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Qualified Immunity After *Pearson v. Callahan*

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ABSTRACT

In *Pearson v. Callahan*, the U.S. Supreme Court altered the contours of the qualified immunity defense with the intention of changing when and how federal courts make constitutional law. Qualified immunity is the primary defense to constitutional torts against government officials. Before *Pearson*, courts were required to determine if an official had violated a constitutional right even when that official was already protected by qualified immunity. After *Pearson*, courts now have the discretion to avoid such constitutional determinations when an official has qualified immunity. To determine *Pearson*'s impact, this Comment presents an empirical study of qualified immunity cases. The findings are surprising. While circuit courts have generally begun avoiding constitutional determinations as expected, district courts have not done so. Because *Pearson* was motivated by significant criticism of mandatory engagement in constitutional analysis, the district courts' reaction is troubling. However, this reaction does indicate that courts tend not to avoid constitutional determinations in order to promote judicial efficiency. If this were the case, such a motivation would affect district courts more than circuit courts. Instead, it seems that a court's decision to avoid a constitutional determination is a product of its interest in controlling constitutional precedent. In sum, *Pearson* has given courts substantial control over what precedent enters the body of constitutional law, and at least circuit courts appear to be consciously using it—a finding with implications for how constitutional law will develop in the future.

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INTRODUCTION

Robert Trammell, a fifty-seven-year-old white male, was visiting a friend in Florida when he stepped into the friend's backyard at night.[1] There, while he was looking at his phone, a dog knocked him to the ground and bit his neck several times.[2] Trammell was rushed to the hospital with severe injuries.[3] The dog belonged to the city police department and was being used to search for a twenty-three-year-old African American male suspected of attempting to break into a house nearby.[4] The dog became silent when it came upon Trammell's friend's yard, indicating that it had found something.[5] The officer claimed he shouted two warnings before releasing the dog into the yard.[6] Trammell claimed the officer gave no warnings.[7] Trammell sued the officer, claiming that the officer's failure to warn constituted an unreasonable seizure in violation of the Fourth Amendment.[8] After losing in district court on summary judgment, Trammell appealed.[9] The court of appeals decided it was irrelevant whether a warning had been given.[10] Even if the officer's use of force without warning had violated Trammell's constitutional rights, the officer was protected from liability by a form of immunity given to government officials acting in their official capacity: qualified immunity.[11]

Toby Cordova was driving down the wrong side of the highway to flee the police when an officer sped ahead of him and attempted to deploy devices that would deflate the tires of Cordova's car.[12] The officer claimed that Cordova's car was coming too quickly and heading straight for him.[13] The officer fired several shots, one of which killed Cordova.[14] Conflicting with the officer's claim of immediate danger, most of his shots, including the one that struck and

1. Trammell v. Thomason, 335 F. App'x 835, 837 (11th Cir. 2009).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.* at 838.
7. *Id.*
8. *Id.* at 838–39.
9. *Id.* at 838–40.
10. *Id.* at 840.
11. *Id.* at 840–43.
12. Cordova v. Aragon, 569 F.3d 1183, 1186, 1197 n.7 (10th Cir. 2009).
13. *Id.* at 1187.
14. *Id.*

killed Cordova, went through the side of the car, not the front, with the fatal bullet striking Cordova in the back of his head.[15] Cordova's survivors sued the officer for the unconstitutional use of excessive force.[16] After losing in the district court on summary judgment, Cordova's survivors appealed.[17] Just as in *Trammell*, the court of appeals determined that the officer was protected by qualified immunity.[18] However, the court did something that had not been done in *Trammell*. It concluded that the district court incorrectly decided the constitutional claim: A reasonable jury could have found that the officer used excessive force in violation of the Fourth Amendment in firing upon the vehicle when it appeared to be turning away (as the bullet holes indicated).[19]

In both *Trammell* and *Cordova*, a ruling on whether a constitutional violation occurred would not have changed the outcome of the case because the officers were held immune from liability.[20] Nevertheless, the court in *Cordova* decided the constitutional issue,[21] and, as a result, courts and officers now know more about when it is constitutionally permissible to fire at an oncoming car. The *Trammell* court made the opposite choice, deciding not to investigate the constitutional question because it had determined that the officer was immune from liability.[22] Courts and officers looking at *Trammell* can therefore know very little about whether it is constitutionally permissible to let a police dog attack without warning.

These cases were some of the first in which courts had to choose whether or not to decide if a constitutional violation was asserted even though the official was already protected by qualified immunity. On January 21, 2009, in *Pearson v. Callahan,*[23] the U.S. Supreme Court altered the contours of the qualified immunity defense to allow courts to have precisely this choice, and it did so with the intention of changing when and how federal courts make constitutional law.[24]

A plaintiff who has suffered a constitutional violation at the hands of a state or local official acting under color of law may seek a civil remedy under

15. *Id.*
16. *Id.* at 1185.
17. *Id.* at 1187.
18. *Id.* at 1192–93.
19. *Id.* at 1188–92.
20. *See id.* at 1190–93; Trammell v. Thomason, 335 F. App'x 835, 841–43 (11th Cir. 2009).
21. *See Cordova*, 569 F.3d at 1188–92.
22. *See Trammell*, 335 F. App'x at 840–43.
23. 555 U.S. 223 (2009).
24. *Id.*

42 U.S.C. § 1983.[25] Federal officials are similarly liable directly under the Constitution in an action created in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*.[26]

For most government officials, qualified immunity provides the defense to a section 1983 or *Bivens* action.[27] In its present form, qualified immunity protects officials from financial liability for constitutional violations as long as the officials did not violate a clearly established constitutional right of which a reasonable person would have known.[28] Three policy motivations underlie the qualified immunity defense: the questionable fairness of holding officials liable for violations of unclear constitutional rights standards; the possibility that fear of liability could overly constrain government action; and the substantial cost of litigation for government officials even if no violation occurred.[29]

When the qualified immunity defense is asserted, liability for a constitutional tort depends on two inquiries: (1) whether a right was violated;[30] and (2) whether the right was clearly established such that a reasonable person would have known that his actions violated the right.[31] These are separate

25. The statute provides that:

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

42 U.S.C. § 1983 (2006). For a history of section 1983, see RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE §§ 19:13–14 (4th ed. 2008).

26. 403 U.S. 388 (1971); *see* Michael A. Rosenhouse, Annotation, Bivens *Actions—United States Supreme Court Cases,* 22 A.L.R. FED. 2d 159 (2007).

27. *See* ROTUNDA & NOVAK, *supra* note 25, § 19.21; Alan K. Chen, *The Burdens of Qualified Immunity: Summary Judgment and the Role of Facts in Constitutional Tort Law*, 47 AM. U. L. REV. 1, 13 (1997).

