, when instructed to decide constitutional questions in immunities cases, the likelihood of rulings against the existence of constitutional rights seems to increase even when all defendants are immune.

[92] Brief for the United States as Amicus Curiae Supporting Petitioners at 26-27, *Pearson*, 129 S Ct 808. The second argument depends on potential confusion between the Harlow standard for qualified immunity and the Leon standard for good faith violations of the Fourth Amendment. See *United States v Leon*, 468 US 897 (1984) (establishing good faith exception to the exclusionary rule). This seems to me to be a weak argument given that the Harlow standard for qualified immunity is the objective standard of clearly established law while the Leon standard looks at subjective good faith in terms of a lack of intent to violate Fourth Amendment rights.

The argument against deciding Fourth Amendment claims on the merits before determining whether the rights allegedly violated are clearly established is that Fourth Amendment standards are likely to be clarified in criminal cases in which the defendant makes a motion to suppress evidence. Given that the normative basis of the *Saucier* procedure is to prevent stagnation in constitutional law due to repeated immunity findings, there is no reason to violate constitutional avoidance principles in Fourth Amendment cases when the issues are likely to be litigated elsewhere. This is a strong argument, but it overlooks the fact, as discussed below, that Fourth Amendment controversies such as the consent-once-removed doctrine that was at issue in *Pearson* can linger for decades with no definitive resolution. This issue may be subject to clarification in a criminal case, but for some reason it has not occurred.

II. *Pearson v. Callahan*

A. The Merits: Fourth Amendment and Qualified Immunity

Pearson v. Callahan presented a relatively routine §1983 case against police officers who conducted a warrantless search of Callahan's home. Callahan sold methamphetamines to an informant (not a police officer) that Callahan had allowed into his home voluntarily. After the sale was completed, the informant signaled police, who entered the home and conducted the search. Callahan was convicted of the sale of methamphetamines in a Utah state trial court after the court rejected Callahan's argument that the warrantless search violated the Fourth Amendment. The Utah Court of Appeals disagreed with the trial court, rejecting arguments based on exigent circumstances and inevitable discovery as bases for admitting the evidence obtained in the search.[93] It is unclear whether the prosecution argued in state court that Callahan, by inviting the informant into his home, had consented to the search by police. Whether or not this ground was argued, the state courts did not rule on it.

After the Utah appeals court vacated Callahan's conviction, Callahan sued the officers and entities involved for damages in federal court under §1983. The District Court found that the search was illegal, but granted the officers summary judgment on qualified immunity grounds, concluding that the officers could have reasonably believed that the "consent-once-removed" doctrine validated the search.[94] The consent-once-removed doctrine holds that a person who invites an undercover officer or informant into their home thereby consents to a police search of the premises.[95] This doctrine had been

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[93] *State v Callahan*, 93 P3d 103 (Ut Ct App 2004).

[94] The District Court rejected the argument that principles of issue preclusion applied to preclude the officers from relitigating the validity of the search since the officers were not parties to the prosecution. See *Callahan v Millard County*, 2006 WL 1409130 *5-6 (D Utah 2006). See generally Joshua M. D. Segal, Note, *Rebalancing Fairness and Efficiency: The Offensive Use of Collateral Estoppel in § 1983 Actions*, 89 BU L Rev 1305 (2009).

[95] Several Circuits had accepted the consent-once-removed doctrine and, at the time of Callahan's arrest, apparently none had rejected it. See *Callahan v Millard County*, 2006 WL 1409130 *7-8 (D Utah 2006) (citing *United States v Pollard*, 215 F3d 643, 648 (6th Cir 2000); *United States v Bramble*, 103 F3d 1475 (9th Cir1996); *United States v Akinsanya*, 53 F3d 852 (7th Cir1995); *United States v Diaz*, 814 F2d 454 (7th Cir1987) and *United States v Paul*, 808 F2d 645 (7th Cir1986)). The Tenth Circuit, in the Callahan

accepted by several Courts of Appeals but not by the Supreme Court, and the closest Supreme Court authority seems to go against it.[96] The Tenth Circuit agreed with the District Court that the "consent-once-removed" doctrine was inconsistent with Fourth Amendment principles, but disagreed with the trial court's view on immunity, holding that the law was clearly established at the time the office violated Callahan's Fourth Amendment rights:

> Here, the Supreme Court and the Tenth Circuit have clearly established that to allow police entry into a home, the only two exceptions to the warrant requirement are consent and exigent circumstances. The creation of an additional exception by another circuit would not make the right defined by our holdings any less clear. Moreover, at the time of these events only the Seventh Circuit had applied the "consent-once-removed" doctrine to a civilian informant. See United States v. Paul, 808 F.2d 645, 648 (7th Cir.1986). The precedent of one circuit cannot rebut that the "clearly established weight of authority" is as the Tenth Circuit and the Supreme Court have addressed it.[97]

