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# The *Saucier* Qualified Immunity Experiment: An Empirical Analysis

Nancy Leong\*

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## I. INTRODUCTION

Citizens blinded by pepper spray during a peaceful protest, fired unceremoniously from their jobs for political reasons, or denied access to the ballot box based on the color of their skin often rest their hopes for remediation on 42 U.S.C. § 1983. That statutory provision imposes liability for constitutional violations perpetrated by government actors, allowing plaintiffs to seek monetary damages and declaratory and injunctive relief from the individual officers who violated their rights.

While the Supreme Court has sanctioned § 1983 as a device for plaintiffs' recovery, it has also expressed reservations about imposing financial liability on government officers. Officers may encounter an incentive not to act for fear of § 1983 liability or may unfairly face damages

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for their inability to predict whether their actions were constitutional.<sup>1</sup> The Court has therefore developed the doctrine of qualified immunity—which imposes liability only if “it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted”<sup>2</sup>—and has created a procedural framework for its implementation. Under this framework, “the first inquiry must be whether a constitutional right would have been violated on the facts alleged; second, assuming the violation is established, the question whether the right was clearly established must be considered on a more specific level.”<sup>3</sup> The Supreme Court first indicated a preference for this ordering of the issues in *Siegert v. Gilley*, decided in 1991,<sup>4</sup> and then made that approach mandatory in *Saucier v. Katz*, decided in 2001.<sup>5</sup> But in 2009—a mere eight years after *Saucier*—the Court overruled that case in *Pearson v. Callahan*, holding that the ordering of the issues should remain discretionary rather than mandatory.<sup>6</sup>

*Pearson*'s holding has, if anything, intensified the debate over the proper procedural framework for addressing qualified immunity claims. Courts and commentators have justified the requirement that courts resolve the constitutional question first—which I will refer to as the “sequencing” approach—by asserting the need to clarify constitutional law.<sup>7</sup> If courts repeatedly hold that a particular right is not clearly established, without ever defining the contours of that right, then government actors may be able to repeatedly engage in unconstitutional conduct without ever incurring liability for their actions. Sequencing, the argument goes, is therefore necessary for two reasons. First, it clarifies the law so that police officers may avoid future violations if their conduct is held unconstitutional. And second, it ensures that, in the future, a similarly-wronged plaintiff would be able to recover if she had, in fact, suffered a violation of her constitutional rights. Although authorities have suggested that the law may be clarified via

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1. This concern for officers' willingness to act and financial security is somewhat misplaced given that the vast majority of jurisdictions have statutory indemnification provisions or offer indemnification to employees by policy or collective bargaining agreement. See, e.g., Lawrence Rosenthal, *A Theory of Governmental Damages Liability: Torts, Constitutional Torts, and Takings*, 9 U. PA. J. CONST. L. 797, 819 & n.89 (2007) (collecting commentary). Of course, such indemnification merely shifts our concern for overdeterrence onto the government employer, which may consequently train its employees to act with caution given its own potential financial liability. See *id.* at 856–57.

2. *Saucier v. Katz*, 533 U.S. 194, 202 (2001).

3. *Id.* at 200.

4. 500 U.S. 226 (1991).

5. 533 U.S. at 202.

6. 129 S. Ct. 808, 813 (2009).

7. See *infra* text accompanying notes 79–81.

other mechanisms—suits for injunctive or declaratory relief, for example—many areas of the law are not susceptible to such suits.<sup>8</sup>

The sequencing approach, however, has met with its share of criticism. Sequencing requires courts to resolve difficult constitutional questions in situations where, previously, they might simply have granted qualified immunity on the ground that the relevant law was not clearly established. From an efficiency standpoint, therefore, sequencing is costly, requiring courts to allocate time and resources to deciding complex constitutional questions. Moreover, sequencing risks premature and poorly reasoned adjudication of these complex questions, particularly because the Supreme Court has indicated that the qualified immunity issue should be resolved as early in litigation as possible. Sequencing also creates a procedural conundrum: where a government official receives an unfavorable constitutional ruling but is granted qualified immunity, sequencing insulates that unfavorable constitutional decision from appellate review because the government is, technically, a prevailing party. Finally, as a jurisprudential matter, sequencing contravenes the well-established and oft-quoted norm favoring avoidance of unnecessary adjudication of constitutional questions. Before *Pearson*, four sitting Justices explicitly questioned the wisdom of sequencing on all these grounds, most vigorously Justice Breyer, who, in 2007, announced that if it were his choice he “would end the failed *Saucier* experiment now.”<sup>9</sup>

No one, however, has yet addressed the empirical underpinnings of the sequencing debate.<sup>10</sup> Does sequencing in fact result in the clarification of the scope of constitutional rights, as its proponents claim? And if so, has

8. For example, a plaintiff may lack standing to seek injunctive relief because he is unable to show a reasonable probability of future injury. In *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983), the Court held that an individual who was subjected to a choke hold during a traffic stop could not sue for injunctive relief because he was unable to show that he would be choke held in the future. Indeed, this problem permeates the Fourth Amendment excessive force context, where plaintiffs injured in a particular situation are generally unable to show that a similar situation would arise in the future. See Pamela S. Karlan, *The Paradoxical Structure of Constitutional Litigation*, 75 *FORDHAM L. REV.* 1913, 1917 (2007).

9. *Morse v. Frederick*, 127 S. Ct. 2618, 2642 (2007) (Breyer, J., concurring); see *infra* text accompanying notes 40–78 for a discussion of other Justices’ criticisms of *Saucier*.

10. See Rosenthal, *supra* note 1, at 859 n.241 (“I am unaware of any empirical evidence that the doctrine of qualified immunity has operated to inhibit the development of constitutional law.”). While Professor Healy has compiled and categorized cases decided during the two years following *Saucier*, his work examines only a single time frame and, therefore, cannot capture *Saucier*’s effect on the course of constitutional decision making. See Thomas Healy, *The Rise of Unnecessary Constitutional Rulings*, 83 *N.C. L. REV.* 847, 930, app. (2005); see also *infra* notes 101–106 and accompanying text (discussing in detail Healy’s work and its limitations).

such clarification resulted in the acknowledgement or denial of constitutional rights? My paper therefore provides an empirical analysis of the consequences of sequencing. Through the research presented here, I sought to determine the results of the forced adjudication of constitutional questions.

My methodology was straightforward. I examined a random sample of federal district courts cases in which a qualified immunity defense was raised during three time intervals: (1) the two years before *Siegert*, before the Court had indicated any preference for sequencing; (2) the two years before *Saucier*, before the Court had made clear that sequencing was mandatory; and (3) the calendar years 2006 and 2007. I then did the same for federal appellate cases within the same three time intervals.

My research yielded both expected and unexpected results. In the two years before *Siegert*, courts avoided the constitutional question in over a quarter of the cases in which the government officer raised a qualified immunity defense. Unsurprisingly, given the Supreme Court's increasing insistence on the sequencing approach, the likelihood of avoidance decreased by half for cases decided in the two years before *Saucier*, and fell below 5% in 2006 and 2007. We might expect this decrease in avoidance to correspond to a relatively similar increase in the percentage of constitutional questions decided for plaintiffs and for defendants—after all, the previously-avoided constitutional questions are likely to be the difficult cases, where courts preferred simply to grant immunity rather than grapple with the constitutional issue. Surprisingly, this was not the case. The marked decline in avoidance did not correspond to any statistically significant increase in the recognition of new constitutional rights. Rather, the decline in avoidance was accompanied only by a sharp increase in the percentage of cases in which courts explicitly held that no constitutional violation had occurred.

My research therefore counters the argument that mandatory sequencing is critical to remediating civil rights violations because it promotes the articulation of new constitutional rights. To the contrary, my research shows that mandatory sequencing does not correspond to any increase in the rate at which courts find for plaintiffs in the qualified immunity context. Sequencing leads to the articulation of more constitutional law, but not the expansion of constitutional rights.

After explaining my research methodology and describing my findings in detail, this article explores possible explanations for this phenomenon. I contend that, given the longstanding norm within our legal system that where there is a right, there must be a remedy, judges are deeply uncomfortable with the notion of acknowledging a violation yet denying relief. Cognitive psychology research supports this notion: judges are reluctant to acknowledge a constitutional violation where they subsequently intend to grant qualified immunity because such a result induces a state of

psychological discomfort known as cognitive dissonance. In an effort to avoid such dissonance, therefore, judges may—entirely unintentionally—allow their beliefs about whether a government officer is entitled to qualified immunity to influence their analysis of whether a constitutional violation occurred at all. I then explore the long-term consequences for the development of the law resulting from a mandatory sequencing approach.

As I was in the process of conducting the research presented in this article, the Supreme Court granted certiorari in *Pearson v. Callahan*, and sua sponte requested that the parties brief whether *Saucier* should be overruled.<sup>11</sup> After briefing and oral argument, a unanimous Court then held that overruling was appropriate.<sup>12</sup> The empirical research I present supports the Court's decision to overturn *Saucier*'s mandatory sequencing regime, but I believe that the judiciary would have been better served by a decision providing more specific guidance to lower courts regarding when sequencing is and is not appropriate. I will therefore also briefly describe an approach that lower courts might adopt to determine whether they should exercise their discretion to rule on the merits of a constitutional issue.

## II. A BRIEF HISTORY OF QUALIFIED IMMUNITY DOCTRINE

With 42 U.S.C. § 1983, enacted in 1871 as part of the Ku Klux Klan Act,<sup>13</sup> Congress created a civil damages remedy against any person acting under color of state law who causes “the deprivation of any rights, privileges, or immunities secured by the Constitution.” A plaintiff who demonstrates the deprivation of such a constitutional or statutory right, however, may not be entitled to recovery if a defendant government official proves himself eligible for qualified immunity, a judge-created doctrine that excuses public officials from liability for illegal behavior if a reasonable official would not have known that the behavior in question violated clearly established law. As the Supreme Court explained in *Pierson v. Ray*, its first enunciation of the qualified immunity doctrine, “a police officer is not charged with predicting the future course of constitutional law.”<sup>14</sup> Therefore, with respect to the police officers sued for falsely arresting civil rights demonstrators in *Pierson*, “if the jury found that the officers reasonably believed in good faith that the arrest was constitutional, then a

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11. 128 S. Ct. 1702 (2008).

12. *Pearson v. Callahan*, 129 S. Ct. 808 (2009).

13. Ku Klux Klan Act, ch. 22, § 1, 17 Stat. 13 (1871).

14. 386 U.S. 547, 557 (1967).

verdict for the officers would follow even though the arrest was in fact unconstitutional.”<sup>15</sup>

Subsequently, the Court cited efficiency concerns in dispensing with the subjective “good faith” component of the qualified immunity analysis. *Harlow v. Fitzgerald* explained that subjective good faith is a factual matter best suited for jury resolution and, as such, “frequently has proved incompatible with our admonition . . . that insubstantial claims should not proceed to trial.”<sup>16</sup> The standard for qualified immunity, therefore, became purely objective: “[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”<sup>17</sup>

For several years following *Harlow*, the Court remained noncommittal about the structure of the immunity analysis.<sup>18</sup> It first introduced the notion of the qualified immunity inquiry as bipartite and sequential in *Siegert v. Gilley*, in which a clinical psychologist brought a due process claim against his former supervisor at a federal government hospital for giving him a poor recommendation that ultimately resulted in a denial of the credential necessary to work at a military hospital.<sup>19</sup> The D.C. Circuit had assumed, without deciding, that the plaintiff had made out a constitutional violation, but had granted qualified immunity to the defendant on the ground that the law was not clearly established.<sup>20</sup> The Court stated that it had “granted certiorari in order to clarify the analytical structure under which a claim of qualified immunity should be addressed,” holding that “petitioner’s claim failed at an analytically earlier stage of the inquiry into qualified immunity: His allegations, even if accepted as true, did not state a claim for violation of any rights secured to him under the United States Constitution.”<sup>21</sup> The Court’s rationale offered little insight into this holding. Justice Rehnquist’s opinion described the determination of whether the right exists as a “necessary concomitant” to the question of whether that right is clearly

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15. *Id.*

16. 457 U.S. 800, 815–16 (1982).

17. *Id.* at 818.

18. See *Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985) (noting that appellate courts addressing interlocutory appeals of qualified immunity rulings “need not . . . determine whether the plaintiff’s allegations actually state a claim” but rather need determine only “whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions”); *United States v. Leon*, 468 U.S. 897, 924–25 (1984) (emphasizing that “courts have considerable discretion in conforming their decisionmaking processes to the exigencies of particular cases”); see also John M.M. Greabe, *Mirabile Dictum!: The Case for “Unnecessary” Constitutional Rulings in Civil Rights Damages Actions*, 74 NOTRE DAME L. REV. 403, 415 n.59 (1999) (collecting cases).

19. 500 U.S. 226, 228–29 (1991).

20. *Id.* at 230–31.

21. *Id.* at 227, 231 (citation omitted).

established, and held that “[d]ecision of this purely legal question permits courts expeditiously to weed out suits which fail the test without requiring a defendant who rightly claims qualified immunity to engage in expensive and time consuming preparation to defend the suit on its merits.”<sup>22</sup> But whether the law is clearly established is a different question from whether the law was violated: the latter asks what the law is, while the former merely asks whether a reasonable officer would have had notice of the state of the law.<sup>23</sup> Moreover, an initial determination of whether a violation took place does nothing to “weed out” suits in which the plaintiff will lose; indeed, given that the question of whether a violation took place may depend on disputed factual issues requiring jury resolution, thus delaying, rather than expediting, a grant of qualified immunity.

Following *Siegert*, the Court alluded to the notion of sequencing but did not elucidate the approach described in that case. Writing for the Court, Justice Souter explained in 1998 in *County of Sacramento v. Lewis*:

[A]s we have held, the better approach to resolving cases in which the defense of qualified immunity is raised is to determine first whether the plaintiff has alleged a deprivation of a constitutional right at all. Normally, it is only then that a court should ask whether the right allegedly implicated was clearly established at the time of the events in question.<sup>24</sup>

Justice Souter’s description of the doctrine is carefully couched in non-absolute terms: The sequencing approach is the “better approach,” and should be followed “normally,” but is not mandatory. And his justification for sequencing is party-neutral: “[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.”<sup>25</sup> In short, Justice Souter reasoned that sequencing is necessary to benefit defendant government officers and plaintiff citizens alike.