28. *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

29. *See* Anderson v. Creighton, 483 U.S. 635, 638 (1987) (noting the potential for liability to "unduly inhibit officials in the discharge of their duties"); *Harlow*, 457 U.S. at 806–07, 814 (noting the necessity of preventing "undue interference" with the duties of public officials and minimizing "the expenses of litigation"); Wood v. Strickland, 420 U.S. 308, 319–22 (1975) (noting fairness concern); Chen, *supra* note 27, at 3–4 (reviewing all three justifications).

30. A court, as opposed to the jury, will confront this first prong in the context of a motion and will therefore be deciding if a right was violated based on the facts alleged taken in the light most favorable to the party claiming the injury. *See* Saucier v. Katz, 533 U.S. 194, 201 (2001). Consequently, since this Comment is only concerned with court determinations, this prong may also be referred to by asking whether a violation was "asserted" or "alleged."

31. *See* Pearson v. Callahan, 555 U.S. 223, 232 (2009); *Saucier*, 533 U.S. at 201; Chen, *supra* note 27, at 13.

inquiries, and negating either prong precludes liability.[32] A central and contentious question in the development of qualified immunity has been whether courts must determine if a constitutional right was violated after it has already precluded liability by holding that, even if there were a violation, the right was not clearly established at the time.[33] Since section 1983 is the primary means of remedying constitutional violations,[34] and since qualified immunity is the primary defense to these actions,[35] the answer to this question has a substantial effect on the development of constitutional law.

In 2001, the Supreme Court in *Saucier v. Katz*[36] required that courts approach qualified immunity by first making the constitutional determination—a practice known as "sequencing."[37] Under this approach, a court was required to make a constitutional determination whenever qualified immunity was asserted, but was obligated to determine whether the law was clearly established only if it had found a constitutional violation.[38] Mandatory sequencing was heavily criticized,[39] and recently, in *Pearson v. Callahan*, the Supreme Court overruled *Saucier* and abandoned mandatory sequencing.[40] *Pearson* gives courts the discretion to avoid a constitutional determination if a claim could be dismissed because the right was not clearly established.[41] As a result, the *Tramell* court could choose to avoid a constitutional analysis, while the *Cordova* court could still choose to create constitutional precedent. And the *Tramell* and *Cordova* decisions are only a small part of the picture. Federal courts have had to make that same choice thousands of times since *Pearson* was decided.[42] To understand the effect of *Pearson* on qualified immunity determinations and on the development of constitutional law, we need a broader view of how courts are choosing to use their newfound discretion.

32. *See Pearson*, 555 U.S. at 232; *Saucier*, 533 U.S. at 201; Paul W. Hughes, *Not a Failed Experiment:* Wilson–Saucier *Sequencing and the Articulation of Constitutional Rights*, 80 U. COLO. L. REV. 401, 407 (2009).
33. *See infra* Part II.
34. *See* ROTUNDA & NOVAK, *supra* note 25, § 19.13.
35. *See id.* § 19.21; Chen, *supra* note 27, at 13.
36. 533 U.S. 194.
37. *Id.* at 201; *see also infra* notes 46–60 and accompanying text.
38. *Saucier*, 533 U.S. at 201. A court that has found no violation may, but need not, proceed to the clearly established prong. *See, e.g.*, Meyer v. Woodward, 617 F. Supp. 2d 554, 565–66 (E.D. Mich. 2008) (holding both that no constitutional right was violated and that the law was not clearly established).
39. *See infra* note 61.
40. Pearson v. Callahan, 555 U.S. 223 (2009).
41. *See id*. at 236.
42. *See infra* notes 147–148 and accompanying text.

Through an empirical investigation, this Comment measures how federal courts have responded to *Pearson*. It begins with a history of qualified immunity in Part I. This Part provides historical context and defines the time periods important for the empirical analysis, which compares qualified immunity determinations after *Pearson* to those made in earlier periods. Part II reviews the various positions of those involved in the sequencing debate and offers an analysis of the strengths and weaknesses of these positions. It then demonstrates how *Pearson* balanced the competing interests articulated in the sequencing debate.

Part III describes the methodology and findings of an empirical study of the effects of *Pearson*. I hypothesized that both district and circuit courts would avoid making a constitutional determination when the law was not clearly established more frequently after *Pearson* than in the period before *Pearson* but after *Saucier*. The empirical study yielded unexpected results. Circuit courts have begun to use the discretion granted by *Pearson* to avoid constitutional determinations far more than they did under the *Saucier* sequencing rule. District courts, on the other hand, are avoiding constitutional determinations at a level similar to the *Saucier* period.

Part IV evaluates the implications of these findings. The response of the district courts is troubling given the problems with mandatory sequencing articulated in *Pearson* and elsewhere. Why district courts have responded in this way is a difficult question, but their divergence from circuit courts offers a unique opportunity to understand what might motivate a court to avoid a constitutional determination. I argue that institutional differences between circuit and district courts result in different motivations: Circuit courts are more concerned with the precedential value of their decisions, while district courts are more concerned with case management. Building on this explanation, I argue that these differing motivations, which help elucidate the differing reactions to *Pearson*, indicate that whether courts use their *Pearson* discretion has less to do with judicial efficiency and more to do with whether a court is interested in producing constitutional law. In other words, courts will likely base the use of their *Pearson* discretion on their interest in promulgating particular types of precedent. Therefore, by granting courts substantial control over whether precedent concerning constitutional violations is created at all in section 1983 and *Bivens* actions, *Pearson* promises to give courts substantially greater control over the articulation of constitutional law, both in the positive ways *Pearson* intended and in other ways yet unknown.

I. THE HISTORY OF QUALIFIED IMMUNITY SEQUENCING

Scholars have divided the history of the Supreme Court's sequencing requirements into three periods.[43] During the first period, from 1973 through 1991, the Supreme Court did not address the sequencing question.[44] Most courts felt free to deny liability on the basis that there was no clearly established right, without deciding the underlying constitutional question.[45] *Siegert v. Gilley*[46] in 1991 brought an end to the first period.[47] In *Siegert*, the court of appeals had dismissed a suit because the right claimed to have been violated was not clearly established.[48] The Supreme Court affirmed, but it resolved the suit "at an analytically earlier stage of the inquiry into qualified immunity."[49] The Supreme Court determined that the plaintiff had failed to allege a constitutional violation.[50] In the majority opinion, Chief Justice Rehnquist stated that "a necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is 'clearly established' at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all."[51]

During the second period, from 1991 through *Saucier* in 2001, circuits split on whether sequencing was required.[52] Many courts still denied liability only on the basis that the claimed right was not clearly established, avoiding reaching the constitutional question.[53] The Supreme Court added some clarity in *Sacramento v. Lewis*[54] by calling sequencing the "better approach."[55] Sequencing was thus preferred at that time, but it was not mandatory.