The Supreme Court granted the officers' petition for certiorari and asked the parties to brief the additional question of whether the Court should retain the mandatory *Saucier* procedure. In its decision on the merits, the Court rejected the Tenth Circuit's immunity analysis and held that the officers in this case could have reasonably believed that the consent-once-removed doctrine validated the search:

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case, rejected application of the doctrine to an informant, holding that inviting a non-police officer informant into the home does not constitute consent to a police search. *Callahan v Millard County*, 494 F3d 891 (10th Cir 2007). This distinction seems consistent with the Supreme Court's decision in *Georgia v Randolph*, 547 US 103 (2006), which held that when two occupants of a residence are present, with one objecting to a search and one consenting, the consent of one occupant is insufficient to render a warrantless search consistent with the Fourth Amendment's warrant requirement. In *Randolph*, the Court explained its decision with language that seems inconsistent with allowing an informant's presence to constitute consent to a search by the occupant of a home: "This case invites a straightforward application of the rule that a physically present inhabitant's express refusal of consent to a police search is dispositive as to him, regardless of the consent of the fellow occupant." *Randolph*, 547 US at 122-23. A Court could approve the consent-once-removed doctrine and distinguish Randolph on the basis that the informant is an agent of the police, and thus the occupant consented to an entry by police when the informant was allowed into the home. In my view, this is a weak argument, but it is not beyond the realm of possibility.

[96] The District Court opined that the Supreme Court would ultimately reject the consent-once-removed doctrine, finding it to be in tension with *Georgia v Randolph*, 547 U. S. 103 (2006). See *Callahan v Millard County*, 2006 WL 1409130 *7-8 (D. Utah 2006). The District Court predicted that "if confronted with a case squarely presenting the 'consent-once-removed' doctrine, the Supreme Court might well conclude that the objections of an occupant might trump the further warrantless police entry that occurs from an undercover operative or confidential informant originally receiving consent to enter from that occupant." Id. The Court concluded, however, that with multiple Courts of Appeals adopting the doctrine, the officers were entitled to qualified immunity. The Court of Appeals rejected this reasoning, concluding that the decisions of other circuits could not trump the Tenth Circuit's clearly established rule against non-consensual warrantless searches. *Callahan v Millard County*, 494 F3d 891, 899 (10th Cir 2007). However, given changes in membership on the Court since Randolph was decided, it is conceivable that the Court would distinguish that case and approve consent-once-removed.

[97] *Callahan v Millard County*, 494 F3d 891, 899 (10th Cir 2007).

> When the entry at issue here occurred in 2002, the "consent-once-removed" doctrine had gained acceptance in the lower courts. This doctrine had been considered by three Federal Courts of Appeals and two State Supreme Courts starting in the early 1980's. See, *e.g.*, United States v. Diaz, 814 F.2d 454, 459 (7th Cir.), cert. denied, 484 U. S. 857 (1987); United States v. Bramble, 103 F.3d 1475 (9th Cir. 1996); United States v. Pollard, 215 F.3d 643, 648– 649 (6th Cir.), cert. denied, 531 U. S. 999 (2000); State v. Henry, 133 N. J. 104, 627 A. 2d 125 (1993); State v. Johnston, 184 Wis. 2d 794, 518 N. W. 2d 759 (1994). It had been accepted by every one of those courts. Moreover, the Seventh Circuit had approved the doctrine's application to cases involving consensual entries by private citizens acting as confidential informants. See United States v. Paul, 808 F.2d 645, 648 (7th Cir. 1986).[98]

The Supreme Court's rejection of the Tenth Circuit's immunity analysis typifies the Court's solicitude for government officials sued for damages in constitutional tort cases. The Supreme Court has required a relatively high degree of specificity to find the law clearly established enough to overcome the qualified immunity defense. As Justice Scalia has explained, "the operation of [the qualified immunity] standard depends substantially upon the level of generality at which the relevant 'legal rule' is to be identified. . . . It should not be surprising . . . that our cases establish that the right the official is alleged to have violated must have been 'clearly established' in a more particularized . . . sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." [99]

In light of this understanding of the degree of specificity necessary to find the law sufficiently clear to overcome qualified immunity, the Tenth Circuit's reliance on more general principles of Fourth Amendment law was insufficient to overcome the uncertainty over whether the consent-once-removed doctrine validated the search in *Pearson*. Given that more than one circuit had accepted the consent-once-removed doctrine and the Tenth Circuit had not specifically rejected it, the Supreme Court's qualified immunities jurisprudence pointed strongly toward immunity in *Pearson*.