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22. *Id.* at 232.

23. See, e.g., Pierre N. Leval, *Judging Under the Constitution: Dicta about Dicta*, 81 N.Y.U. L. REV. 1249, 1278 n.86 (2006).

24. 523 U.S. 833, 841 n.5 (1998).

25. *Id.*



Writing for the Court the following term in *Wilson v. Layne*, Justice Rehnquist reiterated, without explanation, his claim that deciding the constitutional question before the question of whether the law was clearly established facilitates early resolution of the qualified immunity issue.<sup>26</sup> But like Justice Souter, he also emphasized the value of articulating legal standards: “Deciding the constitutional question before addressing the qualified immunity question also promotes clarity in the legal standards for official conduct, to the benefit of both the officers and the general public.”<sup>27</sup> One reading of this statement is that, if courts make the law clear, government officials will better be able to tailor their actions to the applicable legal standards—thus both protecting themselves from suit and better serving the public. A logical extension of the statement, however, is that the law will be sufficiently clear to allow plaintiffs to overcome a qualified immunity defense if defendant officers fail to alter their conduct.

In the wake of *Siegert*, *Sacramento*, and *Wilson*, a split arose among the federal courts. Many courts read those three decisions to hold that they should generally decide the constitutional issue first.<sup>28</sup> A few courts even read the decisions to *require* sequencing.<sup>29</sup> Other courts, however, maintained that the option of bypassing the constitutional question survived those cases.<sup>30</sup> The courts that acknowledged the benefits of sequencing generally focused on its law-elaboration function. For instance, the Seventh Circuit justified a decision to address the constitutional issue first “[i]n order that legal doctrine may continue to evolve in common law fashion.”<sup>31</sup>

In 2001, however, the legal landscape changed with *Saucier v. Katz*, in which the Court made sequencing mandatory.<sup>32</sup> Justice Kennedy, writing for the majority, held that initial decision of the constitutional issue is required:

As we shall explain, the first inquiry must be whether a constitutional right would have been violated on the facts alleged; second, assuming the violation is established, the question whether

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26. 526 U.S. 603, 609 (1999).

27. *Id.*

28. See *Pearson v. Ramos*, 237 F.3d 881, 884 (7th Cir. 2001) (vacating jury verdict on ground that no constitutional violation occurred without addressing qualified immunity question, while noting that “[w]hether [the sequencing approach] is absolute may be doubted”); *Kalka v. Hawk*, 215 F.3d 90, 94–98 (D.C. Cir. 2000); *Horne v. Coughlin*, 191 F.3d 244, 245 (2d Cir. 1999).

29. See *Cline v. Binder*, No. 98-2433, 1999 WL 507199 (4th Cir. July 19, 1999) (unpublished table decision); *McCall v. Williams*, 59 F. Supp. 2d 556 (D.S.C. 1999).

30. See *Spivey v. Elliot*, 41 F.3d 1497, 1498–99 (11th Cir. 1995); *Acierno v. Cloutier*, 40 F.3d 597, 606 n.7 (3d Cir. 1994).

31. *Pearson*, 237 F.3d at 884.

32. 533 U.S. 194 (2001). Commentators have also read *Saucier* to make sequencing mandatory. See, e.g., Healy, *supra* note 10, at 880–81 (noting that *Saucier* made sequencing mandatory).

the right was clearly established must be considered on a more specific level than recognized by the Court of Appeals.<sup>33</sup>

Likewise, “A court required to rule upon the qualified immunity issue must consider, then, this threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer’s conduct violated a constitutional right? This must be the initial inquiry.”<sup>34</sup> In support of mandatory sequencing, the Court emphasized that sequencing was “necessary to set forth principles which will become the basis for a [future] holding that a right is clearly established.”<sup>35</sup> In other words, it was concerned about future plaintiffs being able to recover. The Court also—still without explanation—reiterated the link between the sequencing approach and the early resolution of the qualified immunity issue.<sup>36</sup>

Between *Saucier* and *Pearson*, the Court generally adhered to the sequencing approach<sup>37</sup> and for justification gestured at the importance of clarifying the law.<sup>38</sup> Yet the Court also once ignored its own sequencing requirement without acknowledging that it did so. In a per curiam opinion in *Brosseau v. Haugen*, the Court reversed the Ninth Circuit’s holding that the defendant was not entitled to summary judgment, thereby granting qualified immunity while “express[ing] no view as to the correctness of the Court of Appeals’ decision on the constitutional question itself.”<sup>39</sup> But the Court also stated: “We have no occasion in this case to reconsider our instruction in *Saucier* that lower courts decide the constitutional question prior to deciding the qualified immunity question.”<sup>40</sup> And in *Scott v. Harris*, the Court, in an opinion by Justice Scalia joined by seven other Justices,

33. *Saucier*, 533 U.S. at 200.

34. *Id.* at 201.

35. *Id.*

36. *Id.* at 200–01.

37. See *Morse v. Frederick*, 127 S. Ct. 2618, 2624 (2007); *Scott v. Harris*, 127 S. Ct. 1769, 1774 (2007); *L.A. County v. Rettele*, 127 S. Ct. 1989, 1994 (2007); *Groh v. Ramirez*, 540 U.S. 551, 563 (2004); *Chavez v. Martinez*, 538 U.S. 760, 766 (2003); *Hope v. Pelzer*, 536 U.S. 730, 736–39 (2002).

38. For example, in *Bunting v. Mellen*, Justice Scalia’s dissent from the denial of certiorari reemphasized the law-clarification function of the sequencing approach. He explained that the initial resolution of the constitutional question “is *not* mere dictum in the ordinary sense, since the whole reason we require it to be set forth (despite the availability of qualified immunity) is to clarify the law and thus make unavailable repeated claims of qualified immunity in future cases.” *Bunting v. Mellen*, 541 U.S. 1019, 1023–24 (2004) (Scalia, J., dissenting from denial of certiorari).

39. 543 U.S. 194, 198 (2004).

40. *Id.* at 198 n.3.

hinted at doubts “regarding the wisdom of *Saucier*’s decision to make the threshold inquiry mandatory, especially in cases where the constitutional question is relatively difficult and the qualified immunity question relatively straightforward.”<sup>41</sup> Again, however, the Court explained that it “need not address the wisdom of *Saucier* in this case” because the constitutional question was easily decided, and thus sequencing was the best approach regardless whether it was mandatory.<sup>42</sup>

The Court broadcast its doubts about *Saucier* when it granted certiorari in *Pearson v. Callahan*.<sup>43</sup> While the case involved a Fourth Amendment challenge to a warrantless search on the basis of “consent once removed,” the Justices also instructed the parties to brief a question that neither side had raised: “Whether the Court’s decision in *Saucier v. Katz* should be overruled?”<sup>44</sup> The Court ultimately answered that question in the affirmative.<sup>45</sup> Evaluation of its decision requires consideration of the jurisprudential and practical consequences of sequencing, and I will outline these consequences in the next section.

### III. CRITIQUING SEQUENCING

*Saucier* was a lightning rod for criticism—indeed, Judge Leval of the Second Circuit has described it as “involv[ing] so many and such serious problems that I am not sure where to begin.”<sup>46</sup> At a jurisprudential level, the primary criticism is, as Justice Breyer explained in *Morse*, that sequencing fails to “adhere to a basic constitutional obligation by avoiding unnecessary decision of constitutional questions.”<sup>47</sup> Simply put, avoidance may be thought of as a “last resort rule”: “[E]ven if all other jurisdictional and justiciability obstacles are surmounted, federal courts still must avoid a constitutional issue if there is *any* other ground upon which to render a final judgment.”<sup>48</sup>

The primary justification for avoidance is rooted in the principle of separation of powers. The concern that one branch will “encroach on the domain of another”<sup>49</sup> requires that judges abstain from passing upon the

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41. *Scott*, 127 S. Ct. at 1774 n.4.

42. *Id.*

43. 128 S. Ct. 1702 (2008).

44. *Id.* at 1702–03 (2008) (citation omitted).

45. *Pearson v. Callahan*, 129 S. Ct. 808 (2009).

46. *See, e.g.*, Leval, *supra* note 23, at 1277.

47. *Morse v. Frederick*, 127 S. Ct. 2618, 2640 (2007).

48. Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. REV. 1003, 1025 (1994); *see Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (“The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.”).

49. *Ashwander*, 297 U.S. at 355 (quoting *Sinking-Fund Cases*, 99 U.S. 700, 718 (1878)).

constitutionality of statutes unless no alternative basis for decision is available. But such concern is tied closely to the fact that a statute is a *legislative* product, and therefore its invalidation by the judiciary risks undermining majority rule without political accountability.<sup>50</sup> In the qualified immunity context, however, the acts in question are those of individual government officers—members of the executive branch—rather than of the legislature. Thus, the underlying justification for avoidance is surely less compelling in the context of adjudicating qualified immunity disputes.<sup>51</sup>

Some commentators have also argued that avoidance is desirable because courts may lack the incentive to give due consideration to an issue that has no effect on the outcome of the case before it.<sup>52</sup> But this assumption is both lacking in empirical support and questionable as a general proposition because courts experience considerable scrutiny of each sentence in their opinions. Such scrutiny likely provides an incentive to decide constitutional issues properly even when those issues do not determine the outcome of the case. Relatedly, commentators have contended that individual litigants may fail to adequately brief and argue constitutional issues when there is a chance a court may avoid those issues.<sup>53</sup> But particularly in the qualified immunity context, the failure to brief the constitutional issue may be dispositive if the court finds there was no constitutional violation—it would seem, therefore, that both parties have a substantial incentive to argue that issue vigorously.

In any event, the principle of avoidance is not ironclad: courts routinely decide constitutional questions unnecessarily in other contexts. For instance, harmless error doctrine instructs courts first to decide whether an error actually occurred, and only then to determine whether such error was harmless.<sup>54</sup> Similarly, under the relevant standard for habeas corpus relief, a court need only determine whether a state court's decision "was contrary to,

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50. One commentator has suggested that the "countermajoritarian difficulty" arising from avoidance may be overstated, explaining that our system of government is "dialogic," and so a court's constitutional pronouncement will seldom be the final word. Kloppenberg, *supra* note 48, at 1037–42.

51. See Greabe, *supra* note 18, at 418–24.

52. See, e.g., Healy, *supra* note 10, at 920–21.

53. See *id.*

54. See, e.g., *Lockhart v. Fretwell*, 506 U.S. 364, 369 n.2 ("Harmless error analysis is triggered only after the reviewing court discovers that an error has been committed."). The Court's instruction with regard to harmless error responded to a practice by lower courts of withholding judgment as to whether a constitutional error occurred and simply holding that any such error was harmless. See, e.g., *United States v. Pravato*, 505 F.2d 703, 704 (2d Cir. 1974).

or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.”<sup>55</sup> But courts frequently *decide* the relevant question of federal law rather than simply stating that the state decision did not contravene clearly established principles.<sup>56</sup>

In light of the lack of separation of powers concerns present here, as well as the various exceptions to avoidance doctrine throughout constitutional law, I view the general rule of avoidance as insufficient to automatically invalidate the sequencing approach. Nonetheless, the avoidance norm is so firmly entrenched in American jurisprudence that any deviation from that norm deserves careful consideration.

The mandatory sequencing approach also potentially undermines the process of appellate review.<sup>57</sup> If a court holds that a defendant violated the Constitution but then grants qualified immunity to that defendant, sequencing may “immunize an incorrect constitutional holding from further review.”<sup>58</sup> As a prevailing party, the defendant cannot appeal the constitutional ruling, even if it believes the ruling is incorrect and the consequences of that ruling are unfavorable for both that defendant and others who are similarly situated. So if the plaintiffs decide not to appeal the qualified immunity determination, the constitutional decision remains enshrined in the caselaw.

The Court’s denial of certiorari in *Bunting v. Mellen* provides a prime example of this difficulty. Indeed, Justice Scalia, dissenting from the denial, described the situation as a “perceived procedural tangle of the Court’s own making.”<sup>59</sup> *Bunting* arose from an Establishment Clause challenge to the Virginia Military Institute’s (VMI) invocation of God during its Supper Roll Call ceremony, brought by cadets who sought declaratory and injunctive relief as well as monetary damages.<sup>60</sup> After prevailing in district court, the cadets graduated from VMI, thereby mooting their claims to declaratory and injunctive relief.<sup>61</sup> The Fourth Circuit held that the invocation was unconstitutional, but granted qualified immunity to the VMI officials.<sup>62</sup> The

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55. 28 U.S.C. § 2254(d)(1) (2000).

56. See Healy, *supra* note 10, at 886 (collecting cases).

57. The frequency with which this situation actually occurs is discussed in more detail in the next section. See *infra* Part IV.

58. *Morse v. Frederick*, 127 S. Ct. 2618, 2641 (2007) (Breyer, J., concurring in part and dissenting in part); see *Brosseau v. Haugen*, 543 U.S. 194, 202 (Breyer, J., concurring) (“[Sequencing] can sometimes lead to a constitutional decision that is effectively insulated from review.” (citing *Bunting v. Mellen*, 541 U.S. 1019, 1025 (2004) (Scalia, J., dissenting from denial of certiorari))).

59. *Bunting*, 541 U.S. at 1022 (Scalia, J., dissenting from denial of certiorari).

60. *Id.* at 1022–23.

61. *Id.* at 1022.

62. *Id.*

Court then denied VMI's petition for certiorari in part because the Court will not entertain an appeal by a party on an issue on which that party prevailed, and VMI had technically prevailed on the monetary damages action via the favorable qualified immunity ruling it received.<sup>63</sup> Such a result is particularly perverse because VMI almost certainly viewed the constitutional issue—the preservation of its traditional invocation practice—as greater in importance than the damages immunity of its officials.

This sequencing-created problem could potentially be resolved by an exception to the rule against appeals initiated by prevailing parties. In protest of the *Bunting* certiorari denial, Justice Scalia wrote, "I think it plain that this general rule should not apply where a favorable judgment on qualified-immunity grounds would deprive a party of an opportunity to appeal the unfavorable (and often more significant) constitutional determination."<sup>64</sup> But neither the Supreme Court nor the lower federal courts have acknowledged such an exception.<sup>65</sup> So under the current sequencing framework, any defendant that loses on the merits but prevails on qualified immunity grounds has the potential to find itself in the position of VMI: saddled with an adverse constitutional ruling it has no power to appeal because it is, technically, a prevailing party.