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43. *See* Hughes, *supra* note 32, at 406–17; Nancy Leong, *The* Saucier *Qualified Immunity Experiment: An Empirical Analysis*, 36 PEPP. L. REV. 667, 670 (2009). *But see* Greg Sobolski & Matt Steinberg, *An Empirical Analysis of Section 1983 Qualified Immunity Actions and Implications of* Pearson v. Callahan, 62 STAN. L. REV. 523, 527 (2010) (rejecting the three-period approach based on findings that courts considered themselves bound to sequence before *Saucier*).
44. *See* Hughes, *supra* note 32, at 407. Hughes considers *Scheuer v. Rhodes*, 416 U.S. 232 (1974), to have established the qualified immunity framework beginning in 1973.
45. *See* Hughes, *supra* note 32, at 408.
46. 500 U.S. 226 (1991).
47. *See id.*; *see also* Hughes, *supra* note 32, at 408.
48. *See Siegert,* 500 U.S. at 227.
49. *Id.*
50. *Id.*
51. *Id.* at 232.
52. *See* Hughes, *supra* note 32, at 410–11.
53. *Id.* at 411.
54. 523 U.S. 833 (1998).
55. *Id.* at 841 n.5.

In 2001, *Saucier v. Katz* introduced the third period by mandating sequencing for qualified immunity determinations.[56] In *Saucier*, the court of appeals ruled that the right at issue in the case was clearly established, but it left to the jury the determination of whether a constitutional violation had occurred.[57] The Supreme Court reversed.[58] Justice Kennedy, writing for the majority, held that "[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."[59] The Supreme Court determined that a court must decide whether a constitutional violation has been asserted and is obligated to determine if the right was clearly established only after finding a constitutional violation.[60]

Many criticized the rule of mandatory sequencing.[61] In various opinions, Justices Breyer, Ginsburg, Scalia, and Stevens called for an end to this requirement.[62] Further, some lower courts chose not to follow *Saucier*.[63] On January 21, 2009, the Supreme Court ended mandatory sequencing with its ruling in *Pearson v. Callahan*.[64] In *Pearson*, the Supreme Court held:

> [W]hile the sequence set forth [in *Saucier*] is often appropriate, it should no longer be regarded as mandatory. The judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified

56. 533 U.S. 194 (2001).
57. *Id.* at 200.
58. *Id.* at 209.
59. *Id.* at 201.
60. *Id.*
61. *See, e.g.*, Morse v. Frederick, 551 U.S. 393, 432 (2007) (Breyer, J., concurring in part and dissenting in part) ("I would end the failed *Saucier* experiment now."); Brosseau v. Haugen, 543 U.S. 194, 201 (2004) (Breyer, J., concurring in an opinion joined by Scalia, J., and Ginsburg, J.) ("I am concerned that the current 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."); Bunting v. Mellen, 541 U.S. 1019 (2004) (Stevens, J., respecting the denial of certiorari); Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1275–81 (2006).
62. *See* cases cited *supra* note 61.
63. *See* Pearson v. Callahan, 555 U.S. 223, 234 (2009) (citing Higazy v. Templeton, 505 F.3d 161, 179 n.19 (2d Cir. 2007); Cherrington v. Skeeter, 344 F.3d 631, 640 (6th Cir. 2003); Pearson v. Ramos, 237 F.3d 881, 884 (7th Cir. 2001)); *see also* Leong, *supra* note 43, at 688 (finding that courts skipped a constitutional determination in 6.4 percent of claims in the district court cases studied).
64. *See Pearson*, 555 U.S. at 227.

> immunity analysis should be addressed first in light of the circumstances in the particular case at hand.[65]

Pearson marked the beginning of a new stage in the history of qualified immunity.

II. CONSIDERATIONS FOR AND AGAINST MANDATORY SEQUENCING

The changes in sequencing requirements resulted from a complex debate. Judging the aftermath of *Pearson* requires a review and analysis of previous arguments for and against mandatory sequencing.

A. The Case for Mandatory Sequencing

1. Immunity From Suit

In *Saucier*, the Supreme Court justified mandatory sequencing on the ground that it better assured that qualified immunity would be an immunity from suit—not merely from liability.[66] One of the policy goals of qualified immunity is to prevent the substantial cost of litigation for government officials.[67] Since litigation costs increase as a trial proceeds regardless of outcome, qualified immunity should be used to eliminate meritless claims as early as possible in litigation.[68] The *Saucier* Court contended that mandatory sequencing could achieve this policy goal.[69]

This justification is peculiar. Mandatory sequencing can force the dismissal of a constitutional claim only when the facts alleged do not state a constitutional violation. However, the same result can be reached without mandatory sequencing. Imagine that the alleged facts cannot show a constitutional violation and a court is not required to sequence. Regardless of whether a plaintiff's right was violated, if the right was not clearly established, then the claim can be dismissed on that basis.[70] If the right is clearly established, the court will

65. *Id.* at 236.
66. Saucier v. Katz, 533 U.S. 194, 200–01 (2001).
67. *See* Chen, *supra* note 27, at 3–4.
68. *See* Mitchell v. Forsyth, 472 U.S. 511, 526 (1985); Chen, *supra* note 27, at 27.
69. *See Saucier*, 533 U.S. at 200–01.
70. This explanation is based on the discussion regarding the two questions a court must analyze in a qualified immunity case as discussed in the Introduction. If no constitutional violation is asserted, mandatory sequencing requires a court to dismiss on that basis. Without mandatory sequencing, a court will only be required to dismiss on that basis if the court cannot dismiss on the basis of qualified immunity. Therefore, if no constitutional violation is asserted in a case, that case will be

proceed to the constitutional question and dismiss the suit on the basis that no constitutional violation has been asserted.[71] Thus, mandatory sequencing generally does not facilitate the early resolution of claims.

Although the justification is easier to understand in the context of *Saucier*, the reasoning still is not sound. In *Saucier*, the court of appeals determined that the constitutional right was clearly established, but then it left the constitutional determination to the jury.[72] Refusing to decide the constitutional issue when the right is clearly established does not facilitate the early resolution of a claim. While requiring mandatory sequencing is one way to achieve this policy goal, this goal is more easily achieved by the procedure courts generally follow: evaluating the constitutional issue when a right is clearly established.[73] Despite the Supreme Court's claim in *Saucier*, mandatory sequencing is not necessary to facilitate the early resolution of claims or to save officials from the costs of litigation.

2. Constitutional Articulation

The more convincing argument for mandatory sequencing is that it encourages constitutional articulation. Without mandatory sequencing, some courts would skip the constitutional determination. As precedent, these holdings could give no guidance for future cases. The need for constitutional articulation was the second motivation for the *Saucier* decision:

> In the course of determining whether a constitutional right was violated on the premises alleged, a court might find it necessary to set forth principles which will become the basis for a holding that a right is clearly established. This is the process for the law's elaboration from case to case, and it is one reason for our insisting upon

dismissed at the same time regardless of whether the court is required to sequence. Mandatory sequencing only affects the grounds for dismissal.

71. That courts must and do proceed to the constitutional analysis once they determine that a right is clearly established is confirmed by Nancy Leong's study of qualified immunity cases. The "other" category in her chart would include cases in which the court held that the right was clearly established but made no constitutional finding. It is possible that no case in the "other" category held this; however, even if all did, the percentage of cases in the "other" category in any of the time periods measured was insignificant. *See* Leong, *supra* note 43, at 711 tbls.3 & 4.