B. The *Saucier* Procedure in *Pearson*.

Justice Alito's opinion in *Pearson* recognized that the *Saucier* procedure sometimes entails minimal costs and provides significant benefits, but he clearly was not enthusiastic about it. He noted that in some cases, deciding whether a right is clearly established involves analyzing whether the right exists at all, making a decision on the constitutional merits relatively costless. He also recognized that "the two-step procedure promotes the development of constitutional precedent and is especially valuable with respect to questions that do not frequently arise in cases in which a qualified immunity defense is unavailable."[100] In sum, Justice Alito's opinion recognized two relatively small categories of cases in which following the *Saucier* procedure might be desirable, namely

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[98] *Pearson*, 129 S Ct at 822-23.
[99] *Anderson v Creighton*, 483 US 635, 639-40 (1987).
[100] *Pearson*, 129 S Ct at 818.

when deciding the immunity question requires opining on the constitutional issue itself and when the constitutional issue is unlikely to arise in a context in which immunity is not available.[101]

The opinion contains a much more extensive catalog of problems with the *Saucier* procedure, including (1) expenditure of scarce judicial resources on deciding difficult constitutional questions unnecessarily, (2) expenditure of parties' resources litigating issues that do not affect the outcome of the case,[102] (3) production of fact-bound constitutional decisions that are not useful as precedent, (4) constitutional decisions by lower courts that are likely to be displaced by a decision of a higher court, (5) difficulty deciding constitutional questions on the pleadings when the true facts have not been developed, (6) doubts about the precedential value of constitutional decisions involving uncertain state law issues, (7) difficulty deciding constitutional issues when they have not been fully briefed by one of the parties,[103] (8) difficulty in obtaining appellate review when a defendant loses on the constitutional merits but prevails on an immunity defense, and most fundamentally, (9) violation of the "general rule of constitutional avoidance" which counsels strongly against deciding constitutional issues unnecessarily. Like Justice Breyer's earlier critique of the *Saucier* procedure, many of the problems with the procedure identified by Justice Alito apply to every case in which the procedure might be applied.[104]

The most noteworthy aspect of Justice Alito's opinion in *Pearson* is the absence of an explanation for not reaching the merits in that case before finding that the defendants were entitled to qualified immunity. The opinion leapt directly from the catalog of costs and benefits of the *Saucier* procedure to an analysis of whether the law was clearly established. Although the Court's catalog of the benefits and costs of the *Saucier* procedure may contain hints concerning the types of cases in which the merits should or should not be reached, there is no explicit discussion of the issue. The opinion simply does not mention the issue. It contains no standard for lower courts (or the Court itself) to apply in deciding whether to reach the merits in any particular case. The Court did not even state which if any of the stated costs of the *Saucier* procedure were present in *Pearson*. In short, the determination whether to reach the merits before deciding the

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[101] There are several contexts in which the immunity defense is not available including claims for injunctive relief, claims against local (not state) governments and claims that arise in criminal proceedings such as the Fourth Amendment claim in *Pearson*.

[102] This affects only defendants since plaintiffs must litigate both the merits and whether any rights are clearly established. Only the defendant can prevail without addressing the constitutional merits.

[103] Again, this is because the defendant may lack the incentive to fully address constitutional issues when it is apparent that any right alleged is not clearly established. This line of argument rests on the premise that the defendant is confident that the rights are not clearly established so that the plaintiff is irrationally litigating a hopeless case. This may be true in cases involving pro se plaintiffs, most notably prisoners, who are thought to litigate frivolous claims. However, as discussed above in text, defendants may have an overriding concern over the development of the law that would lead them to argue the merits even in cases in which they are likely to prevail on qualified immunity grounds.

[104] Specifically, it can be argued that deciding the constitutional merits in a case in which the defendant's immunity defense prevails is often or always problematic for the reasons numbered 1, 2, 4, 5, 7, 8 & 9. Thus, Justice Alito's critique is less of a criticism of mandatory *Saucier* than a critique of ever deciding the merits without first rejecting the immunity defense.

immunity defense appears to be completely discretionary, up to the standardless and unreviewable discretion of the deciding court.

In *Pearson*, we are not even told, as we once were,[105] whether deciding the constitutional merits is the preferred decisionmaking procedure, or is simply allowed, as the Court had stated in the early days following the elimination of the subjective prong of the qualified immunity defense. Based on *Pearson's* extensive catalog of the costs of the *Saucier* procedure and the rather tepid statement of its benefits, there does not appear any longer to be great enthusiasm for the procedure on the Court. But we cannot be sure without a standard or catalog of factors that lower courts are supposed to consider to determine whether to reach the constitutional merits in any particular case.

There were good reasons to reach the merits in *Pearson*: The consent-once-removed doctrine had been used by the lower courts for more than twenty years with no definitive Supreme Court decision, thus leaving an important issue of Fourth Amendment law unclear. Conflict persists among the courts over whether consent to admit an informant entails consent to admit the police. The issue is relatively uncomplicated and had been fully briefed by both parties. It is difficult to understand why the Court found it better to leave the issue unsettled when it was fully briefed and argued in *Pearson*.