Mandatory sequencing also engenders a host of undesirable practical consequences, not least the requirement that courts grapple unnecessarily with complex constitutional issues. Several Justices have voiced concern that the *Saucier* rule "rigidly requires courts unnecessarily to decide difficult constitutional questions when there is available an easier basis for the decision (e.g., qualified immunity) that will satisfactorily resolve the case before the court."<sup>66</sup> The Court's reluctance to endorse unnecessary decision of "difficult" questions embodies two concerns.

63. *Id.* at 1023.

64. *Id.*

65. See, e.g., *Kalka v. Hawk*, 215 F.3d 90, 96 (D.C. Cir. 2000) (postulating that "government defendants [as the prevailing parties] will . . . have no opportunity to appeal for review of the newly declared constitutional right in the higher courts").

66. *Brosseau v. Haugen*, 543 U.S. 194, 201 (2004) (Breyer, J., concurring). Justices Breyer, Ginsberg, and Scalia have consistently raised the unnecessary decision of difficult constitutional questions as an argument against mandatory sequencing. See *Morse v. Frederick*, 127 S. Ct. 2618, 2640 (2007) (Breyer, J., concurring in part and dissenting in part) ("In order to avoid resolving the fractious underlying constitutional question, we need only decide a different question that this case presents, the question of 'qualified immunity.'"); *Scott v. Harris*, 127 S. Ct. 1769, 1774 n.4 (2007) (Scalia, J.) (expressing doubt about sequencing "especially in cases where the constitutional question is relatively difficult and the qualified immunity question relatively straightforward"); *id.* at 1780 (Breyer, J., concurring); *L.A. County v. Rettele*, 127 S. Ct. 1989, 1994 (2007) (Stevens, J., concurring, joined by Ginsburg, J.) ("Consequently, regardless of the proper answer to the

The first concern is that inefficiency will ensue from courts expending the time and resources to puzzle through difficult constitutional questions. Justice Breyer has argued that “when courts’ dockets are crowded, a rigid ‘order of battle’ makes little administrative sense,”<sup>67</sup> adding that sequencing sometimes “will require lower courts unnecessarily to answer difficult constitutional questions, thereby wasting judicial resources.”<sup>68</sup> Such inefficiency is compounded by the fact that courts often confront the qualified immunity question early in the course of litigation, spurred on by the Court’s insistence that qualified immunity should be resolved as expeditiously as possible “so that the costs and expenses of trial are avoided where the defense is dispositive.”<sup>69</sup> In a significant number of cases, therefore, courts decide these difficult constitutional questions on a motion to dismiss—indeed, my research reveals that, in 2006 and 2007, 24.6% of cases in which a court addressed a qualified immunity issue took place on a motion to dismiss.<sup>70</sup> At these early stages of the proceedings the constitutional issues are more likely to be insufficiently briefed by parties struggling to meet ambitious filing deadlines, so courts will therefore have to invest even more judicial resources in compensating for these shortcomings with their own research.<sup>71</sup>

The efficiency problem, while serious in its own right, also segues into a broader worry: that in their effort to decide difficult constitutional questions with the limited time and resources available to them, courts will make bad

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constitutional question, the defendants were entitled to qualified immunity. I would reverse on that ground and disavow the unwise practice of deciding constitutional questions in advance of the necessity for doing so.”).

67. *Brosseau*, 543 U.S. at 201–02 (Breyer, J., concurring, joined by Scalia & Ginsburg, JJ.) (citing *Bunting*, 541 U.S. at 1025 (Scalia, J., dissenting from denial of certiorari)).

68. *Morse*, 127 S. Ct. at 2641 (Breyer, J., concurring in part and dissenting in part).

69. *Saucier v. Katz*, 533 U.S. 194, 200 (2001); see, e.g., *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (per curiam) (“[W]e repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation.”).

70. Of these cases, in 21.5% the qualified immunity issue was raised on a motion to dismiss, and in 3.1% that issue was raised on a motion styled in the alternative as a motion to dismiss or a motion for summary judgment. In addition, 73.8% of cases involved qualified immunity raised on a motion for summary judgment, bringing the total of cases in which a court addressed the qualified immunity issue on either a motion to dismiss or a motion for summary judgment to approximately 98%. For a description of my research methodology, see *infra* Part IV.A. See Leval, *supra* note 23, at 1275 (“We dismiss a large number of [qualified immunity] cases, probably the great majority, at the outset because it is immediately apparent that there are no rulings establishing the unconstitutionality of the officer’s conduct.”).

71. Indeed, as Professor Ravenell has observed, plaintiffs may not have pled a violation of *clearly established* law, given that qualified immunity is an affirmative defense for which the burden falls on the defendant to raise. Teresa E. Ravenell, *Hammering in Screws: Why the Court Should Look Beyond Summary Judgment When Resolving §1983 Qualified Immunity Disputes*, 52 VILL. L. REV. 135, 164–65 (2007). Judgment on a motion to dismiss is particularly premature under such circumstances.

law.<sup>72</sup> Justice Breyer expressed this concern in *County of Sacramento v. Lewis*, when he wrote in concurrence that “[*Siegert*] should not be read to deny lower courts the flexibility, in appropriate cases, to decide [§1983] claims on the basis of qualified immunity, and thereby avoid wrestling with constitutional issues that are either difficult or poorly presented.”<sup>73</sup> Justice Stevens, concurring in the judgment, likewise registered an objection to the Court’s statement that sequencing is “normally” the “better approach.” He argued: “That is sound advice when the answer to the constitutional question is clear. When, however, the question is both difficult and unresolved, I believe it wiser to adhere to the policy of avoiding the unnecessary adjudication of constitutional questions.”<sup>74</sup> Thus, without denying the concern for articulating legal principles that underlies the sequencing approach, Justices Breyer and Stevens express concern for the quality of the law articulated. No law, they suggest, is better than bad law.<sup>75</sup> And their concern that courts will do a poor job of articulating constitutional principles seems intuitively reasonable if courts are forced to make law under conditions of constrained resources and insufficient briefing.

But the Justices’ reasoning also exposes a quandary. Although the objection to deciding constitutional questions unnecessarily is that doing so will require courts to resolve difficult constitutional questions, the entire *reason* for courts to address these questions is to clarify difficult areas of the law for the benefit of government officials and public citizens. Deciding the constitutional question only when the answer is already “clear,” as Justice Stevens recommends, would do little to clarify the constitutional standards

72. At first blush, this discussion may seem to contradict the previous discussion of constitutional avoidance. See *supra* text accompanying notes 52–53. My point with respect to avoidance, however, is simply that one cannot generalize about the behavior of judges and parties: we cannot assume that judges will decide a constitutional issue in a cursory fashion simply because it is unnecessary to the result, nor can we assume that parties will brief a constitutional issue inadequately simply because the court may not reach that issue. Therefore, a universal principle of avoidance predicated on these assumptions is unwarranted. Here, by contrast, I wish to raise the possibility that the difficulty of the constitutional question and the thoroughness of the briefing may at times make decision of the constitutional issue difficult and time-consuming for judges.

73. 523 U.S. 833, 858–59 (Breyer, J., concurring); see *Scott v. Harris*, 127 S. Ct. 1769, 1780 (2007) (Breyer, J., concurring) (“Sometimes . . . the order-of-battle rule will spawn constitutional rulings in areas of law so fact dependent that the result will be confusion rather than clarity.”); *Wilkie v. Robbins*, 127 S. Ct. 2588, 2617 n.10 (2007) (Ginsburg, J., concurring in part and dissenting in part, joined by Stevens, J.) (“As I have elsewhere indicated, in appropriate cases, I would allow courts to move directly to the second inquiry.”).

74. *Lewis*, 523 U.S. at 859 (Stevens, J., concurring).

75. Judge Leval also raises the possibility that the defendant may not be sufficiently invested in the constitutional issue to brief the issue in a manner helpful to the court. Leval, *supra* note 23, at 1278.



applicable to government officials' conduct. Nor would such a decision increase the number of injured plaintiffs who could recover, because if a particular constitutional principle is already "clear," then any government official who acted in contravention of that principle would already be unable to raise the defense of qualified immunity.

The confluence of jurisprudential and practical problems outlined here has led four Justices—Breyer, Ginsburg, Stevens, and Scalia—to state explicitly that sequencing should not be mandatory.<sup>76</sup> And, responding to these Justices' cues, lower courts have not uniformly adhered to the sequencing approach. The First, Second, Sixth, and Seventh Circuits have, in some instances, deviated from sequencing, although they have not articulated clear standards for when such deviation is appropriate.<sup>77</sup> And several other courts have chosen to disregard the sequencing requirement in select unpublished opinions.<sup>78</sup>

Sequencing proponents, however, claim that all these objections are outweighed by the law-elaboration function of sequencing. And certainly compelling considerations favor resolving a constitutional issue even when doing so is unnecessary because the court would ultimately grant qualified immunity. Rather obviously, if a court skips over the constitutional question and simply grants qualified immunity, then a constitutional question controversial enough to engender litigation remains unanswered.<sup>79</sup> Negative consequences ensue for both governments and individuals. Governments lack guidance in training their employees and crafting policies to conform to constitutional standards. And for citizens, a potential category of wrong

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76. Indeed, a fifth Justice presently seated on the Court—Justice Kennedy—concurred in the judgment in *Siegert* to state:

I do not, however, agree that the Court of Appeals [should not have avoided the constitutional issue]. The Court of Appeals adopted the altogether normal procedure of deciding the case before it on the ground that appeared to offer the most direct and appropriate resolution, and one argued by the parties. If it is plain that a plaintiff's required malice allegations are insufficient but there is some doubt as to the constitutional right asserted, it seems to reverse the usual ordering of issues to tell the trial and appellate courts that they should resolve the constitutional question first.

*Siegert v. Gilley*, 500 U.S. 226, 235 (1991) (Kennedy, J., concurring). Given that Justice Kennedy authored *Saucier*, however, we may reasonably infer that he has now renounced his previously-stated attachment to "the usual ordering of issues."

77. See, e.g., *Hatfield-Bermudez v. Aldanondo-Rivera*, 496 F.3d 51, 59 (1st Cir. 2007); *Roberts v. Ward*, 468 F.3d 963 (6th Cir. 2006); *Koch v. Brattleboro*, 287 F.3d 162 (2d Cir. 2002); *Pearson v. Ramos*, 237 F.3d 881, 884 (7th Cir. 2001).

78. See, e.g., *Corbett v. Garland*, 228 F. App'x 525 (6th Cir. 2007); *Lathan v. Thompson*, 251 F. App'x 665 (11th Cir. 2007); *Olagues v. Kousharian*, 177 F. App'x 537 (9th Cir. 2006); *Bruton v. Paesani*, 162 F. App'x 151 (3d Cir. 2006); *Hill v. Fleming*, 173 F. App'x 664 (10th Cir. 2006); *Rolen v. City of Brownfield*, 182 F. App'x 362 (5th Cir. 2006).

79. *Bunting v. Mellen*, 541 U.S. 1019, 1023–24 (Scalia, J., dissenting from denial of certiorari) ("That constitutional determination is *not* mere dictum in the ordinary sense, since the whole reason we require it to be set forth (despite the availability of qualified immunity) is to clarify the law and thus make unavailable repeated claims of qualified immunity in future cases.").

remains, troublingly, irremediable for the indefinite future. Without clarification of the law, no future plaintiff, even one who has suffered an identical injury, can overcome a government official's defense that the relevant law was not clearly established.<sup>80</sup> This concern is not theoretical. Writing before the Court's decision in *Saucier*, John Greabe has argued compellingly in favor of resolving constitutional issues, collecting numerous cases where courts' failure to clarify novel constitutional questions left officials uncertain about the standards that should govern their conduct and potentially wronged citizens without recourse to money damages.<sup>81</sup>

Sequencing dissidents have struggled to marshal arguments to counter the claim that, if courts repeatedly avoid difficult constitutional questions, the law will remain unclear and many plaintiffs will remain unable to recover. Justice Stevens has attempted to allay this concern by asserting that such contentions may be addressed in other contexts such as "adversarial suits against municipalities, which have a substantial stake in the outcome and a risk of exposure to damages liability even when individual officers are plainly protected by qualified immunity."<sup>82</sup> While suits against municipalities undoubtedly also can clarify the law, Justice Stevens's response is incomplete because a suit against a municipality requires the additional showing of a policy or custom that engendered the alleged violation.<sup>83</sup> This requirement may be prohibitive in many instances. Moreover, while some constitutional claims are likely to be raised by defendants in criminal proceedings—where the incentive for raising the claim is high and an attorney is provided free of charge to the indigent—other claims are not susceptible to such resolution.<sup>84</sup> In the Fourth Amendment context, for example, victims of excessive use of force by police officers are far less likely to litigate their claims due to the time and

80. As Greabe explains:

When a court bypasses the merits of the pleaded constitutional claim in the circumstances just described, it not only effectively awards the defendant officers one 'liability-free' violation of the Constitution (as it must under the doctrine of qualified immunity), but it also, by declining to 'clearly establish' the undermined right, paves the way for 'multiple bites of a constitutionally forbidden fruit.'

Greabe, *supra* note 18, at 430 (quoting Garcia by Garcia v. Miera, 817 F.2d 650, 656–57 n.8 (10th Cir. 1987) (criticizing avoidance of constitutional questions in qualified immunity context)).

81. *Id.* at 429 n.139.

82. *County of Sacramento v. Lewis*, 523 U.S. 833, 859 (1998); see Rosenthal, *supra* note 1, at 859 n.241 (questioning whether qualified immunity doctrine "has stunted the development of constitutional law," given that new constitutional law also grows from suits for injunctive relief, suits against municipal policies, and criminal litigation).

83. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978).

84. Karlan, *supra* note 8, at 1915–16.

expense associated with finding an attorney and filing suit.<sup>85</sup> The notion that the law may be clarified via mechanisms other than § 1983 suits against individual government defendants, therefore, is an incomplete response to sequencing proponents' emphasis on the need for law elaboration.