72. Katz v. United States, 194 F.3d 962, 970–71 (9th Cir. 1999); *see also Saucier*, 533 U.S. at 200.

73. *See supra* note 71.

> turning to the existence or nonexistence of a constitutional right as the first inquiry.[74]

Constitutional articulation has several benefits. First, as expressed in *Saucier*, if a court makes no constitutional determination when a right is not clearly established, that right cannot become clearly established.[75] This is because the right that must be clearly established is not a general right, but the right to be free from the particular government conduct at issue in a case. For example, in the Fourth Amendment case *Wilson v. Layne*,[76] the Supreme Court stated that the "the right allegedly violated must be defined at the appropriate level of specificity."[77] The appropriate question in *Wilson* was therefore not whether the Fourth Amendment right in general was clearly established, but "whether a reasonable officer could have believed that bringing members of the media into a home during the execution of an arrest warrant was lawful, in light of clearly established law and the information the officers possessed."[78] Rights only become clearly established as a result of a court holding that, on a particular set of facts, there was a constitutional violation. If a court makes no constitutional determination after denying a plaintiff a remedy because the law was not clearly established by a previous decision with analogous facts, a remedy will be denied in a later case with a similar violation, because the right is still not clearly established.[79] In this way, constitutional violations can indefinitely go without being remedied, and officials can continuously engage in unconstitutional conduct.[80]

Second, constitutional articulation has a notice-giving function.[81] The finding that a violation of a right occurred allows officials to modify their behavior to avoid future violations.[82] The finding that no violation occurred encourages officials to freely engage in beneficial activities by eliminating fears of liability.[83]

74. *Saucier*, 533 U.S. at 201.
75. *Id.*; Hughes, *supra* note 32, at 429.
76. 526 U.S. 603 (1999).
77. *Id.* at 615.
78. *Id.*
79. Hughes, *supra* note 32, at 429.
80. *Id.*; John M.M. Greabe, *Mirabile Dictum!: The Case for Unnecessary Constitutional Ruling in Civil Rights Damages Actions*, 74 NOTRE DAME L. REV. 403, 430 (1999).
81. Greabe, *supra* note 80, at 407.
82. *Id.*
83. *Id.*

Notice-giving can be especially useful in cases in which new technologies or procedures are used.[84]

Third, constitutional articulation helps allay fears of constitutional stagnation that have been expressed by some critics. The law will never be clearly established when a constitutional claim based on a factual situation not previously addressed by a court is presented, but such novel claims present the only possibility for the growth of constitutional law.[85] If courts skip the constitutional question when presented with novel claims, constitutional law may become frozen.[86] In theory, mandatory sequencing encourages constitutional articulation, to the benefit of plaintiffs and defendants.

B. The Case Against Mandatory Sequencing

1. Wasted Resources

Opponents of sequencing claim that the *Saucier* rule wastes judicial and party resources. In *Pearson*, the Supreme Court noted the "substantial expenditure of scarce judicial resources on difficult questions that have no effect on the outcome of the case."[87] However, this claim is less serious than it appears. Regarding expenditure in the sense of court legal research and analysis, ascertaining the lack of a clearly established right may require less analysis than determining the exact contours of a right in evaluating whether it was violated. However, the difference would be small. Determining whether a violation occurred and whether the right was clearly established both involve researching the same legal right; thus, analysis of the prongs quite often is integrally related.[88]

It might appear that the question of whether a right was clearly established is less fact-bound than the determination of whether a violation occurred. If this were the case, sequencing would require greater expenditure of judicial

84. *Id.* at 407, 427.
85. *Id.* at 410.
86. *Id.* The effect that mandatory sequencing has on constitutional articulation has been measured in at least one study. *See* Hughes, *supra* note 32. The percentage of qualified immunity cases dismissed without a constitutional determination dropped from 34.23 percent in 1988 (before sequencing was preferred under *Siegert*), to 25.83 percent in 1995 (after *Siegert*), to 1.20 percent in 2005 (when sequencing was mandatory under *Saucier*). *See id.* at 423, tbl.1.
87. Pearson v. Callahan, 555 U.S. 223, 236–37 (2009).
88. *Cf.* Jonathan M. Freiman, *The Problem of Qualified Immunity: How Conflating Microeconomics and Law Subverts the Constitution*, 34 IDAHO L. REV. 61, 85 (1997) ("A judge considering a claim in a gray area of the law knows that the claimed right was not clearly established . . . *because* she is in the process of deciding whether or not clearly to establish it.").

resources on discovery and factual analysis. However, this assumption is false for two reasons. First, whether a right was clearly established is fact-specific.[89] In the abstract, nearly all rights, such as due process, are clearly established.[90] The real question is whether a reasonable government official would understand that he was violating a legal right. This requires an understanding not just of the state of the applicable constitutional law at the time of the violation, but of the facts as the official would have understood them.[91]

Take, for example, a post-*Pearson* case, *Ruiz v. Sotelo*,[92] in which a prisoner alleged that prison officials violated his Eighth Amendment right to be free from cruel and unusual punishment by placing him in a cell with an enemy.[93] The court found, without addressing the constitutional question, that the officials had not violated clearly established law.[94] However, the court's analysis centered not on broad legal principles, but on how the prisoner and his enemy behaved in the sight of prison officials as they were led to the cell.[95] Those actions were determinative because they indicated whether or not a reasonable prison official would have realized there was a risk a fight would break out resulting in harm to the prisoner.[96] As this case demonstrates, a fact-specific analysis is required just as much to find that a right was not clearly established as by a finding that no right was violated. Second, even if the constitutional determination were more fact specific, this should not lead to greater expenditure on discovery or factual analysis. Qualified immunity is intended to be an immunity from suit.[97] The costs of litigation—including the costs of discovery—are to be avoided, and qualified immunity is to be resolved at the earliest stage possible.[98] As a result of these pressures, courts will often make the qualified

89. *See* ROTUNDA & NOVAK, *supra* note 25, § 19.29; Karen M. Blum, *Qualified Immunity: A User's Manual*, 26 IND. L. REV. 187, 208 (1993); Chen, *supra* note 27, at 39 (noting that "rights may be understood only in context").
90. ROTUNDA & NOVAK, *supra* note 25, § 19.29.
91. *Id.*
92. 338 F. App'x 665 (9th Cir. 2009) (unpublished opinion).
93. *Id.* at 666.
94. *Id.*
95. *Id.*
96. *Id.*
97. Mitchell v. Forsyth, 472 U.S. 511, 526 (1985).
98. Pearson v. Callahan, 555 U.S. 223, 231–32 (2009) ("[T]he 'driving force' behind creation of the qualified immunity doctrine was a desire to ensure that 'insubstantial claims' against government officials [will] be resolved prior to discovery." (quoting Anderson v. Creighton, 483 U.S. 635, 640 n.2 (1987))); *see also* ROTUNDA & NOVAK, *supra* note 25, § 19.29.

immunity determination without a developed factual record.[99] Even if more facts are needed to make a constitutional determination, there is pressure not to develop a factual record. For these two reasons, requiring sequencing should not waste significant judicial resources.