Deciding the issue in *Pearson* would have provided guidance to courts and to numerous police departments across the country. The continued lack of clear law affects both civil rights plaintiffs who cannot overcome qualified immunity and police departments who do not know whether an apparently effective law enforcement technique is constitutional. A risk averse police department, fearing exclusion of evidence, may choose to not employ the technique until the Supreme Court rules on it. Although the legality of searches is subject to litigation in a motion to suppress evidence, and thus at some point is likely to be settled in the that context,[106] the fact that it has not definitively been determined after more than twenty years raises questions concerning whether that is a good basis for deciding not to reach the merits.

Deciding the constitutional merits in *Pearson* would have incurred only one of the costs Justice Alito listed, violation of the general rule of constitutional avoidance. Given the decline in the Supreme Court's caseload, the resources necessary for it to decide the issue are not particularly scarce. The parties had fully briefed and argued the constitutional merits, the issue was not fact-bound (any determination would apply to many if not all instances of alleged consent by inviting a (non-police officer) informant into the home), there was no higher court that could displace the Supreme Court's decision, the facts were fully litigated, there were no uncertain state law issues and there is no appellate

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[105] See *Siegert v Gilley*, 500 US 226 (1991); *County of Sacramento v Lewis*, 523 US 833 (1998).

[106] The legality of searches based on consent-once-removed has been litigated often in the context of motions to suppress the evidence seized as a result of an allegedly illegal search. In *Pearson*, the Tenth Circuit noted the following cases which accepted consent-once removed, involving undercover police officers or private informants. *United States v Pollard*, 215 F3d 643 (6th Cir 2000); *United States v Diaz*, 814 F2d 454 (7th Cir1987); *United States v Bramble*, 103 F3d 1475, 1478 (9th Cir1996); *United States v Paul*, 808 F2d 645 (7th Cir1986) and *United States v Yoon*, 398 F3d 802 (6th Cir 2005). See *Pearson*, 129 S Ct at 896.

review after the Supreme Court in any case. Deciding the issue would have been of significant benefit to law enforcement agencies across the country and to plaintiffs in constitutional tort cases. In short, if the costs and benefits identified by Justice Alito in *Pearson* are supposed to guide the decision of whether to reach the merits, in *Pearson* the Court should have done so. The only reason not to was the principle of constitutional avoidance. If that was the reason, then the Court should have prohibited the *Saucier* procedure altogether.

Further along these lines, in last Term's only qualified immunity decision rendered after *Pearson*, the Court reached the constitutional merits before determining that the defendants were immune without explaining why it was doing so.[107] In *Safford Unified School Dist. No. 1 v. Redding*,[108] school officials conducted a strip search of a student who was suspected of distributing ibuprofen, an over-the-counter pain reliever. The Court held that the search violated the student's Fourth Amendment rights but that the right was not clearly established, thus immunizing the school officials from damages liability. Justices Stevens,[109] Ginsburg[110] and Thomas[111] each wrote separate opinions, with Stevens and Ginsburg disagreeing with the Court's immunity determination and Thomas disagreeing with the Court's determination on the constitutional merits. No Justice questioned, or even mentioned, the decision to reach the constitutional merits.

Because the Court did not address the issue at all, it is impossible to know why the Court chose to reach the merits in *Safford* but not in *Pearson*. If anything, *Pearson* was a better case for reaching the merits than *Safford*. In both cases, the constitutional merits were fully briefed by both parties, and both cases involved tricky issues of Fourth Amendment law. But the differences outweigh these similarities. *Pearson* involved a longstanding legal issue with a clear conflict in authority and was much less fact bound than the constitutional issue in *Safford*. In *Pearson*, the Court could have settled the law on whether consent-once-removed by inviting an informant into the home was sufficient for Fourth Amendment purposes. By contrast, in cases like *Safford*, small differences in the nature of the medication and the reliability of information creating the suspicions are likely to reduce the precedential value of a decision on the merits. Even if it was sensible for the Court to reach the merits in *Safford*, there is no apparent reason for reaching the merits in that case but not in *Pearson*.

Perhaps the Court decided not to construct any governing criteria because it would be well nigh impossible to supervise lower courts in their decisions on whether to reach the constitutional merits on a particular case. Without alteration of accepted legal practices, no party can force a court to reach the merits or seek review of the decision whether to reach the constitutional merits in an immunity case. The Court is unlikely to accept a case for review to instruct the lower court to reach the merits in a case in which it agrees that the defendant is entitled to immunity even if a constitutional violation occurred. For

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[107] See *Safford Unified School Dist No. 1 v Redding*, 129 S Ct 2633 (2009).
[108] 129 S Ct 2633 (2009).
[109] Id at 2644 (Stevens, J concurring in part and dissenting in part).
[110] Id at 2645 (Ginsburg concurring in part and dissenting in part).
[111] Id at 2646 (Thomas concurring in the judgment and dissenting in part).

whatever reason, the Court in *Pearson* not only moved the law to the pre-*Saucier* situation of not mandating that the constitutional merits be determined before making the immunity determination, it has done so without providing any guidance on when the merits should be reached. In what follows, I discuss the wisdom of purely discretionary *Saucier*, concluding that the current version leaves a great deal to be desired.