The key to settling the sequencing debate, therefore, lies in closer examination—at an empirical rather than theoretical level—of the law-clarification function of sequencing. Following *Saucier's* sequencing requirement, How did courts resolve the constitutional questions that they previously would have avoided? To that end, I collected data regarding the effect of the Court's imposition of the sequencing rationale over time, and in the next section, I present a quantitative analysis that supplies insight into this previously unanswered question and another framework for evaluating the Supreme Court's recent decision to overrule *Saucier*.

#### IV. EMPIRICAL EVIDENCE

My research attempted to measure the effect of *Siegert* and *Saucier* on federal courts' decisions in qualified immunity cases. Caselaw prior to *Siegert* reveals that, left to their own devices, courts would practice constitutional avoidance and decide many cases on qualified immunity grounds alone. *Saucier*, however, required decision of the constitutional question the case presents. I strove, therefore, to determine how courts decided those constitutional questions that they previously would have avoided.

My empirical examination proceeded from the assumption that the cases where courts previously chose to avoid the constitutional question generally presented more difficult constitutional issues. In those cases, the constitutional question was close enough that the court opted to resolve the case on immunity grounds instead. Indeed, one might reasonably predict that these difficult decisions, balanced on a knife edge, would come out in favor of the plaintiff and the defendant with similar frequency. My research sought to determine whether empirical reality bore out this tentative hypothesis.

##### A. Methodology

I used the cases available on Westlaw as my data set. Within the database containing all federal district court cases (DCT), I generated a numbered list of every case containing the term "qualified immunity" for each of three time periods: (1) two years before *Siegert*; (2) two years before

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85. *Id.* at 1916.

*Saucier*; and (3) two recent calendar years, 2006 and 2007. I did the same within the database containing all federal appellate court cases (CTA).

It was not feasible to read every case decided during each of these time periods,<sup>86</sup> so I instead examined a random sample of cases from each time period. To ensure that cases I read were a random sample, I used a random sequence generator to create a numerical sequence containing the number of cases in each of the three lists.<sup>87</sup> I then read the cases in the order dictated by the sequence. For example, for the two years leading up to *Siegert*, Westlaw contains 746 district court cases that contain the words “qualified immunity.” I therefore used the random sequence generator to create a sequence including the integers 1 to 746. The sequence began with 305, so the 305th case on my Westlaw-generated list became the first case that I read.<sup>88</sup>

Not every case that I read became part of my sample. Rather, a case became part of the sample only if it met the following criteria: (1) a plaintiff brought at least one constitutional or federal statutory claim seeking money damages against an individual government-official defendant; (2) the defendant raised a qualified immunity defense against that claim; and (3) the court decided the merits of either the constitutional or statutory claim, the

86. The district court database on Westlaw contained 746 cases containing the words “qualified immunity” for the two years before *Siegert*, 1,720 cases for the two years before *Saucier*, and 6,680 cases for the years 2006 and 2007. The appellate court database contained 646 cases containing the words “qualified immunity” for the two years before *Siegert*, 1,146 cases for the two years before *Saucier*, and 1,195 cases for the years 2006 and 2007. There are considerably more cases in later years—particularly district court cases for 2006 and 2007—because, over time, Westlaw has included a greater number of unpublished cases from many jurisdictions. See *infra* notes 122–125 and accompanying text.

87. The random sequence generator I used is available at Random.org, <http://www.random.org/sequences/> (last visited March 24, 2009).

88. I acknowledge some imperfections in my data set. Westlaw itself is biased in a number of ways. It contains all published cases, but only some unpublished cases. The percentage of unpublished cases it contains varies from one jurisdiction to the next. This percentage also has changed over time. Relatedly, different jurisdictions vary dramatically in the percentage of decisions they publish. In short, discrepancies between published and unpublished cases might, in many instances, taint Westlaw-based empirical work. I found, however, that for my purposes, no material difference existed in the results for published and unpublished cases. See *infra* text accompanying notes 119–125. As an alternative to Westlaw, I considered looking at all cases—both published and unpublished—from selected jurisdictions, but concluded that this tactic would risk introducing idiosyncrasies associated with certain jurisdictions. Despite Westlaw’s imperfections, therefore, I concluded that it was best suited to my purposes. Finally, other empirical research indicates that Westlaw and Lexis contain a very similar set of cases, so my decision to use Westlaw rather than Lexis was unlikely to influence the result. See Brian N. Lizotte, *Publish or Perish: The Electronic Availability of Summary Judgments by Eight District Courts*, 2007 WIS. L. REV. 107, 134 (2007) (reporting that only 6% of cases in relevant data set appeared in one database but not the other).

qualified immunity claim, or both. A case on the Westlaw-generated list might fail to meet these criteria for any number of reasons. The case might have been resolved on other grounds—for example, the court might have held that the case was brought outside the statute of limitations, the case was moot, or the plaintiff lacked standing. Or the case might mention qualified immunity (in a parenthetical describing another case, for example) even if it did not actually involve the assertion of a qualified immunity defense. For each of the six Westlaw-generated lists, between a quarter and a third of the cases on the list did not meet the three criteria set forth above. If a case did not meet my criteria, I did not include it in my data set. I continued reading cases until I had a set of 100 district court and 100 appellate cases that met my criteria from each of the three time periods.

Unsurprisingly, some of the 100 cases involved more than one claimed constitutional or statutory<sup>89</sup> violation against which qualified immunity was raised.<sup>90</sup> For each time period, therefore, I created a spreadsheet in which I listed separately each claim adjudicated in each of the 100 cases.<sup>91</sup>

Some cases also involved the same claim brought against multiple defendants. I listed the claims against multiple defendants separately only where the court reached different results for different defendants. For example, if a prisoner brought a § 1983 suit against twelve prison officials, claiming that they were deliberately indifferent to his serious medical needs, and the court held that none of the twelve had committed a constitutional violation, the suit counted once. If, however, the court held that one of the twelve officers had violated the Constitution and was not entitled to qualified immunity, I would list that claim twice on my spreadsheet. In other words, a different result led to a separate listing.<sup>92</sup>

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89. As it turned out, most of the claims against which defendants asserted qualified immunity were constitutional claims. Throughout the paper, I will refer to the elements of the sequencing inquiry as “the constitutional issue” and “the qualified immunity issue.” The former, however, should always be understood to refer to “the constitutional or statutory issue.”

90. If a defendant raised qualified immunity against some claims but not others within a single case, I did not include the claims against which the qualified immunity defense was not raised in my data set.

91. These spreadsheets are available at Nancy Leong, [http://nancyleong.com/the-saucier-qualified-immunity-experiment-an-empirical-analysis-36-pepperdine-law-review-667\\_\\_24/](http://nancyleong.com/the-saucier-qualified-immunity-experiment-an-empirical-analysis-36-pepperdine-law-review-667__24/) (last visited Apr. 13, 2009).

92. This method of counting separate defendants only when they generated different results is admittedly imperfect. However, I chose it because it is better than any alternative. Counting each claim against each defendant separately would give undue weight to cases in which the plaintiff (perhaps gratuitously) sued many defendants. The only other alternative—fractional division—would, I believe, undervalue the significance of the courts allowing a claim to proceed against even one defendant out of many, because even that holding generates new plaintiff-friendly case law. At a minimum, my method allows a comparison among results from different time periods because the methodology is consistent throughout.

Ultimately, each set of 100 cases generated between 142 and 195 separate claims.<sup>93</sup> I then placed each resulting claim in one of six categories:<sup>94</sup>

(1) The court recognized a constitutional violation but granted qualified immunity.

(2) The court recognized a violation, then denied immunity. This included cases decided on a motion to dismiss, a motion for judgment on the pleadings, or a motion for summary judgment where the court took the facts in the light most favorable to the plaintiff. Thus, to fall in this category, the court did not need to enter judgment in the plaintiff's favor. Rather, the court merely needed to hold that the plaintiff could make out a case that her rights had been violated and that the defendant was not entitled to qualified immunity, given whatever view of the facts was appropriate at that particular stage of the proceedings.

(3) The court held that no violation had occurred and did not address the immunity question.

(4) The court held that no violation had occurred and went on to hold that, in any event, the defendant was entitled to immunity.

(5) The court granted immunity without addressing whether a constitutional violation had occurred—in other words, it avoided the constitutional question.

(6) The court did none of the above. Usually this meant that the court deviated substantially from prevailing Supreme Court guidelines regarding the resolution of qualified immunity cases. For example, this residual category includes cases where the court found (at least for purposes of a motion to dismiss or a motion for summary judgment) that a constitutional violation had occurred, yet failed to address whether the defendant was entitled to qualified immunity (despite the defendant having raised the defense).<sup>95</sup> It also includes cases where the court (oddly) held that the defendant was *not* entitled to qualified immunity—because the relevant law

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93. The district court cases yielded 163 claims in the pre-*Siegert* time period, 165 claims in the pre-*Saucier* time period, and 195 claims in the 2006–2007 time period. The appellate court cases yielded 142 claims in the pre-*Siegert* time period, 144 claims in the pre-*Saucier* time period, and 155 claims in the 2006–2007 time period.

94. The six categories enumerated here correspond to the number under the “Type” column on my spreadsheets. See Nancy Leong, [http://nancyleong.com/the-saucier-qualified-immunity-experiment-an-empirical-analysis-36-pepperdine-law-review-667\\_\\_24/](http://nancyleong.com/the-saucier-qualified-immunity-experiment-an-empirical-analysis-36-pepperdine-law-review-667__24/) (last visited Apr. 13, 2009).

95. See, e.g., *Ernst v. Borough of Fort Lee*, 739 F. Supp. 220 (D.N.J. 1990) (holding strip search violated Constitution but failing to address officers’ asserted immunity defense).

was clearly established—but that, in fact, no constitutional violation had occurred.<sup>96</sup>

Although this categorization was my primary focus, I also collected a variety of additional information to allow for the possibility of identifying other trends, including the constitutional or statutory basis for the claim asserted by the plaintiff, the procedural posture of the case, any subsequent procedural history, which judge decided the case, and the party of the president who appointed that judge.<sup>97</sup>

Finally, to test the reliability of my own categorization decisions, I recoded my results by having an independent auditor read and categorize twenty-five cases from each of my six samples. The rate of agreement was 92%, leading to a conclusion that my results were highly reliable.

## B. Summary of Findings

Unsurprisingly, as the Supreme Court moved toward mandatory sequencing, the percentage of cases in which courts avoided the constitutional question decreased significantly.<sup>98</sup> Figure 1 summarizes the results for the district court cases for each of the three time periods for the claims in which the court found for the defendant.<sup>99</sup> The percentage of claims where the court avoided the constitutional question decreased from 28.6% [21.2, 36.0] pre-*Siegert* to 6.4% [2.5, 10.3] in 2006–2007. Intriguingly, that decrease corresponded to an increase *only* in the percentage of claims in which courts found no violation. Thus, the percentage of claims where the court found a violation but then granted

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96. See, e.g., *DiLegge v. Gleason*, 131 F. Supp. 2d 520 (S.D.N.Y. 2001) (holding that qualified immunity was unavailable because the law was clearly established, yet concluding that no constitutional or statutory violation had taken place).

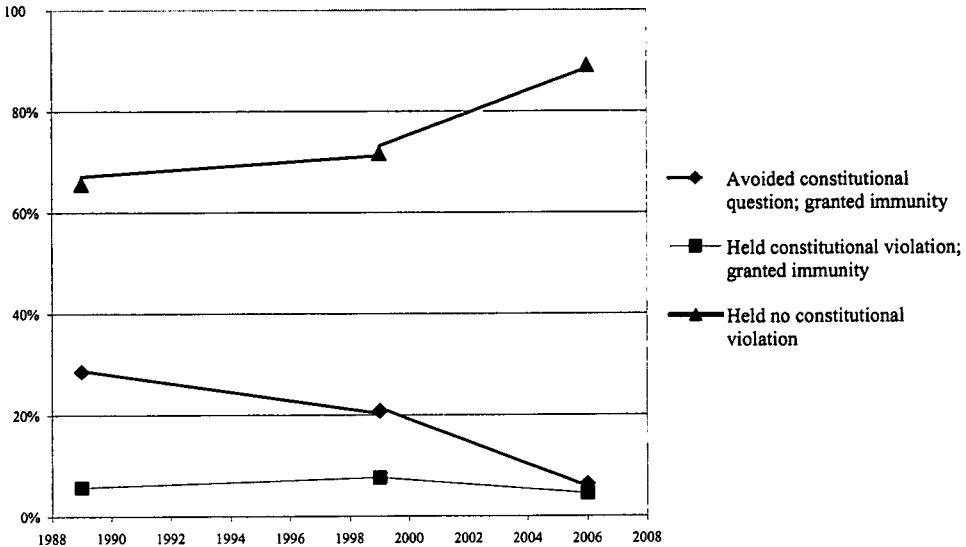
97. In addition, for the district court cases I also noted whether the plaintiff was pro se and whether a magistrate judge was involved. For the appellate court cases I also noted how the district court had decided the case and whether the appellate court affirmed or reversed that decision. I did not, however, end up incorporating that data into this paper.

98. Throughout this section, I employ the notation X% [Y, Z] to denote the actual percentage my sample yielded, followed by the upper and lower boundaries of the 95% confidence interval associated with the result. Thus, when I say that district courts in the pre-*Siegert* time period avoided the constitutional question in 28.6% [21.2, 36.0] of cases, I mean to convey that my best estimate is 28.6%, but that the actual number could be as low as 21.2% or as high as 36.0%. I expect that the percentages I found and the uncertainty relating to those percentages will provide sufficient information for the vast majority of readers. For the statistically inclined, I have also posted a document on my website detailing the statistical analysis I performed using the data I gathered. See Nancy Leong, [http://nancyleong.com/the-saucier-qualified-immunity-experiment-an-empirical-analysis-36-pepperdine-law-review-667\\_24/](http://nancyleong.com/the-saucier-qualified-immunity-experiment-an-empirical-analysis-36-pepperdine-law-review-667_24/) (last visited Apr. 13, 2009). Throughout this section, I have attempted to conform the presentation of my data to the helpful standards elucidated by Lee Epstein, Andrew D. Martin, & Matthew M. Schneider, *On the Effective Communication of the Results of Empirical Studies*, 59 VAND. L. REV. 1811 (2006).