The court in *Pearson* also expressed concern that sequencing "forces the parties to endure additional burdens of suit—such as the costs of litigating constitutional questions and delays attributable to resolving them—when the suit otherwise could be disposed of more readily."[100] This claim too is tenuous. Again, the factual and legal issues involved in the two inquiries are intertwined,[101] so the burden of litigating the constitutional issue should not be substantial. Additionally, since defendants can avoid liability by disproving either prong, defendants will frequently opt to brief and argue both the constitutional question and the clearly established question.

Although mandatory sequencing may require some additional expenditure of court and party resources, the difference is probably insignificant.

2. Bad or Useless Constitutional Law

The more convincing and interesting objections to mandatory sequencing argue that at least some of the law mandatory sequencing creates is either bad or useless. Rather than contending that mandatory sequencing does not increase constitutional articulation, these objections contend that many constitutional determinations "fail to make a *meaningful* contribution to [constitutional] development."[102]

There are at least three circumstances in which a constitutional determination may not create useful precedent. First, some factual scenarios are so unique and unlikely to recur that a constitutional finding will not be useful.[103] A First Amendment case, *Harper v. Poway Unified School District*,[104] provides an example. In that case, students challenged a school policy that forbade wearing a t-shirt

99. *Cf. Pearson*, 555 U.S. at 238–39 (noting that lower courts have complained of having to make constitutional determinations based on a limited factual record).
100. *Id.* at 237 (quoting Brief for National Ass'n of Criminal Defense Lawyers as Amicus Curiae Supporting Respondent at 30, *Pearson*, 555 U.S. 223 (No. 07-751)).
101. *See supra* notes 89–95.
102. *Pearson*, 555 U.S. at 237 (emphasis added).
103. *Id.*
104. 318 F. App'x 540 (9th Cir. 2009).

depicting religious condemnation of homosexuality.[105] The school had already abandoned its policy, however, and the court stated that "[u]nder these rather unusual circumstances, in which we are asked to award nominal damages on the basis of a school policy that is no longer in existence, we decline to reach the difficult substantive constitutional question at issue. Instead, we . . . conclude that the individual defendants are entitled to qualified immunity."[106] Because a specific policy had already been abandoned, a constitutional investigation of the policy would not have been of any use to the school system or to future litigants siding against the school.

Second, when the constitutional question is also pending before a higher court, the lower court's constitutional determination will have little precedential value.[107] The lower court's decision will end up either being a consistent but less binding version of the higher court's determination or being overruled. A similar case occurs when a court of appeals panel considers a question also pending before an en banc panel.[108] Third, some constitutional determinations will require interpretations of ambiguous state law.[109] Such determinations presumably will not be useful precedent[110] because a federal court's interpretation of state law is often non-controlling and is of little use to federal courts in other states.

In addition to useless precedent, mandatory sequencing may also create bad precedent for at least two reasons. First, mandatory sequencing may force courts to decide constitutional questions with insufficient information. Qualified immunity is supposed to be resolved at the earliest stage possible, often before discovery.[111] As a result, the factual record is often insufficient to allow the court to answer constitutional questions satisfactorily.[112] Further, courts rely heavily upon the parties to present the constitutional question to be decided, but

105. For the factual story behind the case, see *Harper v. Poway Unified School District*, 345 F. Supp. 2d 1096 (S.D. Cal. 2004).
106. *Harper*, 318 F. App'x at 541.
107. *Pearson*, 555 U.S. at 238 (citing Motley v. Parks, 432 F.3d 1072, 1078 & n.5 (9th Cir. 2005) (en banc)).
108. *Id.*
109. *Id.* (citing Egolf v. Witmer, 526 F.3d 104, 109–11 (3d Cir. 2008); Tremblay v. McClellan, 350 F.3d 195, 200 (1st Cir. 2003); Ehrlich v. Glastonbury, 348 F.3d 48, 57–60 (2d Cir. 2003)).
110. *Id.*
111. *Id.* at 231 ("[T]he 'driving force' behind the creation of qualified immunity doctrine was a desire to ensure that 'insubstantial claims against government officials [will] be resolved prior to discovery.'" (quoting Anderson v. Creighton, 483 U.S. 635, 640 n.2 (1987)) (some internal quotation marks omitted)); *see also* ROTUNDA & NOVAK, *supra* note 25, § 19.29.
112. *Pearson*, 555 U.S. at 239.

often the briefing of constitutional questions is poor.[113] A court opinion written under such circumstances may not be helpful to other courts, since it will lack the factual specificity required for analogies, and will not have benefited from the clear presentation of issues that good briefing would have provided. Instead of risking such bad precedent, it might be better to allow courts to skip some constitutional determinations.

Second, mandatory sequencing may create bad precedent because it will shape the attention and reasoning of judges considering constitutional questions. In *Pearson*, the Supreme Court worried about cases in which a court quickly decides that there was no clearly established right before considering the constitutional question.[114] Since the judge knows that the constitutional determination will have no effect on the outcome, the judge may give it insufficient attention.[115] This concern had been previously articulated by Judge Pierre Leval in a speech at the New York University School of Law.[116]

The result of judges paying insufficient attention to the constitutional inquiry in cases in which the law was not clearly established could be courts improperly determining that no constitutional right was violated. If a judge decides that a law was not clearly established, that judge must have concluded that insufficient precedent existed to alert a reasonable person that his or her actions were unconstitutional. Insufficient precedent tends to indicate that precedent cannot support that the right was violated.[117] It would therefore be relatively easy for a judge to conclude that no right was violated after deciding that a right was not clearly established. However, to decide that a right was violated, significant elaboration and development of constitutional principles would be required. If *Pearson* and Leval are right, the attention required for such elaboration could easily be lacking when a right was not clearly established, leaving a judge only with the conclusion that no right was violated. Therefore, mandatory sequencing in cases in which the law was not clearly established may result in a judge improperly finding that no right was violated, even though additional inquiry would have lead the judge to conclude otherwise.

In addition to the concern expressed by *Pearson* and Leval, Nancy Leong has suggested that mandatory sequencing leads judges to find that no constitutional

113. *Id.*
114. *Id.* at 239–40 (citing Leval, *supra* note 61, at 1278–79).
115. *Id.*
116. Leval, *supra* note 61, at 1249.
117. *Cf.* Leong, *supra* note 43, at 704–05.

violation occurred in order to avoid cognitive dissonance.[118] Cognitive dissonance occurs when an individual holds inconsistent beliefs.[119] This creates a feeling of discomfort that the individual may try to eliminate by rejecting one of the beliefs.[120] Society, including judges, tends to believe that the violation of a right deserves a remedy.[121] A judge who believes that a right was not clearly established must know that there can be no remedy and may therefore feel uncomfortable finding that a right has been violated.[122] Further, judges are trained to rely on precedent.[123] The proposition that a right was not clearly established is close to the proposition that no precedent supports that the right was violated.[124] Therefore, a judge who has determined that the right was not clearly established may again feel uncomfortable finding that a right has been violated.[125] Leong's theory is as troubling as Leval's. The psychological pressure of cognitive dissonance may be felt regardless of whether well-reasoned constitutional interpretation would identify the violation of a right. Therefore, it could also lead a court to improperly find that no right was violated.