C. Purely Discretionary *Saucier*

The purely discretionary *Saucier* procedure is an anomaly in the law. It is not common for judges to have complete discretion over whether to decide unsettled constitutional issues, with no stated standard governing when the judges should reach the issue, and in circumstances in which the decision will not affect the outcome of the case before the court. Perhaps only the Court's certiorari procedure (and similar procedures in state supreme courts) comes close to having this range of discretion, but even there, a set of traditional criteria guide the determination of whether the Supreme Court should review a particular case, and the Court's decision is likely to affect the outcome of the case.[112] Flexibility and discretion can be a virtue in procedural regimes, but there are reasons to be highly suspicious of purely discretionary *Saucier*. For reasons elaborated below, the purely discretionary *Saucier* procedure may represent the worst possible regime.

Writing in 2007, Michael Wells criticized Justice Breyer's then recent suggestion that the *Saucier* procedure be made discretionary.[113] Wells was concerned that judges with discretion will take the easy way and clear their dockets by not deciding difficult constitutional issues when the immunity determination is much easier, which would lead to stagnation in constitutional law. In fact, as Wells suggests, the hard constitutional cases may be the ones that need to be decided in order to provide guidance in areas of uncertainty, and yet with discretion, the harder the issue, the less likely the court will decide it. Wells suggests following Justice Scalia's lead and allowing defendants who prevail on immunity grounds to seek review of any adverse ruling on the constitutional merits. Wells disputes the argument that defendants will not devote sufficient resources to arguing constitutional merits issues. He points out that cases that are so clear on immunities are unlikely to be litigated, and thus defendants are not likely, in a substantial portion of cases, to be so confident of winning on immunity grounds that they would not fully argue the constitutional merits.[114]

Except in his first argument, Wells is responding to criticisms of *Saucier* generally, not merely discretionary *Saucier*. But there are strong arguments against discretionary *Saucier* that are distinct from arguments against the procedure in general.

The first problem with *Pearson* is that it did not relieve defendants of the burden of addressing the merits in qualified immunity cases. With no governing standard, defendants cannot safely predict whether the court will reach the merits in any particular case and thus may find it necessary to expend resources addressing the constitutional

[112] Likely but not guaranteed, given the flexibility in mootness and ripeness doctrines, for example.
[113] Wells, cited in note x at 1565 (discussing Justice Breyer's opinion in *Scott v Harris*).
[114] See Wells, cited in note x at 1558-68.

merits even when they expect to prevail on immunity grounds. If a standard for determining whether the court should reach the merits had been created, then at least defendants could make an educated determination of whether it was necessary to argue the merits in a particular case. Even worse, a defendant who would like the court to clarify the law may expend substantial resources arguing the merits and be disappointed when the court does not reach them and the defendant will not even receive an explanation from the court on why it decided not to. And future litigants on the same or similar issues will be left in the dark as to whether they should reach the merits in their cases. Even a defendant who previously prevailed on qualified immunity grounds without a ruling on the merits may not know whether in the next case it should argue the merits or argue only that any right that might be recognized is not clearly established. Purely discretionary *Saucier* may satisfy the courts' concerns, but not defendants'. In short, *Pearson* may satisfy federal judges who would rather not have to decide the merits, but the Court was apparently not concerned with the resources defendants must expend to argue the merits, perhaps unnecessarily.

Discretionary *Saucier* may, however, give power to defendants to try to influence whether a court will reach the merits. Defendants may behave strategically, pressing the constitutional merits only when they perceive a strong likelihood of prevailing, which may depend on variables such as the state of authority in a particular circuit or whether the plaintiff's case presents particularly sympathetic or unsympathetic facts.[115] This will make it even more likely than it already is that when the court decides the constitutional merits, the decision goes in favor of government interests.

If the defendant is willing to take the risk of a decision on the merits without much input, a strategic choice to not press the constitutional merits might influence the court's decision to decide them. In a difficult case with only one side presenting a comprehensive argument on the merits, a court might rationally be inclined to decide the immunities issue only, thereby saving resources and avoiding decisions that might be reconsidered with fuller briefing. The plaintiff, who always has to argue the constitutional merits, is virtually helpless to influence the court's decision to address the merits. Although defendants have an incentive to argue the merits, in case the court decides to reach them, some may take a risk that not arguing them might make the court less willing to do so.