99. I have included the precise numerical data from which I created Figures 1 through 6 in the Appendix.

immunity actually decreased slightly, from 5.7% [1.8, 9.6] pre-*Siegert* to 4.5% [2.5, 10.3] in 2006–2007. But the percentage of claims for which the court found no constitutional right existed increased dramatically, from 65.7% [58.1, 73.3] pre-*Siegert* to 89.1% in 2006–2007 [84.2, 94.0].<sup>100</sup>

Figure 1: District court claims where the defendant(s) prevailed



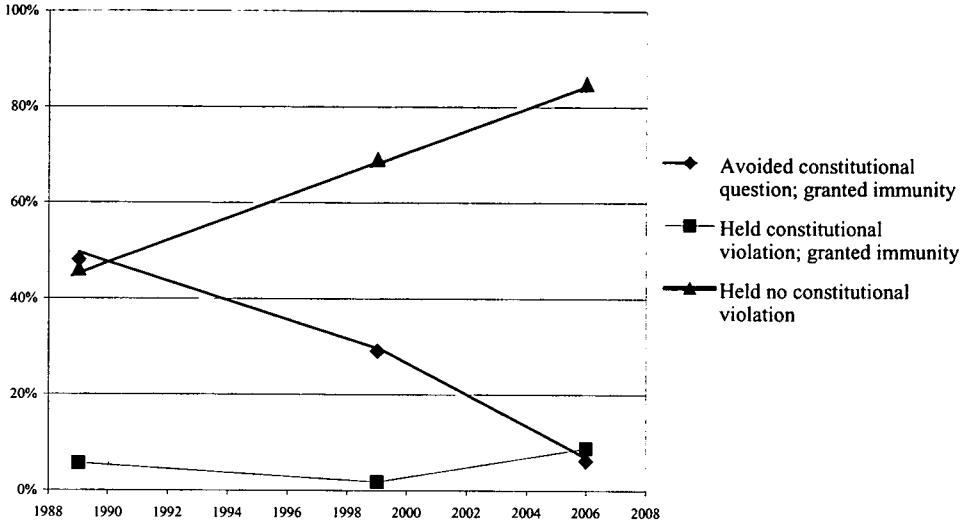
As depicted in Figure 2, the trend was similar among appellate courts. The percentage of claims where the court avoided the constitutional question decreased substantially, from 48.1% [40.1, 56.1] pre-*Siegert* to only 6.2% [2.1, 10.3] in 2006–2007. The percentage of claims in which courts found a constitutional violation but then granted qualified immunity was 5.7% [2.0, 9.4] pre-*Siegert* and 8.8% [3.9, 13.7] in 2006–2007—thus, the difference

100. These percentages aggregate the percentage of cases where the court simply found no violation and those in which the court found no violation *and* went on to grant immunity (perhaps as a means of protecting the ultimate outcome against appellate reversal). This aggregate percentage is most useful in considering the overall trends because it reflects the total percentage of cases in which courts did not recognize a violation. For the sake of revealing the trends within the subcategories, however, I will include the subcategory breakdown in parentheses following the overall percentage in the charts contained in the Appendix. The first number represents the percentage of claims where the court simply found no constitutional violation had occurred. The second number represents the percentage where the court went on to state that in any event the defendant was entitled to qualified immunity.



was not statistically significant. But the percentage of claims where the court found no constitutional right existed increased dramatically, from 46.2% [39.3, 53.1] pre-*Siegert* to 84.9% [78.8, 91.0] in 2006–2007.

Figure 2: Appellate court claims where the defendant(s) prevailed



The data for both district and appellate court cases show, therefore, that the expected significant decrease in the percentage of cases where courts avoided the constitutional question was accompanied by virtually no change in the percentage of cases where courts held that a constitutional violation had taken place and a striking increase in the percentage of cases where courts held that no constitutional violation had taken place.

The trend remains consistent when claims where the court ultimately ruled in favor of the plaintiff are included in the calculations.<sup>101</sup> Figure 3 summarizes that data at the district court level: the decline in avoidance (from 18.6% [13.3, 23.9] pre-*Siegert* to 5.1% [2.0, 8.2] in 2006–2007) is accompanied by no change in the likelihood of a court finding a constitutional violation but granting qualified immunity (level at about 4%) and a marked increase in the likelihood of the court finding no constitutional violation (from 42.2% [35.7, 48.7] pre-*Siegert* to 61.4% [54.7, 68.1] in

101. We would not automatically expect the trend to persist when cases where the court denied qualified immunity are included. For example, *Saucier* might have induced courts that would previously have avoided the constitutional issue to consider the constitutional issue first, reach the conclusion that a violation occurred, and thus be disinclined to grant qualified immunity to the defendant officer. Such a trend would result in expansion of constitutional rights, thereby contradicting the trend seen in Figures 1 and 2.

2006–2007). Similarly, Figure 4 summarizes the data at the appellate level: the decline in avoidance (from 35.4% [28.7, 42.1] pre-*Siegert* to 4.5% [1.4, 7.6] in 2006–2007) is accompanied by a statistically insignificant change in the likelihood of a court finding a constitutional violation but granting qualified immunity (from 4.2% [1.5, 6.9] pre-*Siegert* to 6.5% [3.0, 10.0] in 2006–2007) and a marked increase in the likelihood of the court finding no constitutional violation (from 34.0% [27.5, 40.5] pre-*Siegert* to 61.9% [54.8, 69.0] in 2006–2007).

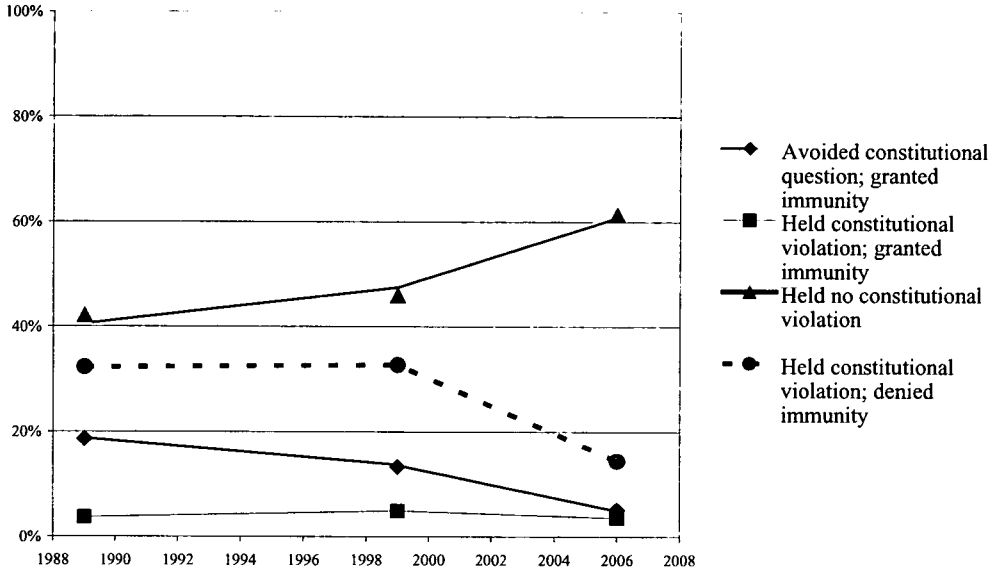
I note that among district court cases, the percentage of claims where the court found a constitutional violation and denied qualified immunity decreased significantly, from 32.3% [26.0, 38.6] prior to *Siegert* to 14.4% [9.5, 19.3] in 2006–2007. A decrease in the same category, however, was not present at the appellate level, where virtually no change occurred.<sup>102</sup> Perhaps the decline at the district court level is explicable by a trend among plaintiffs to bring more claims per lawsuit.<sup>103</sup> But in any event, the decline in rulings for plaintiffs at the district court level does not explain the overall increase in the articulation of law favoring defendants.

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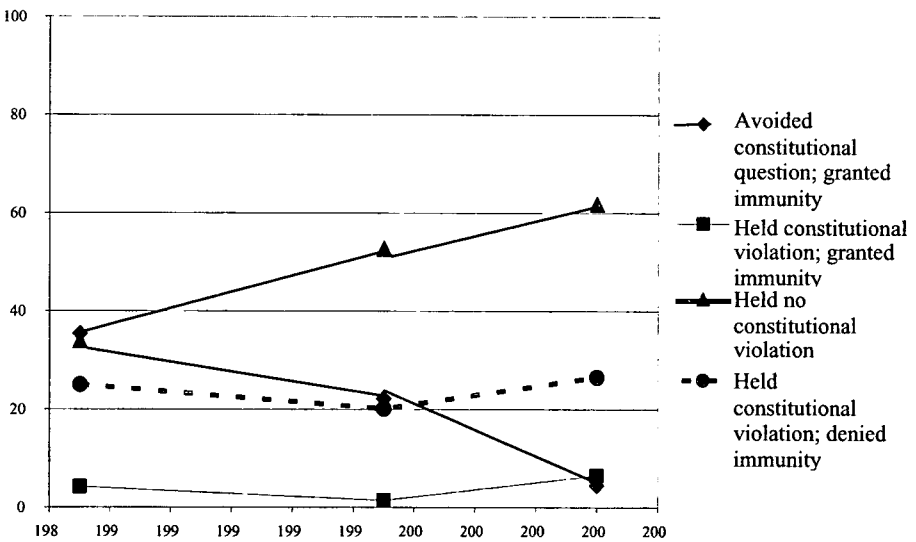
102. In the pre-*Siegert* time frame, the court found a violation in 25.0% [19.1, 30.9] of cases, and in 2006–2007, the court found a constitutional violation in 26.5% [20.2, 32.8] of cases.

103. Within the district court sample, plaintiffs brought a greater average number of claims per case in 2006–2007 than in the pre-*Siegert* time period: the 100-case sample for the 2006–2007 time period yielded 195 claims, while the pre-*Siegert* sample yielded only 161 claims.

**Figure 3: All district court claims**



**Figure 4: All appellate court**



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.

I express no opinion on whether sequencing actually creates an *incentive* for judges to find against plaintiffs. The data I have collected neither support nor contradict that conclusion because they offer no insight into how the courts would have decided the cases they avoided pre-*Saucier*. Rather, my research simply reveals an unexpected phenomenon: that the constitutional questions avoided pre-*Saucier* are now almost uniformly decided in defendants' favor. The possibility that sequencing not only causes the articulation of, but actually *incentivizes*, denial of constitutional violations is an intriguing one that perhaps future scholarship will explore.

Finally, I wish to address the other empirical work in this area. Professor Healy's work examining courts' willingness to expand constitutional rights in the two years following *Saucier* is—as far as it goes—consistent with my results.<sup>104</sup> Although Healy's methodology differed from mine in several respects,<sup>105</sup> making direct comparison impossible, he found that courts were far more likely to deny than to acknowledge new constitutional rights: In 76% of the cases where an appellate court ultimately granted qualified immunity for the defendants, the court also held that the asserted constitutional right did not exist, while in only 17% of cases did the court acknowledge the existence of the right.<sup>106</sup> At a basic level, therefore, our results similarly demonstrate that courts are more likely to deny than to acknowledge constitutional rights.

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104. See Healy, *supra* note 10, at 930–31, app.

105. I do not wish to criticize Professor Healy's research, which suffices for the purposes of his eloquent and persuasive article; I merely wish to explain why his results are not suitable for direct comparison to my own. The differences in methodology are substantial. Healy generated his initial list from a Westlaw headnote stating *Saucier*'s sequencing requirement. Because many cases might have cited other precedent for the sequencing requirement (such as the leading case within the circuit), his list is almost certainly underinclusive. Healy acknowledges this possibility but declares his methodology sufficient to capture, broadly, the fact that courts are more likely to deny than to acknowledge constitutional rights when they plan to grant qualified immunity. *Id.* at 937 n.431. Healy's failure to compare the post-*Saucier* time frame with a pre-*Saucier* reference point also limits the probative value of his data: he cannot claim that sequencing led to increased denial of constitutional rights when he lacks data regarding the rate of such denials pre-*Saucier*. Healy also does not examine cases in which courts found a constitutional right and denied qualified immunity, which overlooks the possibility that *Saucier* affected such cases as well. For a discussion of this possibility, see *supra* note 100. Finally, Healy makes no attempt to account for situations in which courts reached different results for different defendants.

106. In the other 7% of cases, Healy found that courts departed from *Saucier*'s sequencing requirement. Healy, *supra* note 10, at 930 n.423

Paul Hughes has also published empirical research categorizing all circuit court cases involving a qualified immunity defense decided in 1988, 1995, and 2005.<sup>107</sup> His careful and thorough research reveals—unsurprisingly in light of *Siegert* and *Saucier*—that the appellate courts followed the Supreme Court’s directive with respect to the resolution of the constitutional issue before the qualified immunity issue: constitutional law articulation rose from 65% to 74% to 99%, respectively, during the three time periods examined.<sup>108</sup> Hughes does not, however, attempt to examine the nature or quality of the newly articulated law. His paper, therefore, chiefly demonstrates that the appellate courts largely tend to follow the procedural framework laid out by the Supreme Court. As such, his work is fully consistent with both Professor Healy’s and my own.

### C. *Eliminating Other Explanations*

Before further exploring the trends in my data, I wish to rule out several alternate explanations for the results obtained. I considered possible extrajudicial explanations for the data, as well as some problems with the data set itself.

*Overall composition of courts’ dockets.* One factor that could call my results into question is variation in the overall number and composition of civil rights cases filed. Figure 5 presents data on this issue compiled by the federal government.<sup>109</sup> Broadly speaking, the total number of non-prisoner-

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107. Paul Hughes, *Not a Failed Experiment: Wilson-Saucier Sequencing and the Articulation of Constitutional Rights*, 80 COLO. L. REV. 401 (2009).