3. Lopsided Constitutional Articulation: Empirical Evidence and Explanations

Leong developed her theory of cognitive dissonance as a possible explanation for her findings in an empirical study regarding qualified immunity determinations. In this study, Leong collected data on the results of qualified immunity determinations in circuit and district courts from three time periods: pre-*Siegert* (when the Supreme Court offered no guidance on sequencing); post-*Siegert*, but pre-*Saucier* (when sequencing was preferred); and post-*Saucier*, but pre-*Pearson* (when sequencing was mandatory).[126] Leong found that as the Supreme Court moved toward mandatory sequencing, the percentage of qualified immunity cases in which courts decided the constitutional question increased as she expected. However, while this increase coincided with an increase in the percentage of claims finding no constitutional violation, there was no significant

118. *Id.* at 703.
119. *Id.*
120. *Id.*
121. *Id.* at 704.
122. *Id.*
123. *Id.*
124. *Id.* at 704–05.
125. *Id.* at 704.
126. *Id.* at 684–85.

corresponding increase in the percentage of claims finding a violation when the right was not clearly established.[127] In other words, for those claims in which courts would not previously have made a constitutional determination but were required to do so under *Saucier*, courts overwhelmingly found that no right was violated.[128] Thus, according to Leong's study, the result of mandatory sequencing was a lopsided increase in the finding that no constitutional right was violated.

This finding has been questioned, however. A study by Greg Sobolski and Matt Steinberg found no statistically significant increase after *Saucier* in the frequency with which courts found that no right was violated.[129] As a result of these conflicting findings, no definitive empirical support has been established for the cognitive theories positing that mandatory sequencing leads to courts improperly determining that no constitutional right was violated.[130]

4. Lack of an Appeal

Critics of mandatory sequencing also claim that the inability to appeal some constitutional decisions exacerbates the problem of bad law.[131] When a court determines that a right was violated, but that the official is entitled to qualified immunity, the defendant will often be more concerned about the adverse constitutional ruling than about his qualified immunity victory.[132] Government actors, such as police officers and their departments, even if immune from liability in a particular case, may have a long term interest in continuing to use the methods or policies held unconstitutional.[133] Regardless, such defendants cannot appeal the decision since it is not adverse to them.[134] This insulates plaintiff-favorable constitutional decisions from review when plaintiffs choose not to appeal.

127. *Id.* at 692–93.
128. *Id.*
129. Sobolski & Steinberg, *supra* note 43, at 548.
130. The study performed here does tend to confirm Leong's finding that mandatory sequencing leads to a lopsided increase in the frequency with which courts find that no right was violated, as a trend opposite to that noted by Leong can be seen in the post-*Pearson* circuit court sample. *See infra* Part III.B.1. However, the present study is not intended to resolve the conflict between these studies but is instead focused on determining whether courts are now using their *Pearson* discretion and what conclusions can be drawn from the reaction of courts to *Pearson*.
131. Pearson v. Callahan, 555 U.S. 223, 240 (2009); Leval, *supra* note 61, at 1279.
132. *See Pearson*, 555 U.S. at 240; Bunting v. Mellen, 541 U.S. 1019, 1023 (2004) (Scalia, J., dissenting) (criticizing the lack of an "opportunity to appeal the unfavorable [and often more significant] constitutional determination").
133. Horne v. Coughlin, 191 F.3d 244, 247–48 & n.1 (2d Cir. 1999).
134. *Pearson*, 555 U.S. at 240.

However, these fears may be overstated. While there have certainly been cases in which constitutional determinations have been insulated from review,[135] it is not clear that mandatory sequencing was the reason for it. At least one empirical study has indicated that mandatory sequencing does not increase the percentage of cases in which a court finds that a right was violated, but that the right was not clearly established.[136] Therefore, adverse, unappealable constitutional rulings may exist whether or not sequencing is mandatory.

5. Other Methods for Preventing Repeated Violations

Critics of mandatory sequencing have also questioned whether mandatory sequencing is necessary to prevent repeated violations.[137] These critics argue that a constitutional determination can be achieved by other methods in cases in which unconstitutional conduct is likely to be repeated. Plaintiffs in such cases may bring suit against a municipality or request an injunction, in which case qualified immunity is not an available defense.[138] However, this argument has little merit because these methods by themselves cannot solve the problem of repeated violations.

A municipality is a "person" subject to suit for purposes of a section 1983 action. [139] Although an official must violate a right for a municipality to be liable, this is not sufficient.[140] A municipal policy must also be the moving force behind the constitutional violation.[141] Courts often reject a claim against a municipality without making any constitutional determination on the basis that no policy existed.[142] Therefore, it is possible for municipal claims to be concluded without a constitutional determination, including in cases in which official misconduct is likely to be repeated even though no policy causes the repetition.

135. *Bunting*, 541 U.S. at 1019 (denying a writ of certiorari because the dispute was insufficient to support jurisdiction over the defendants' appeal when a constitutional violation was found but qualified immunity was granted).
136. Leong, *supra* note 43, at 692 figs.3 & 4.
137. *Pearson*, 555 U.S. at 242–43; Leval, *supra* note 61, at 1280.
138. *Pearson*, 555 U.S. at 242–43; Leval, *supra* note 61, at 1280.
139. ROTUNDA & NOVAK, *supra* note 25, § 19.16.
140. *Id.* § 19.32.
141. *Id.* (citing Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978)).
142. *See, e.g.*, Trammell v. Thomason, 355 F. App'x 835, 844–45 (11th Cir. 2009); Nielander v. Bd. of Cnty. Comm'rs, 582 F.3d 1155, 1169–70 (10th Cir. 2009); Cloaninger *ex rel.* Estate of Cloaninger v. McDevitt, 555 F.3d 324, 335 n.11 (4th Cir. 2009).

Similarly, injunctive relief can be denied without a decision on the merits for a number of reasons.[143] In particular, injunctive relief will be denied if the plaintiff will not suffer future injury.[144] Therefore, no constitutional determination is required in cases in which individuals other than the plaintiff are at risk of suffering a similar violation.

Municipal liability and actions to enjoin future conduct may require constitutional determinations in some cases in which repetition is likely. However, repeated violations can occur in many cases in which relief will not be available.

C. The Best of Both Worlds: *Pearson*

Making a constitutional determination when a right is not clearly established can play a useful role in preventing repetition of constitutional violations when injunctive relief and municipal claims are unavailable (and they often are). However, because of inadequate briefing, undeveloped facts, and cognitive biases, forcing constitutional determinations in all cases in which the right was not clearly established leads to some bad and useless law and potentially to courts improperly determining that no constitutional right was violated.