Judges may also find that *Pearson* puts them in an unpleasant bind. While many are undoubtedly relieved that they no longer have to reach the merits when the qualified immunity determination is much simpler, judges' views on the propriety or wisdom of reaching the merits are likely to vary. Some may be committed to principles of restraint and generally disfavor reaching the merits while others may place a higher value on ensuring that the law develops despite qualified immunity. Some judges may reach out to decide constitutional issues to further a policy agenda and decline to decide the constitutional merits when the law leads in a direction contrary to their preferences.

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[115] Plaintiffs, of course, must always press the constitutional merits, because a plaintiff cannot prevail without winning on both the immunity issue and the constitutional merits. Defendants, by contrast, need prevail on only one of the two issues.

Judges committed to the avoidance canon might then feel disadvantaged because they will be on the sidelines watching their colleagues create clearly established law with which they may disagree.

By deciding whether to reach the constitutional merits at the trial stage, district judges may also be able to influence the decision at the Court of Appeals level over whether to address the merits, since the higher court may be more likely to reach the merits if the lower court has already done so. This could happen for three related reasons. First, the Court of Appeals may feel more confident in its judgment if it has the analysis of the District Court to review. Second, the Court of Appeals may find a greater need to reach the merits to clarify whether the District Court's view was correct, especially if the Court of Appeals disagrees with the trial court's conclusion. Finally, a decision on the merits at the trial level might inspire the parties to pay more attention to the constitutional merits at on appeal, thus providing fuller briefing which may make the Court of Appeals more likely to reach the merits.

Had *Pearson* created a standard for determining when to reach the merits, the disparity in behavior among judges would not be eliminated, since the standard would likely be at least somewhat discretionary, but it would be reduced. There are certainly marked disparities in how judges apply standards such as standing, mootness, ripeness, abstention and other jurisdiction limiting doctrines. On the Supreme Court, for example, we know that some justices are likely to be stricter than others in reaching the merits in the face of justiciability concerns. But each of these doctrines is governed by a set of rules and standards that cabin the exercise of judicial discretion and allow the Supreme Court to oversee their application in the lower courts. While the rules and standards may not prevent manipulation, at least they constrain it and provide the possibility of rejection by a higher court.

Although as discussed above I do not believe that reaching the merits in qualified immunity cases implicates the rule against advisory opinions, purely discretionary *Saucier* may be worse than the practice of advisory opinions in jurisdictions that allow them. In jurisdictions that allow their courts to issue advisory opinions, established limitations on the practice avoid excessive judicial action in the absence of a live controversy.[116] One common limitation is that only specified officials or bodies are allowed to submit requests for advisory opinions.[117] Other limitations restrict advisory opinions to important matters involving public rights concerning the immediate exercise of the executive or legislative function.[118] And some courts will not render an advisory opinion on a matter already in litigation.[119] Some of the limitations on rendering advisory opinions are best characterized as rules while others constitute more flexible standards. What most jurisdictions have in common is the rejection of a free for all in

[116] See Persky, cited in note x.
[117] For example, in Rhode Island the Governor and each house of the state legislature have the power to request an advisory opinion. Id at 1156. In Florida, which represents the extreme case, only the Governor can request an advisory opinion. See id at 1168, citing Florida Const. Art. 4 § 1.
[118] See id at 1185.
[119] See id at 1187.

which courts exercise unguided discretion over the decision whether to answer a particular request for an advisory opinion.[120]

Discretionary *Saucier* is worse than existing advisory opinion regimes for another reason, the fact that so many judges have been granted such extreme discretion. The *Saucier* procedure allows nearly 700 federal district judges[121] to choose, with no guidance, whether to decide the constitutional questions with. If discretionary *Saucier* were limited to the Supreme Court, or perhaps even to the Courts of Appeals, standards would likely evolve that would guide the decision of whether to reach the constitutional merits. Now, hundreds of district judges, acting alone, have unfettered discretion to choose whether to decide constitutional questions in qualified immunity cases even though these decisions are not ordinarily sufficient to provide the one benefit they are designed to provide, i.e., clearly establishing the law for future guidance and litigation.[122]

III. Less discretionary *Saucier*

It may be appropriate for courts to exercise some discretion over whether to reach the merits in qualified immunities cases, but this discretion should be exercised within established guidelines. The question then becomes what guidelines should replace mandatory *Saucier*. Assuming that the Court is not likely either to prohibit the procedure or mandate it once again, the Court, or perhaps initially each Circuit, should construct principles to guide the determination of whether to reach the constitutional merits in cases in which the defendant prevails on qualified immunity grounds.

At a minimum, in light of the strong reasons for reaching the constitutional merits, courts should be required to give reasons for not reaching the merits in qualified immunity cases. Even if no standard is created immediately to guide the decision of whether to reach the merits, a requirement that courts give reasons for not reaching the merits could foster the development, in a common law manner, of a set of practices that could ultimately crystallize into governing standards. This includes the Court of Appeals. On appeal, the parties should be able to argue to the Court of Appeals that it should reach the constitutional merits even if the District Court did not do so, and even if the Court of Appeals affirms the District Court's decision finding no clearly established rights, it should either reach the constitutional merits or state reasons for not doing so.