108. *Id.*

109. I used data compiled by the U.S. Department of Justice Bureau of Statistics and the Administrative Office of the U.S. Courts to complete this Figure. I drew the number of civil rights cases from 1990 to 2000 for cases not involving prisoners from BUREAU OF JUSTICE STATISTICS, CIVIL JUSTICE DATA BRIEF: CIVIL RIGHTS COMPLAINTS IN U.S. DISTRICT COURTS, 2000 (2002), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/crcus00.pdf>. For 2001 through 2005, I drew the numbers from ADMIN. OFFICE OF THE U.S. COURTS, 2005 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS 161 tbl. C-2A (2006), available at <http://www.uscourts.gov/judbus2005/appendices/c2a.pdf> [hereinafter 2005 ANNUAL REPORT]. And for 2006 and 2007, I drew the numbers from ADMIN. OFFICE OF THE U.S. COURTS, 2007 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS 145 tbl. C-2 (2008), available at <http://www.uscourts.gov/judbus2007/appendices/C02Sep07.pdf> [hereinafter 2007 ANNUAL REPORT]. For 2001 and later, therefore, the data actually include the twelve months preceding September 30 of that year—i.e., the data reported for 2001 include cases between October 1, 2000, and September 30, 2001; the data reported for 2002 included cases between October 1, 2001, and September 30, 2002; and so forth. I obtained data regarding prisoner-filed civil rights cases from 1990 to 2000 by aggregating the claims filed by federal and state inmates reported in BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: PRISONER PETITIONS FILED IN U.S. DISTRICT COURTS, 2000, WITH TRENDS 1980–2000, at 2 tbl. 1 (2002), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ppfusd00.pdf>. For 2001 through 2007, I drew data from 2005 ANNUAL REPORT, *supra*, and 2007 ANNUAL REPORT, *supra*. To obtain the total number of cases for these years, I added prisoner civil rights and prison conditions suits together because the civil rights category from the

initiated civil rights cases increased steadily until 1997, then declined until the present. Meanwhile, the number of prisoner-initiated suits increased significantly until 1996, when it declined dramatically—probably due to the enactment of the Prison Litigation Reform Act, with its requirement of administrative exhaustion<sup>110</sup>—and has remained fairly stable since 2001. In the aggregate, therefore, the number of civil rights cases commenced in the federal district courts peaked in 1996 at 83,222, well before *Saucier* was decided in 2001, and subsequently declined, steadily, to only 55,781 such cases in 2007.

These trends in the number of cases filed do not have any inherent implication for my data. Even if the raw number of cases changed, the percent of such cases that were decided in a particular way would not necessarily change. Some commentators have speculated, however, that the increase in suits filed during the 1990s was attributable to an increase in the proportion of frivolous or non-meritorious suits, particularly those suits involving prisoners.<sup>111</sup>

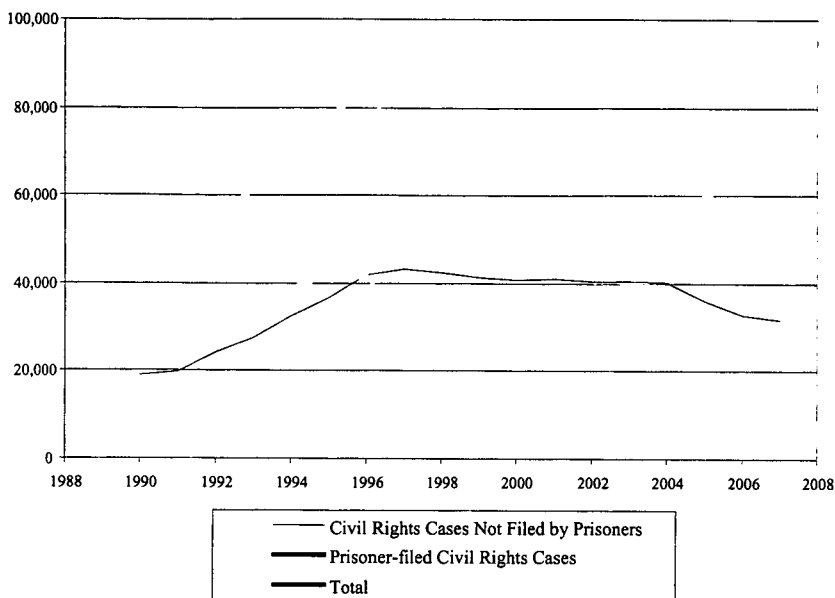
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1980–2000 report included prison conditions suits. Finally, I added the non-prisoner-initiated and prisoner-initiated numbers together to obtain the total number of civil rights claims.

110. See Prison Litigation Reform Act, Pub. L. No. 104-134, §§ 801–810, 110 Stat. 1321 (1996); 42 U.S.C. § 1997e (codification of exhaustion requirement).

111. See, e.g., Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1594 (2003) (explaining that 82% of inmate litigation from 1980 to 1995 resulted in judgment for the defendants, and that inmate litigation comprised fifteen percent of the federal docket in 1995).

Figure 5: Civil Rights Cases Commenced in District Court 1990-2007



For the sake of argument, I will assume that more suits overall equates to more frivolous suits. And an increase in the number of frivolous suits might be linked to an increase in the percentage of claims in which the court found that no constitutional violation occurred.

But even if this assumption is in fact true—a proposition on which I express no opinion—it has not skewed the data for present purposes. Most obviously, the increase in the overall number of suits, with its hypothesized corresponding increase in the number of non-meritorious suits, peaked in 1996 and declined thereafter. But my data show a steady increase in the number of constitutional rulings against plaintiffs during this period of decline, from 46% during the pre-*Saucier* period in 1999–2001 to 71% in 2006–2007. If anything, therefore, the decline in rulings favorable to plaintiffs has occurred *despite* this hypothesized decrease in the number of non-meritorious suits.

More concretely, I base my conclusion that the overall composition of civil rights cases on the federal docket has not skewed my results on the similarity of the trends seen at the district court and appellate levels. Even if a greater percentage of claims filed before the district court in recent years are—for whatever reason—lacking in merit, such cases are unlikely to reach the appellate level. First, such cases are less likely to be appealed. Moreover, structures present at the appellate level mitigate the possibility that a greater number of non-meritorious cases filed at the district court level

will affect the appellate docket. Each circuit has a screening procedure involving a team of staff attorneys to deal more expeditiously with non-meritorious cases.<sup>112</sup> Although commentators have analyzed and critiqued this screening process,<sup>113</sup> the important point, for my purposes here, is that non-meritorious cases are likely to be weeded out before hearing by an appellate panel and disposed of by summary disposition.<sup>114</sup> Given this vetting process, it is improbable that the decline in rulings favorable to plaintiffs revealed by my data is the byproduct of a greater percentage of appellate courts' written decisions ruling on non-meritorious cases.

*Political views of judges.* One might also argue that courts' apparent reluctance to avail themselves of the option of finding a violation but granting immunity could stem from the much-discussed conservative trend in the judiciary.<sup>115</sup> Ideally, one would test this possibility by attempting to compare the results reached by conservative and liberal district court judges.<sup>116</sup> But because (obviously) there is no database listing judges as "liberal" or "conservative," the best available proxy for the political ideology of a judge is the party of the president who appointed the judge.

112. U.S. Courts, Newsroom, *Staff Attorney Offices Help Manage Rising Caseloads* (Feb. 17, 2004), <http://www.uscourts.gov/newsroom/stffattys.htm> ("Core responsibilities vary among staff attorney offices, but in each appeals court they include review of all appeals filed by prison inmates without a lawyer's help. Screening such 'pro se' prisoner cases was the initial focus of staff attorney offices when they were formally authorized and established by Congress in 1982."). The magnitude of the staff attorneys' screening role is also acknowledged by judges. See, e.g., Alex Kozinski, *The Appearance of Propriety*, LEGAL AFF., Jan.–Feb. 2005, at 19 (explaining that a team of seventy staff attorneys processes about 40% of the cases in which the Ninth Circuit issues a merits ruling).

113. See, e.g., Penelope Pether, *Sorcerers, Not Apprentices: How Judicial Clerks and Staff Attorneys Impoverish U.S. Law*, 39 ARIZ. STATE L.J. 1 (2007).

114. None of the cases I examined on Westlaw fell into this category.

115. See, e.g., Robert A. Carp et al., *The Voting Behavior of George W. Bush's Judges: How Sharp a Turn to the Right?*, in PRINCIPLES AND PRACTICE OF AMERICAN POLITICS: CLASSIC AND CONTEMPORARY READINGS 429, 438–41 (Samuel Kernell & Steven S. Smith eds., 3d ed. 2007) (discussing evidence that federal judges appointed by George W. Bush are the most conservative in modern history with respect to civil rights and liberties). Commentators debate the recency of this conservative trend. See, e.g., STEVEN P. POWERS & STANLEY ROTHMAN, *THE LEAST DANGEROUS BRANCH?* 28 (2002) (contending that the lower federal courts are a battleground between more liberal Carter and Clinton appointees and more conservative judges appointed by Ronald Reagan, George H.W. Bush, and George W. Bush); William P. Marshall, *Constitutional Law as Political Spoils*, 26 CARDOZO L. REV. 525, 530 (2005) (highlighting the Reagan Justice Department's efforts to appoint conservative judges to the bench). I do not attempt to weigh in on this debate; rather, I only wish to rule out the impact of political affiliation on the data I have accumulated.

116. I did not attempt to examine the effects of political affiliation on the results reached by three-judge appellate panels. Such an inquiry would have entailed weighing the party of the president who appointed all three judges, and measuring the multiplicity of factors affecting the personal interplay between the judges would require its own theoretical modeling—a complex project beyond the scope of this article.



Using the Federal Judicial Center biographical database, I identified the president who had appointed each judge who decided a case in my set.<sup>117</sup> I then performed logistic regression to determine whether the trends I identified remained when the political party of the appointing president was taken into account.<sup>118</sup>

The analysis demonstrated that the party of the appointing president did not account for the trends I identified. When political affiliation was taken into account, there was no statistically significant change in the percentage of cases in which courts held that there was a constitutional violation but granted qualified immunity. There was a statistically significant increase in the percentage of cases in which courts denied that a constitutional violation had occurred. And there was a corresponding statistically significant decrease in the percentage of cases where courts avoided the constitutional question.

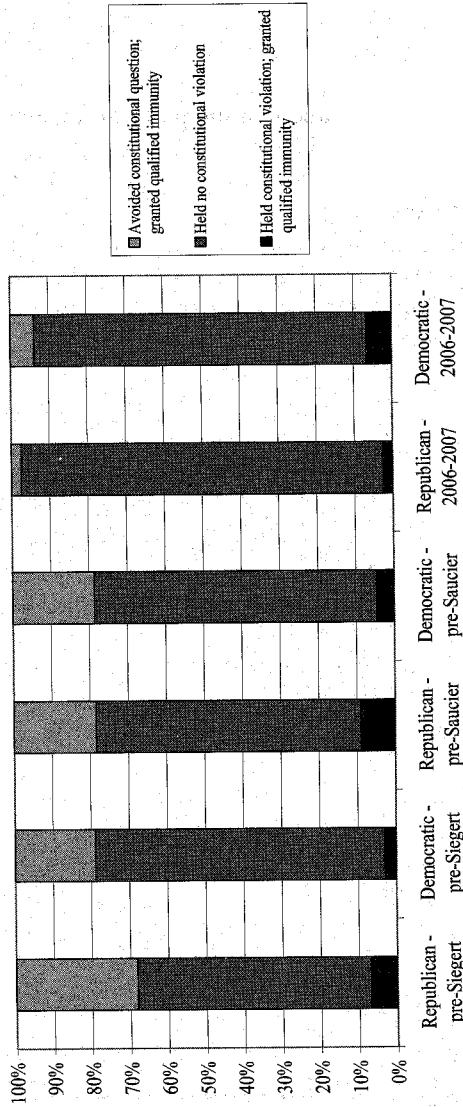
For readers less versed in statistics, Figure 6 offers a visual demonstration of the minimal impact of political affiliation. The visible similarity in the bar graphs for Democratic and Republican appointees for each time period helps to illustrate that the two groups decided cases in a quite similar fashion during all three time periods.

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117. Federal Judicial Center, Biographical Directory of Federal Judges, <http://www.fjc.gov/public/home.nsf/hisj> (last visited March 24, 2009). A few cases were decided by magistrate judges, who are not politically appointed. These cases were not included in the statistical analysis.

118. Regression analysis was appropriate because time functioned as a continuous independent variable in the analysis. Logistic regression, rather than standard regression, was necessary because the values in question were percentages. I used the statistical software R to perform the logistic regression. The full results of that analysis are available at Nancy Leong, [http://nancyleong.com/the-saucier-qualified-immunity-experiment-an-empirical-analysis-36-pepperdine-law-review-667\\_\\_24/](http://nancyleong.com/the-saucier-qualified-immunity-experiment-an-empirical-analysis-36-pepperdine-law-review-667__24/) (last visited Apr. 13, 2009).

Figure 6: Cases in which defendant prevailed by political party of president who appointed judge



The results demonstrate that members of both parties were uniformly reluctant to hold that a violation had taken place, yet grant immunity. There were more claims decided by Republican appointees in the pre-Siebert and 2006–2007 time frames (72 to 33 and 78 to 62, respectively), but more claims decided by Democratic appointees in the pre-Saucier time frame (65 to 36). The shifting majority is unsurprising given that the pre-Saucier time

frame fell near the end of a Democratic presidential administration, while the other time frames followed Republican administrations. But the fact that the identified trends persisted despite the change in the political makeup of the judiciary indicates that political appointment had little to do with those trends. Moreover, there were several instances of judicial behavior that were ideologically counterintuitive. Stereotypically, Republican appointees are more reluctant to acknowledge constitutional rights for plaintiffs, yet Republican appointees were actually *more* likely than their Democratic counterparts to find a constitutional violation yet grant immunity in the pre-*Siegert* and pre-*Saucier* time periods (although the disparity was not statistically significant). In short, the alleged conservative trend in the judiciary does not appear to have had an impact on the consequences of mandatory sequencing.