The solution lies in discretion. *Pearson* allows courts to choose when sequencing is appropriate.[145] This allows courts to avoid constitutional questions in those cases in which there is inadequate briefing. It also allows courts to undertake constitutional investigations in those cases in which repetition is likely or in which notice to officials is particularly called for. Further, in such cases, courts would have the motivation to undertake a careful constitutional investigation, reducing the risk that cognitive biases will affect a decision. Discretion should allow for the benefits of mandatory sequencing without its disadvantages. What remains to be seen, however, is how courts are using this discretion.

143. *See* SHELDON NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983, at § 5:1 (4th ed. 2010).
144. *See* Los Angeles v. Lyons, 461 U.S. 95, 101–05 (1983); NAHMOD, *supra* note 143, § 5:12.
145. Pearson v. Callahan, 555 U.S. 223, 241 (2009).

III. AN EMPIRICAL INVESTIGATION OF THE QUALIFIED IMMUNITY DEFENSE'S POST-*PEARSON* RESOLUTION

A. Methodology and Data

In order to assess the effect of *Pearson* on qualified immunity decisions, I conducted a survey of district and circuit court resolutions of the qualified immunity defense after *Pearson*. I used substantially the same methodology as Leong used in her study in order to enable a comparison of these results to earlier periods.[146] To generate a data set, I first searched the Westlaw database of federal district court cases (DCT) using the term "qualified immunity." I restricted the search to cases decided after January 21, 2009, the day *Pearson* was decided, and up to September 7, 2009.[147] I also performed the same search using the Westlaw database of all federal court of appeals cases (CTA).[148]

I collected data from one hundred randomly selected district court cases and one hundred circuit court cases. To select these cases, I randomized two lists of numbers, with each list consisting of numbers equal to the number of cases derived from each of the Westlaw searches respectively.[149] For each list, beginning with the first number in the list and then continuing down the list, I coded the case from the Westlaw search corresponding to the number on the list if it met the inclusion 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 qualified immunity claim, or both."[150] I continued down each list until I had one hundred district court cases and one hundred circuit court cases.

For each set of cases, I recorded the result of the qualified immunity determination for each claim in each case that met the inclusion criteria. If the same claim had been brought against multiple defendants, I recorded a

146. Leong, *supra* note 43, at 684–88. The only difference between the studies is that the cases in Leong's study were selected from two-year periods, while the cases in the present study were necessarily selected from a shorter time period.

147. The search yielded 2563 cases.

148. The search yielded 388 cases.

149. I used a randomizer provided at http://www.pangloss.com/seidel/rnumber.cgi.

150. Leong, *supra* note 43, at 685–86. For a list of reasons why a case might fail to meet the criteria, see *id.* at 686.

claim for each type of qualified immunity result reached. Therefore, when the result was the same for each defendant, I would record only one claim. When one result was reached as to one defendant, but another as to the rest, I would record two claims. Using this system, I recorded 240 claims for the one hundred district court cases and 159 claims for the one hundred circuit court cases.

For each claim, I recorded one of six possible results of the qualified immunity determination:

(1) a constitutional violation was found and qualified immunity was granted;
(2) a constitutional violation was found and qualified immunity was denied;
(3) no constitutional violation was found and a qualified immunity determination was not made;
(4) no constitutional violation was found and qualified immunity was also granted;
(5) qualified immunity was granted, but no constitutional determination was made; or
(6) none of the above.

I hypothesized that the frequency of claims in which a court avoided a constitutional determination but granted qualified immunity would increase in both circuit and district courts following *Pearson*. I based this hypothesis on the assumption, after *Pearson*, courts would no longer be required to sequence, and courts should have an incentive to avoid a constitutional determination in certain cases, as noted in Part II.B. The data would confirm this hypothesis if the percentage of claims in which a court granted qualified immunity but avoided a constitutional determination was higher in the period following *Pearson* than in the period between *Saucier* and *Pearson*.[151]

B. Analyses and Findings

The results of the present study were distinctly different for circuit and district courts. While circuit courts have increasingly avoided constitutional determinations after *Pearson*, as hypothesized, district courts have not.

151. Many of the claims were decided on summary judgment or on a motion to dismiss. For a constitutional violation to have been found, the court need not have entered judgment in favor of a plaintiff. *Id.* at 687. For example, on a motion for summary judgment, the court need only decide that a right was violated if all facts were taken in the light most favorable to the plaintiff.

1. Circuit Courts

Regarding circuit courts' reactions to *Pearson*, I hypothesized that the frequency of claims in which a circuit court avoided a constitutional determination would be higher in the period after *Pearson* than in the period between *Saucier* and *Pearson*.

To test this hypothesis, I first calculated the percentage of claims out of the total claims denied in my post-*Pearson* circuit sample in which (1) no constitutional violation was found; (2) no constitutional determination was made and qualified immunity was granted; and (3) no constitutional violation was found and qualified immunity was also granted. I then compared the results of this analysis to Leong's earlier results.

Next, I calculated the percentage of claims out of the total claims in my post-*Pearson* circuit sample in which each of the six possible results of the qualified immunity determination was reached. I then compared the results of this analysis to Leong's earlier results.

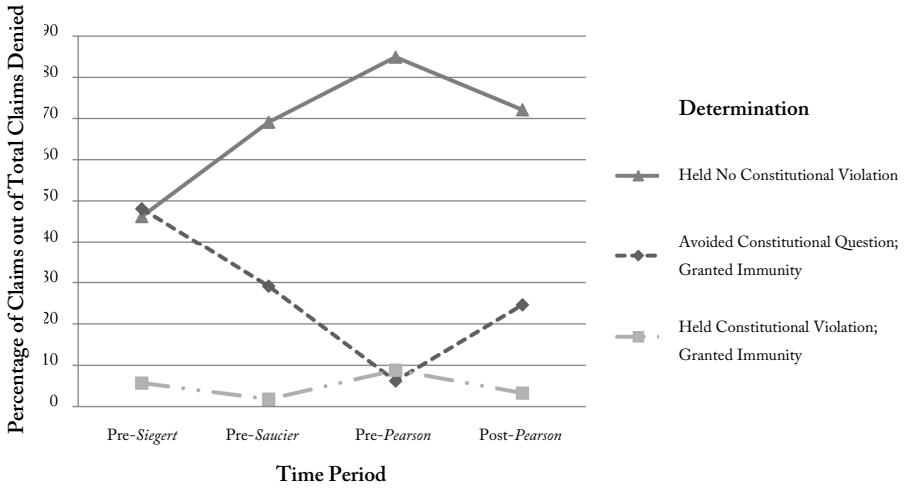
In the circuit sample, as mandatory sequencing was abandoned, a trend occurred that was opposite to that recorded by Leong in her study of the move toward mandatory sequencing. In Leong's study, as the Supreme Court moved toward mandatory sequencing, a decrease in avoidance of constitutional determinations corresponded to an increase in claims in which a court determined no right was violated.[152] However, there was no significant increase in the number of claims in which a violation was found, but qualified immunity was granted.[153]