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[120] In three jurisdictions, Alabama, Florida and Michigan, advisory opinions are discretionary with the courts, and the courts operate under no external constraints concerning whether to answer any particular question. Even so, the courts in those jurisdiction appear to operate under self-imposed guidelines. In Florida and Alabama, the courts appear to answer every question posed, unless there is a jurisdictional problem, while in Michigan the courts have ceased issuing advisory opinions, at least for the last 20 years or so. See id at 1194-95. None of these jurisdictions picks and chooses among advisory opinion requests with no standard.

[121] For a table on the number of authorized District Judgeships, see http://www.uscourts.gov/history/tableh.pdf.

[122] See cases cited in note x (decisions of Supreme Court and Court of Appeals establish clear law for circuits).

As far as the substance of the standard that should apply, there should be a presumption in favor of deciding the merits.[123] The principles guiding the decision of whether to reach the merits should be derived from the normative bases and problems with the *Saucier* procedure. The reason for reaching the merits in qualified immunities cases is to prevent stagnation of constitutional law so that defendants can escape liability through repeated rulings that rights are not clearly established. There are numerous situations in which it is desirable to reach the constitutional merits to achieve the goal of preventing constitutional stagnation.[124] The cases in which there would be a strong argument against deciding the constitutional merits are those in which deciding the federal constitutional issue would not provide clearly established law to apply in future constitutional tort litigation.[125] In deciding whether to reach the merits, courts should also consider the value of doing so. When guidance is needed because conduct is likely to be repeated, courts should be more likely to reach the merits. Conversely, courts should be more open to not reaching the merits in situations that are unlikely to be repeated so that guidance for future conduct is not necessary.

In light of these principles, courts may decide not to reach the merits in the following types of cases: fact bound situations in which a ruling will not provide useful precedent, cases in which the constitutional decision is tied to an uncertain issue of state law with a substantial likelihood that a determination of the state law issue would render the federal constitutional ruling irrelevant, cases that present issues that will soon be decided by a higher court so that the lower court's ruling will lack precedential value, and cases in which the facts needed to identify a constitutional violation are not fully developed, so that the precedential value of the ruling is highly uncertain. In all of these situations, the precedential value of the ruling on the constitutional merits is likely to be low or nonexistent.

Notice that these cases identified as candidates for not reaching the constitutional merits are not based on the principle of constitutional avoidance. In all cases in which the defendant ultimately prevails on qualified immunity grounds, deciding the merits is in

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[123] This presumption is not a presumption in favor of expanding constitutional rights. It would work in favor of both plaintiffs and defendants who would benefit from clarity in the law, and in light of the history of rulings favorable to defendants under the *Saucier* procedure, may actually be more favorable to defendants than plaintiffs.

[124] These include cases in which guidance over permissible actions is needed, *Pearson v Ramos*, 237 F3d 881, 884 (7th Cir 2001) ("The issue on the merits is important and should be resolved without further delay."); cases in which the issue is unlikely to arise in a context other than a constitutional tort action for damages; cases in which the questions of whether the right is clearly established and whether there is a constitutional violation are bound up so that deciding both is either necessary or relatively costless; and cases that may not otherwise arise in a federal court. See also John M.M. Graebe, cited in note x, 74 Notre Dame L Rev at 407 ("[M]y primary point is that, because novel constitutional claims brought in civil rights damages actions often involve the use of new technologies and procedures by executive actors who are not constitutional experts and who therefore are not themselves well-equipped to judge the constitutionality of their conduct, the merits rulings I advocate have important notice-giving aspects that should not be overlooked.").

[125] Even though District Court decisions do not create clearly established law, they should reach the merits whenever the Court of Appeals would reach the merits, if for no other reasons than to encourage the defendant to address the merits and to frame the issues for decision by the Court of Appeals.

tension with the principle of constitutional avoidance. If the principle of constitutional avoidance were sufficient to rebut the presumption in favor of deciding the constitutional merits, there would be very few if any cases in which courts would reach the merits. Thus, the principle of avoidance alone should be insufficient to rebut the presumption in favor of deciding the constitutional merits.

The principle of constitutional avoidance does provide an argument, albeit a weak one, against deciding the constitutional merits when the constitutional issue is subject to litigation in a non-immunities context. It is not that ruling on the merits will not produce useful precedent but that the law is likely to be clarified elsewhere without violating the principle of avoidance. This argument is weak because it is usually speculative as to whether the law on any particular issue is likely to be clarified outside the constitutional tort context. Take the experience discussed above with the rule at issue in *Pearson*—we still do not know when the law concerning consent-once-removed with regard to informants and undercover officers will be clarified one way or the other. Thus, in my view, better practice would be to reject this as a basis for not reaching the merits in classes of cases that are more likely than most to be litigated in a non-immunities context. In any case, the principle avoidance should only influence the decision whether to reach the merits when the law is very likely to be clarified in another context.