*Westlaw and publication practices.* Aside from the external factors discussed above, I wish to discuss a few potential issues with the data set itself. These issues result from the arbitrary manner in which cases are selected for publication and the way Westlaw selects cases for inclusion. According to the most recent available data, federal district court judges decide to publish only one or two out of every ten opinions,<sup>119</sup> and appellate courts also publish less than 20% of their opinions.<sup>120</sup> The movement toward limited publication began in 1964, when the Judicial Conference of the United States noted that the increasing number of published opinions burdened the resources of law libraries.<sup>121</sup> According to the 1973 Advisory Council for Appellate Justice Report formal guidelines, which govern both federal district and appellate courts:

An opinion should be published if it does any one of the following: (1) “lays down a new rule of law, or alters or modifies an existing rule”; (2) “involves a legal issue of continuing public interest,” rather than “general public interest of a fleeting nature”; (3) “criticizes existing law,” especially calling for change by a higher court or legislature; or (4) resolves a conflict of authority and “rationalizes apparent divergences in the way an existing rule has been applied.”<sup>122</sup>

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119. See, e.g., Karen Swenson, *Federal District Court Judges and the Decision to Publish*, 25 JUST. SYS. J. 121 (2004); Stephen L. Wasby, *Unpublished Court of Appeals Decisions: A Hard Look at the Process*, 14 S. CAL. INTERDISC. L.J. 67 (2004).

120. See ADMIN. OFFICE OF THE U.S. COURTS, 2006 JUDICIAL FACTS AND FIGURES tbl. 2.5, available at <http://www.uscourts.gov/judicialfactsfigures/2006/alljudicialfactsfigures.pdf> (noting that only 18.4% of cases were published in 2005).

121. Swenson, *supra* note 119, at 121.

122. *Id.*

Different jurisdictions, however, have markedly different practices with respect to publication, publishing anywhere from 10% to slightly over half of their decisions.<sup>123</sup> The first complication, therefore, arises because Westlaw ties inclusion in its database to publication: it includes all published opinions and only some unpublished ones. Consequently, the fact that some jurisdictions publish at higher rates than others may lead to overrepresentation of those jurisdictions in the database.

An additional complexity arises as a result of Westlaw's inclusion practices with respect to unpublished opinions. For some jurisdictions, Westlaw includes all unpublished opinions; for others, only a percentage of those opinions.<sup>124</sup> The process by which Westlaw determines which opinions to include is opaque and, apparently, somewhat arbitrary.<sup>125</sup> The different rates of inclusion for different jurisdictions thus create another potential opportunity for the data set to become skewed.

Though these complications limit the use of Westlaw for some purposes, further analysis of my data shows that any such limitation does not affect my results. Similar to the analysis for political affiliation, I divided the claims within each time period into "published" and "unpublished" categories and performed logistic regression. The analysis demonstrated that changes in the percentage of published cases did not account for the trends I identified. When publication was taken into account, all the identified trends remained present: There was no statistically significant change in the percentage of cases in which courts held that there was a constitutional violation but granted qualified immunity. There was a statistically significant increase in the percentage of cases in which courts denied that a constitutional violation had occurred. And there was a corresponding statistically significant decrease in the percentage of cases in which courts avoided the constitutional question.

*Combined factors.* Finally, I used logistic regression to determine whether political ideology and publication *together* would account for the

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123. Wasby, *supra* note 119, at 69.

124. For example, the database of federal district court cases on Westlaw includes all published opinions as well as unpublished cases for the following jurisdictions: Northern District of Illinois (since April 1985); Eastern District of Louisiana (since September 1986); District of Massachusetts (since September 1986); Eastern District of New York (since September 1986); Southern District of New York (since May 1984); Eastern District of Pennsylvania (since September 1985); District of Kansas (since November 1988); District of the District of Columbia (since July 1990); Northern District of California (since March 1993); Northern District of Mississippi (since June 1996); and Northern District of Texas (since January 1997).

125. Interview with Robert Blackstone, Westlaw representative (Jan. 15, 2008) (notes on file with author).

trend I observed. Once again, even when both political ideology and publication were taken into account, the trends I identified persisted: no statistically significant change in the percentage of cases in which courts held there was a constitutional violation, a statistically significant increase in the percentage of cases in which courts denied that a constitutional violation had occurred, and a statistically significant decrease in the percentage of cases in which courts engaged in avoidance.

Thus, having considered an array of potential problems, I conclude that none of the variables I have discussed accounts for the trend I have identified. The lack of plausible alternative explanations therefore supports the conclusion that, in the qualified immunity context, some feature of the sequencing approach itself accounts for the simultaneous decrease in avoidance and increase in the denial of constitutional rights. In the next section, I will offer a few thoughts about why sequencing accounts for this decidedly one-sided trend.

## V. EXPLANATIONS AND IMPLICATIONS

Sequencing has altered the course of the constitutional river. Judges are deciding cases in a way that they would not have done but for *Saucier*. Rather than avoid the constitutional question and grant qualified immunity based on lack of clearly established law, courts are now articulating new constitutional law. But these new statements of law are not those we might have predicted. The original rationale for sequencing was to allow injured plaintiffs to recover—as Justice Scalia explained, the purpose “is to clarify the law and thus make unavailable repeated claims of qualified immunity in future cases.”<sup>126</sup> But no increase in recovery by injured plaintiffs has occurred. Rather, the data suggest that the new constitutional principles that would not have been articulated but for the sequencing requirement overwhelmingly favor government defendants.

This lopsided result invites speculation about the complexities of judicial behavior. I will therefore offer a few thoughts, bolstered by relevant research from the field of cognitive psychology, in the hope that future scholarship will further illuminate the shadowy realms of judges’ decision making processes in this area.

The theory of cognitive dissonance, described as “one of the most influential theories in social psychology,”<sup>127</sup> provides a compelling explanation for judges’ demonstrated reluctance to acknowledge a

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126. *Bunting v. Mellen*, 541 U.S. 1019, 1024 (2004) (Scalia, J., dissenting from denial of certiorari).

127. Eddie Harmon-Jones & Judson Mills, *An Introduction to Cognitive Dissonance Theory and an Overview of Current Perspectives on the Theory*, in *COGNITIVE DISSONANCE: PROGRESS ON A PIVOTAL THEORY IN SOCIAL PSYCHOLOGY* 3 (Eddie Harmon-Jones & Judson Mills, eds., 1999).

constitutional violation but grant qualified immunity. Cognitive dissonance is the feeling of discomfort that results from holding two contradictory or inconsistent ideas simultaneously, which produces a drive to reduce the dissonance by modifying or rejecting one of the inconsistent ideas.<sup>128</sup> Leon Festinger, the pioneer of cognitive dissonance theory, offers the example of an individual who continues to smoke, knowing that it is bad for his health.<sup>129</sup> That individual may reconcile this inconsistency by deciding:

(a) he enjoys smoking so much it is worth it; (b) the chances of his health suffering are not as serious as some would make out; (c) he can't always avoid every possible dangerous contingency and still live; and (d) perhaps even if he stopped smoking he would put on weight which is equally bad for his health.<sup>130</sup>

The existence of a dissonant state, therefore, leads individuals to seek or accept information that reduces dissonance, while discounting evidence that increases dissonance by ignoring, discrediting, or denying it.<sup>131</sup>

Subsequent studies about the factors that influence dissonance suggest that judges are likely to experience dissonance more acutely than members of the general population.<sup>132</sup> Judges, in other words, have unique and powerful incentives to avoid dissonance wherever possible. Research indicates that the drive to reduce cognitive dissonance is particularly strong when individuals are publicly and irrevocably committed to a position they have adopted.<sup>133</sup> This research undoubtedly applies to judges, whose written opinions are enshrined for all to read in print reporters and online databases. Likewise, the drive to reduce cognitive dissonance inheres in a decision only when that decision is made freely.<sup>134</sup> Research has found, for example, that

128. LEON FESTINGER, A THEORY OF COGNITIVE DISSONANCE 128–29 (1957).

129. *Id.* at 2.

130. *Id.*

131. *See id.* at 3 (“When dissonance is present, in addition to trying to reduce it, the person will actively avoid situations and information which would likely increase the dissonance.”).

132. While a comprehensive survey of cognitive dissonance research is unnecessary for the general conclusions presented in this paper, two useful resources that offer up-to-date overviews of the field are COGNITIVE DISSONANCE: PROGRESS ON A PIVOTAL THEORY IN SOCIAL PSYCHOLOGY, *supra* note 127, and JOEL COOPER, COGNITIVE DISSONANCE: FIFTY YEARS OF A CLASSIC THEORY (2007).

133. *See, e.g.*, J. Merrill Carlsmith et al., *Studies in Forced Compliance*, 4 J. PERSONALITY & SOC. PSYCHOL. 1 (1966); Keith E. Davis & Edward E. Jones, *Changes in Interpersonal Perception as a Means of Reducing Cognitive Dissonance*, 61 J. ABNORMAL & SOC. PSYCHOL. 402 (1960).

134. *See, e.g.*, Darwyn E. Linder et al., *Decision Freedom as a Determinant of the Role of Incentive Magnitude in Attitude Change*, 6 J. PERSONALITY & SOC. PSYCHOL. 245 (1967).

students who *chose* to participate in an experiment experienced a great deal more dissonance (and correspondingly changed their attitudes to reduce that dissonance) when asked to write essays that conflicted with their beliefs than those who were *required* to participate in the same experiment.<sup>135</sup> It is likely that those who participated voluntarily felt more responsible for their own behavior. As Professor Cooper emphasizes, “[c]hoice matters,”<sup>136</sup> and judges, with their lifetime tenure and broad discretion, exercise virtually unfettered choice. This freedom to choose the outcome of a case, and the responsibility that accompanies such a choice, initiates a powerful compulsion to reduce dissonance resulting from that choice.

Cognitive dissonance theory offers a compelling explanation for the lopsidedness of constitutional law articulation after *Saucier*.<sup>137</sup> As we have seen, even before *Siegert*, judges were reluctant to acknowledge a violation but deny recovery on immunity grounds. From the perspective of dissonance theory, such reluctance is expected. Our legal culture is steeped in the principle that “where there is a right, there must be a remedy.”<sup>138</sup> The act of recognizing a right, yet precluding a remedy, could create cognitive dissonance for many judges, whose education, training, and even moral inclination encourage them to ensure that rights and remedies remain linked. Such dissonance is only compounded by the fact that it is a *constitutional* right that would be recognized, and a judge-made mechanism that would preclude entitlement to a remedy. Acknowledging a constitutional injury while precluding recovery may therefore create intense internal discomfort for judges. Rather than tolerate this cognitive dissonance, judges may be subconsciously inclined to deny that a constitutional violation occurred at all.

Other jurisprudential conventions also induce judges to avoid cognitive dissonance by denying the existence of constitutional rights. The notion of reliance on precedent is deeply ingrained in—indeed, integral to—our common law legal system. But granting immunity to a defendant officer tends to undermine the plausibility of holding that a constitutional violation occurred. The act of acknowledging that no court has previously held that a constitutional violation exists under the circumstances entails

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135. *Id.*

136. COOPER, *supra* note 132, at 63.

137. Festinger seems almost to have directly contemplated judicial decision making, explaining that “[w]here an opinion must be formed or a decision taken, some dissonance is almost unavoidably created.” FESTINGER, *supra* note 128, at 5.

138. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 162–63 (1803) (citing WILLIAM BLACKSTONE, 3 COMMENTARIES \*23, \*109); Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1733, 1778 & n.243 (1991) (summarizing the establishment of the principle that, where there is a law, there is a remedy and explaining that this principle is a cornerstone of the American legal tradition).

acknowledging the lack of precedent for what the court is about to do.<sup>139</sup> The inherent reasonableness of a decision is also a well-recognized precept, one not casually ignored. For a defendant officer to be held liable, “the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.”<sup>140</sup> By recognizing a constitutional violation but granting qualified immunity, a court must concede (at least implicitly) that it is reaching a result that a reasonable officer would not have predicted.<sup>141</sup> The judiciary has recently faced accusations of so-called judicial activism, and in light of these charges, judges may be especially wary of reaching a result that appears to go out on a limb or create new law.<sup>142</sup>

In the few cases where judges have recognized a constitutional right while granting qualified immunity to the officers who violated that right, the decision was often justified by some additional factor, such as novel factual circumstances or previously-unaddressed technology. The Supreme Court, for instance, has found a constitutional violation, yet granted immunity, on only one occasion. In *Wilson v. Layne*, the Court held that officers who entered a private residence to execute an arrest warrant violated the Fourth Amendment when they brought a newspaper reporter and a photographer with them.<sup>143</sup> But concluding that the constitutional question “is by no means open and shut,” the Court then granted immunity to the police officers.<sup>144</sup> *Wilson* is notable for the novelty of its factual circumstances. Indeed, the Court identified only one published state intermediate court

139. The Supreme Court has held that “clearly establish[ing]” legal principles sufficient to preclude qualified immunity requires on-point caselaw from the Supreme Court, controlling authority in the relevant jurisdiction, or a “consensus of cases of persuasive authority.” *Wilson v. Layne*, 526 U.S. 603, 617 (1999). A court might therefore be able to buttress its argument using persuasive authority that fell short of a consensus or non-persuasive authority such as district court opinions. The use of such authority, however, might also signal the lack of stronger authority, thereby highlighting, rather than downplaying, the uniqueness of the court’s result.

140. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

141. See Amanda K. Eaton, Note, *Optical Illusions: The Hazy Contours of the Clearly Established Law and the Effects of Hope v. Pelzer on the Qualified Immunity Doctrine*, 38 GA. L. REV. 661, 696–702 (2004) (advocating increased emphasis on the reasonableness of the officer’s actions in determining qualified immunity).

142. See Keenan D. Kmiec, *The Origin and Current Meanings of “Judicial Activism,”* 92 CAL. L. REV. 1441, 1442 (2004) (noting that the term has been discussed in over five thousand law review articles); *id.* at 1443 n.8 (“In the past decade (from 1994 to August 2004), ‘judicial activism’ and its cognates have appeared 163 times in the *Washington Post* and another 135 times in the *New York Times*.”).

143. 526 U.S. at 605–06.

144. *Id.* at 615–16.



decision that dealt with the same issue.<sup>145</sup> Given such novelty, the Justices likely experienced less dissonance in finding a constitutional violation but granting immunity: the lack of precedent was simply a function of the new factual scenario, and the fact that reasonable officers failed to anticipate the decision could also be explained by the lack of prior guidance.

Cognitive dissonance theory also accounts for the *direction* in which the constitutional issues that courts avoided pre-*Saucier* are resolved. One might contend that judges could also reduce dissonance by recognizing a constitutional violation and *denying* immunity. But as discussed in Part III, empirical evidence suggests that the proportion of cases in which courts deny qualified immunity has, if anything, decreased.<sup>146</sup> Why does this denial of violations predominate?