Although in my view courts should only avoid the merits when the decision is likely to lack precedential value, courts may not agree, and may go beyond parameters outlined above. In such cases, if a court finds especially strong reasons to apply the principle of avoidance in a particular case and decides not to reach the merits even when its decision would have precedential value, the court should state its reasons for not reaching the merits. Even under *Saucier*, some courts declined to reach the merits in cases in which it was obvious that the rights were not clearly established, especially when the cases presented complex, difficult, unsettled issues of constitutional law. Here, in addition to the principled reasons for avoiding unnecessary constitutional decisions is the practical consideration that to reach the merits, defendants and judges would be forced to expend substantial resources to address an issue that will not affect the outcome of the case.

In my view, the fact that the issue is complex and unsettled points in favor of deciding it, to provide guidance for future conduct and create clearly established constitutional law. If, however, courts decide that this is a valid reason for not reaching the merits, at a minimum this consideration should be weighed against the value of providing guidance for future behavior and preventing repeated claims of immunity in the face of potential constitutional violations. Courts should be more likely to reach the merits in common situations and less likely to do so in rare situations that are unlikely to be repeated so that guidance on the merits is not particularly important. And in all cases in which a court decides not to reach the merits, the court should state the reasons for that determination.

A remaining question is whether courts should have the discretion to reach the constitutional merits even in those situations in which the decision is unlikely to have precedential value. For two reasons, the answer to this should be no. First, if a decision on the merits of a constitutional issue is unlikely to aid in the establishment of clear law

and if it is unnecessary to the outcome of the case at hand, there is no reason to decide it and a host of reasons not to. Second, this would reinstitute the extreme discretion that, in my view, is the primary failing of *Pearson*, presenting all of the problems with current doctrine discussed above. In sum, if the Supreme Court or a Court of Appeals creates standards for determining whether the constitutional merits should be reached, those standards should be mandatory.

IV Conclusion

The Supreme Court's elimination of the subjective element of the qualified immunity defense in constitutional tort cases had the unanticipated side effect of creating the potential for constitutional stagnation. Despite valiant attempts, the Supreme Court has not yet successfully dealt with this problem. Initially, the Court followed the lead of some lower courts and decided that in qualified immunity cases, federal courts ought to address the constitutional merits first, even if ultimately the defendant is found immune. Despite this apparent violation of the well established doctrine of constitutional avoidance, the Court even went so far as to make this procedure mandatory.

This attempted solution spawned problems of its own. Lower court judges and some Supreme Court Justices were unhappy at the prospect of addressing constitutional issues in all immunities cases, especially in those cases in which it was clear that the rights allegedly violated were not clearly established at the time of the violation. Even more so, courts were reluctant to reach the merits when the constitutional issues were difficult and complex, and when the decision on the merits was unlikely to provide much guidance in future cases, perhaps because the case was fact bound or unlikely to recur. In this Term's *Pearson v. Callahan*, the Court relented and held that federal courts are no longer required to reach the constitutional merits whenever the defendant raises a qualified immunity defense.

The *Pearson* decision is highly problematic in one aspect, namely that it stated no standard that federal courts should apply to decide whether to reach the constitutional merits in any particular case. In *Pearson* itself, the Court did not reach the merits and did not explain why. In *Safford*, a qualified immunity case decided this Term after *Pearson*, the Court did reach the merits without explaining why it was doing so.[126] The lack of a standard governing this determination is a serious failing of the *Pearson* decision. The decision whether to reach the constitutional merits in constitutional tort cases in which all defendants are immune has thus apparently been left to complete judicial discretion with no governing standard whatsoever.

While it may be appropriate for courts to exercise discretion over whether to reach the constitutional merits in qualified immunity cases, this discretion should be guided by legal standards to provide guidance to the parties and prevent strategic behavior designed to influence whether the merits are reached in a particular case. The primary factor that should guide the discretion is whether the decision on the merits is likely to have

[126] In both *Safford* and *Pearson*, the Court held that the defendants were immune, thus rendering the decision on the merits unnecessary to the outcome in both cases.

precedential value in future constitutional tort cases, i.e. whether deciding the merits will create clearly established law, either new rights or a clear denial of the existence of rights alleged. If courts find that other factors should also influence whether the merits should be reached, such as the complexity or difficulty of the constitutional issue and the simplicity of determining that no rights are yet clearly established, courts should balance those factors against the need for clarity in the law. While it may be surprising that the Court has authorized, and even for a while required, courts to decide constitutional issues when not necessary to the outcome of the particular case, it should be even more surprising that the Court has now made the determination of when to do so completely discretionary with no standard to guide the exercise of that discretion.