Festinger termed the process of resolving dissonance “psychological work,” explaining that such work will typically result in support of the cognition most resistant to change.<sup>147</sup> Here, the relevant subset of cases consists of those where previously courts would have avoided the constitutional question and simply granted immunity. It is a reasonable assumption that, within this set of cases, the immunity question is generally easy and the constitutional question difficult. Judges, therefore, are likely to have a clear intuition about the outcome of the immunity question. The greater level of certainty regarding the immunity determination makes the outcome on that issue, the cognition, more resistant to change. Under such circumstances, acknowledging a constitutional violation will inevitably intensify, rather than resolve, cognitive dissonance. Judges, it stands to reason, will instead lessen or avoid cognitive dissonance by denying that a constitutional violation occurred.

Aside from the relative ease of the immunity determination in avoidance cases, other facets of qualified immunity jurisprudence also explain why dissonance is generally resolved in favor of the defendant. The Supreme Court has instructed that the qualified immunity issue should be resolved as early as possible in litigation<sup>148</sup>—perhaps even on a motion to dismiss, before the plaintiff has had ample opportunity for discovery. This emphasis on early resolution means that these issues generally arise on the *defendant’s* motion for dismissal or summary judgment on immunity grounds. The

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145. *Id.* at 616.

146. See Appendix *infra* tbls. 3 & 4.

147. In Festinger’s words: “[T]here is a limit to the magnitude of dissonance which can exist in a system. . . . If the dissonance becomes greater than the resistance to change, then the least resistant elements of cognition will be changed, thus reducing the dissonance.” FESTINGER, *supra* note 128, at 128–29.

148. See *Saucier v. Katz*, 533 U.S. 194, 200 (2001); see, e.g., *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (*per curiam*) (“[W]e repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation.”).

court's initial focus, therefore, is on whether the defendant deserves immunity—not on the possibility that a constitutional violation occurred. This initial focus inevitably privileges the defendant's narrative.<sup>149</sup> As Professor Nahmod has explained, the judge makes the objective reasonableness determination “by reading the defendant's particularized narrative and imagining what it was like when she acted as she did under the circumstances confronting her.”<sup>150</sup> And once the immunity question has been decided in favor of the defendant, cognitive dissonance theory suggests that the constitutional issue is likely to be decided the same way.

One might expect that the Supreme Court would be less concerned about the implications of acknowledging a constitutional violation but granting qualified immunity. The Court has an inherent lawmaking function—indeed, grants of certiorari are often prompted by circuit splits, which by definition indicate a lack of clarity in the law, and so the Court is more accustomed to reaching the result it deems most appropriate where the law is unclear. The Supreme Court's role thus contrasts with that of the lower courts, whose responsibilities involve a mixture of articulating law and applying existing legal principles. Moreover, the Supreme Court is likely less concerned with lack of precedent for its result than are lower courts. Its decisions run no risk of being overturned, and no real consequences (aside, perhaps, from public excoriation) flow from reaching a result that is only minimally supported by precedent. But, as noted, even the Supreme Court has found a constitutional violation yet granted immunity only once, in *Wilson v. Layne*, where the novelty of the factual circumstances likely resulted in less dissonance for the Justices.<sup>151</sup>

The question remains: why should we care about the increased articulation of defendant-friendly law after *Saucier*? The sequencing approach is still functioning to articulate constitutional law, however unilaterally, thereby placing government officers and members of the public on notice of the relevant legal standards. But the forced articulation of constitutional principles has implications over time. When a court answers a constitutional question rather than saving that question for another day, it creates a new legal principle. In the process, the court recenters the legal

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149. Sheldon Nahmod, *The Restructuring of Narrative and Empathy in Section 1983 Cases*, 72 CHI.-KENT L. REV. 819, 827–32 (1997) (“As a practical matter . . . the plaintiff's story is typically narrated in a barebones fashion . . . . And it is this barely told story, not fleshed out, that competes with the defendant's more elaborate and evidentiary narrative articulated in the qualified immunity setting.”).

150. *Id.* at 828–29.

151. See *supra* text accompanying notes 141–143.

regime in that area, altering expectations and changing the legal landscape for all future claims.<sup>152</sup> Professor Healy has described this process as a “domino effect,” noting that “a ruling that a constitutional right does not exist authorizes government officials to engage in conduct they otherwise might have avoided.”<sup>153</sup>

In the Fourth Amendment context, for example, police officers in most jurisdictions are trained that various restraint techniques are arrayed along a “continuum of force,” with more severe uses of force appropriate only in more dangerous situations.<sup>154</sup> Consequently, a decision upholding the use of a particular technique—say, pepper spray—to physically subdue a recalcitrant suspect recenters the continuum, leading the judiciary, government officers, and the general public to view that technique as more acceptable.<sup>155</sup> In a future case involving a slightly more dangerous technique—a taser, perhaps<sup>156</sup>—the question will not be decided on a blank slate, but will be decided in light of the previous case. But the previous case would not have been decided but for *Saucier*’s sequencing requirement.

Cognitive psychology offers a compelling explanation for the trend in law articulated as a result of *Saucier*. Regardless of the underlying mechanisms at work, however, the ensuing slow shift in the law over time raises serious concerns regarding the interplay between the sequencing approach and the articulation of constitutional law in the qualified immunity context. Under such circumstances, continued adherence to *Saucier*’s mandate was inadvisable, and the Supreme Court thus correctly held in *Pearson* that sequencing take place at the court’s discretion.

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152. Indeed, even attorneys may cite unpublished appellate cases in their briefs for their precedential or persuasive value in all but three circuits (the Second, Seventh, and Ninth). See ROBERT TIMOTHY REAGAN, FED. JUDICIAL CTR., CITING UNPUBLISHED FEDERAL APPELLATE OPINIONS ISSUED BEFORE 2007 (2007), available at [http://www.uscourts.gov/rules/Unpub\\_Opinions.pdf](http://www.uscourts.gov/rules/Unpub_Opinions.pdf). Courts, of course, may discuss or rely on any authority, published or unpublished, they find relevant and persuasive.

153. Healy, *supra* note 10, at 933.

154. See, e.g., *Griffith v. Coburn*, 473 F.3d 650, 657 (6th Cir. 2007) (“Police tactics are classified along a ‘force continuum’ and . . . the vascular neck restraint falls toward ‘the harder or the more violent part’ of this continuum, probably beyond pepper spray, at the ‘point where you are using batons, or . . . tasers.’”); *Jennings v. Jones*, 499 F.3d 2, 12 (1st Cir. 2007) (explaining that various techniques for subduing and restraining an arrestee are placed along a “Use of Force Continuum”).

155. See *Mecham v. Frazier*, 500 F.3d 1200 (10th Cir. 2007) (holding to be constitutional the use of pepper spray during a roadside stop after a female detainee took a cell phone call from her mother, refused to terminate the call on a police officer’s command, and indicated that she did not wish to exit the car until her mother arrived because she was afraid of what the police officers would do if she exited the car).

156. See *Griffith*, 473 F.3d. at 657; see also *Covington v. Fairman*, 123 F. App’x 738, 743 (9th Cir. 2004) (indicating that pepper spray is a less extreme use of force than is a taser).

## VI. CONCLUDING THOUGHTS

After eight years of debate, the Supreme Court has now rejected *Saucier*'s holding that the sequencing approach should be mandatory. The empirical evidence presented in this article, and the long-term skew in the law that would result from continued mandatory sequencing, add support for the result the Court reached.

The Supreme Court revised *Saucier* by allowing courts to undertake sequencing at their discretion rather than at the Supreme Court's mandate. But it offered little guidance as to when courts should exercise that discretion. In my view, discretion need not and should not be arbitrary. Rather, the decision to decide the constitutional question should result from thoughtful assessment of two relevant factors: whether the constitutional issue is likely to be repeated without ever becoming more susceptible to review and whether the issue is adequately presented in the particular case, taking account of the procedural posture of the case, the corresponding thoroughness of the parties' briefing of the constitutional issue, and the level of factual development. If the constitutional question is unlikely to arise in a more appropriate posture for resolution, and the issue is adequately presented and briefed in the case at hand, then the court could proceed to rule on the constitutional issue. Otherwise, it could simply resolve the matter on qualified immunity grounds, saving the constitutional question for another day. Such an approach would at least partially address the concerns of those who argue that constitutional law will otherwise fail to evolve. But it would also avoid the forced articulation of constitutional law—and subsequent skew toward denial of constitutional rights—engendered by *Saucier*'s mandatory sequencing approach.

Despite the Court's decision to end the "*Saucier* experiment," we should remain mindful that the new approach it has prescribed has simply replaced that experiment with another. The goal of the new experiment is, as always, to balance the need to facilitate the development of the law with pragmatic concerns such as judicial economy and informed judicial decision making. And the success or failure of the new experiment inherently hinges on real-world results, which must be assessed through the collection and analysis of empirical data. My ultimate hope, therefore, is that subsequent research will continue to monitor the effect of qualified immunity doctrine on the evolution of the law by examining the nature and quality of the law the doctrine facilitates. This article, then, is only the first stage of what must be an ongoing process of evaluating the procedures we espouse by examining the law those procedures produce.

**Appendix: Numerical Tables Corresponding to Charts and Graphs**

**Table 1: District court claims where the defendant(s) prevailed**

	Total number of claims	Avoided constitutional question; granted immunity (%)	Held constitutional violation; granted immunity (%)	Held no constitutional violation (%) <sup>157</sup>
Pre- <i>Siegert</i>	105	28.6	5.7	65.7 (47.6 + 18.1)
Pre- <i>Saucier</i>	106	20.8	7.6	71.7 (51.9 + 19.8)
2006–2007	156	6.4	4.5	89.1 (69.9 + 19.2)

**Table 2: Appellate court claims where the defendant(s) prevailed**

	Total number of claims	Avoided constitutional question; granted immunity (%)	Held constitutional violation; granted immunity (%)	Held no constitutional violation (%)
Pre- <i>Siegert</i>	106	48.1	5.7	46.2 (31.1 + 15.1)
Pre- <i>Saucier</i>	110	29.1	1.8	69.1 (62.7 + 6.4)
2006–2007	113	6.2	8.8	84.9 (80.5 + 4.4)

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157. For an explanation of the numbers in parentheses, see *supra* note 100.

**Table 3: All district court claims**

	Total number of claims	Avoided constitutional question, granted immunity (%)	Held constitutional violation, granted immunity (%)	Held no constitutional violation (%)	Held constitutional violation, denied immunity (%)	Other (%) <sup>158</sup>
Pre-Siegert	161	18.6	3.7	42.2 (30.4 + 11.8)	32.3	3.1
Pre-Saucier	165	13.3	4.9	46.0 (33.3 + 12.7)	32.7	3.0
2006–2007	195	5.1	3.6	61.4 (56.0 + 15.4)	14.4	5.6

**Table 4: All appellate court claims**

	Total number of claims	Avoided constitutional question, granted immunity (%)	Held constitutional violation, granted immunity (%)	Held no constitutional violation (%)	Held constitutional violation, denied immunity (%)	Other (%)
Pre-Siegert	144	35.4	4.2	34.0 (22.9 + 11.1)	25.0	1.4
Pre-Saucier	144	22.2	1.4	52.8 (47.9 + 4.9)	20.1	3.5
2006–2007	155	4.5	6.5	61.9 (58.7 + 3.2)	26.5	0.7

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158. For a description of this category, see *supra* Part IV.A.

**Table 5: District court results by political party of appointing president**

	Percentage of total decisions <sup>159</sup>	Avoided constitutional question; granted immunity (%)	Held constitutional violation; granted immunity (%)	Held no constitutional violation (%)	Held constitutional violation; denied immunity (%)	Other (%)
Pre-Siegert - D	31.9	13.5	1.9	48.0 (36.5 + 11.5)	34.6	1.9
Pre-Siegert - R	68.1	20.7	4.5	39.6 (27.9 + 11.7)	31.5	3.6
Pre-Saucier - D	46.7	18.2	4.0	33.8 (19.5 + 14.3)	44.2	0.0
Pre-Saucier - R	49.7	7.3	6.1	57.3 (45.1 + 12.2)	23.2	6.1
2006-2007 - D	39.0	9.2	5.3	67.1 (55.3 + 11.8)	7.9	10.5
2006-2007 - R	51.3	2.0	2.0	74.0 (54.0 + 20.0)	19.0	3.0

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159. For the pre-Saucier and 2006-2007 time periods, the percentages do not add up to one hundred because a few decisions were made by magistrate judges, who are not politically appointed and whose political affiliation is therefore not known.

**Table 6: Civil rights cases commenced in district court 1990–2007**

Year	Civil rights cases not filed by prisoners	Civil rights cases filed by prisoners	Total
1990	18,914	25,992	44,906
1991	19,892	26,042	45,934
1992	24,233	30,555	54,788
1993	27,655	33,933	61,588
1994	32,622	39,065	71,687
1995	36,600	41,679	78,279
1996	42,007	41,215	83,222
1997	43,278	28,632	71,910
1998	42,354	26,461	68,815
1999	41,304	25,694	66,998
2000	40,908	25,504	66,412
2001	40,910	24,118	65,028
2002	40,420	23,964	64,384
2003	40,516	24,073	64,589
2004	40,239	23,449	63,688
2005	36,096	24,614	60,710
2006	32,865	24,239	57,104
2007	31,756	24,025	55,781



**Table 7: Published district and appellate court claims**

	Avoided constitutional question; granted immunity (%)	Held no constitutional violation (%)	Held constitutional violation; granted immunity (%)	Held constitutional violation; denied immunity (%)	Other (%)
<i>Pre-Siegert</i>	28.3	35.1	3.9	29.3	3.7
<i>Pre-Saucier</i>	11.4	51.0	3.4	29.5	4.7
2006–2007	7.5	66.3	3.7	19.4	3.2

**Table 8: Unpublished district and appellate court claims**

	Avoided constitutional question; granted immunity (%)	Held no constitutional violation (%)	Held constitutional violation; granted immunity (%)	Held constitutional violation; denied immunity (%)	Other (%)
<i>Pre-Siegert</i>	23.3	44.0	4.3	28.4	0
<i>Pre-Saucier</i>	23.1	47.6	3.1	24.4	1.9
2006–2007	3.9	69.5	3.5	19.5	3.5