In the period after *Pearson*, the percentage of claims in which a court avoided a constitutional determination rose as expected: Of those claims in which the claim was ultimately denied, courts avoided a constitutional determination in 6.2 percent of claims in the *Saucier* period,[154] but after *Pearson* the court avoided a constitutional determination in 24.6 percent of claims. This increase corresponded to a decrease in the percentage of claims in which a court determined no right was violated: Courts found no constitutional violation in 84.9 percent of claims in the *Saucier* period,[155] but after *Pearson* the rate dropped to 72.1 percent. The percentage of claims in

152. *Id.* at 688–90.
153. *Id.* at 690.
154. *Id.* at 710 tbl.2.
155. *Id.*

which a court found a violation, but granted immunity, decreased only slightly after *Pearson*: Courts found a violation, but granted immunity in 8.8 percent of claims in the *Saucier* period[156] and in 3.3 percent of claims after *Pearson*. After *Pearson*, the results of qualified immunity determinations mirror the results in the *Siegert* sequencing-preferred period, not the pre-*Siegert* period in which there was little guidance from the Supreme Court as to sequencing. These changes are summarized in Figure 1.

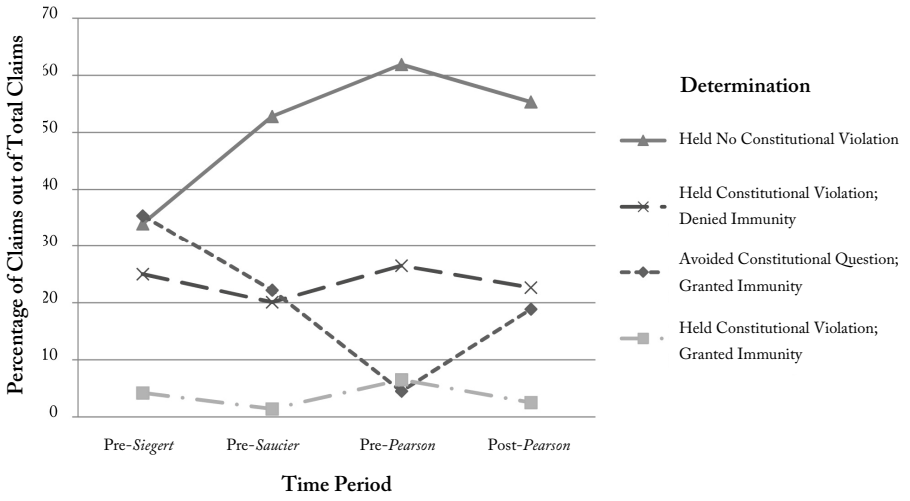
FIGURE 1. Distribution of Circuit Court Qualified Immunity Determinations: Denied Claims Only[157]



When percentages are calculated using all claims, the above-noted trends remain. The percentage of claims in which a violation was found and qualified immunity denied did not change significantly: The percentage of claims in which the plaintiff prevailed was 26.5 percent in the *Saucier* period[158] and 22.6 percent after *Pearson*. This information is summarized in Figure 2.

156. *Id.*
157. All data points, except the post-*Pearson* points, can be found in *id.*
158. *Id.* at 711 tbl.4.

FIGURE 2. Distribution of Circuit Court Qualified Immunity Determinations: All Claims[159]



Two important conclusions can be drawn from the circuit data. First, as hypothesized, circuit courts are using the discretion *Pearson* granted. Second, the reaction of circuit courts to *Pearson* is consistent with the trend Leong identified in her initial study. Leong found that when courts were forced to make a constitutional determination they would otherwise avoid, they tended to find no constitutional violation. Now that circuit courts have the option of avoiding a constitutional determination, they tend to less frequently find that no right was violated when making a constitutional determination.

2. District Courts

Regarding district courts' reactions to *Pearson*, I hypothesized that the frequency of claims in which a district court avoided a constitutional determination would be higher in the period after *Pearson* than in the period between *Saucier* and *Pearson*.

To test this hypothesis, I first calculated the percentage of claims out of the total claims denied in my post-*Pearson* district sample in which (1) no constitutional violation was found; (2) no constitutional determination was

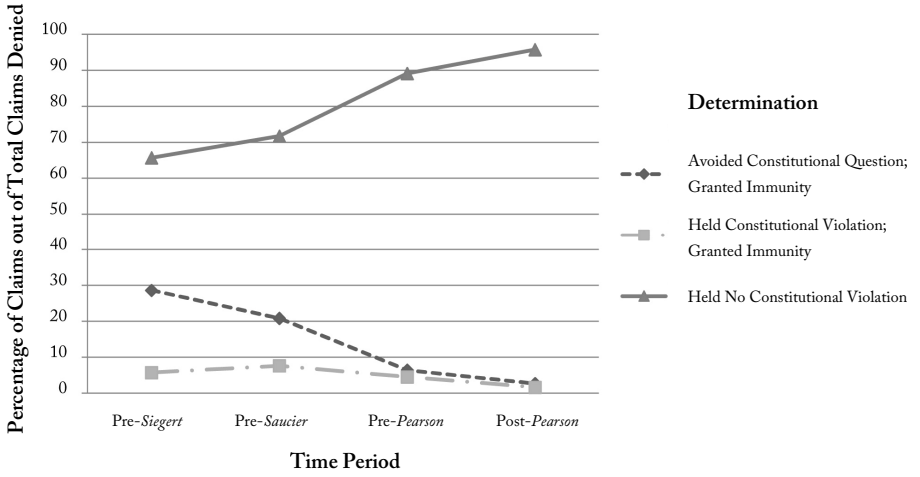
159. All data points, except the post-*Pearson* points, can be found in *id.*

made and qualified immunity was granted; and (3) no constitutional violation was found and qualified immunity was also granted. I then compared the results of this analysis to Leong's earlier results.

Next, I calculated the percentage of claims out of the total claims in my post-*Pearson* district sample in which each of the six possible results of the qualified immunity determination was reached. I then compared the results of this analysis to Leong's earlier results.

The reaction of district courts to *Pearson* was unexpected. The percentage of claims in which a court avoided a constitutional determination decreased slightly since *Pearson*: Of claims in which the defendant prevailed, avoidance occurred in 6.4 percent of claims in the *Saucier* period,[160] while after *Pearson* avoidance occurred in 2.1 percent of claims. The percentage of claims in which the court found a violation, but granted immunity, also decreased slightly: from 4.5 percent[161] to 1.6 percent. However, the percentage of claims in which the court determined that no right was violated has increased slightly: No violation was found in 89.1 percent of claims in the *Saucier* period, but after *Pearson* the percentage increased to 95.7 percent. These trends are summarized in Figure 3.

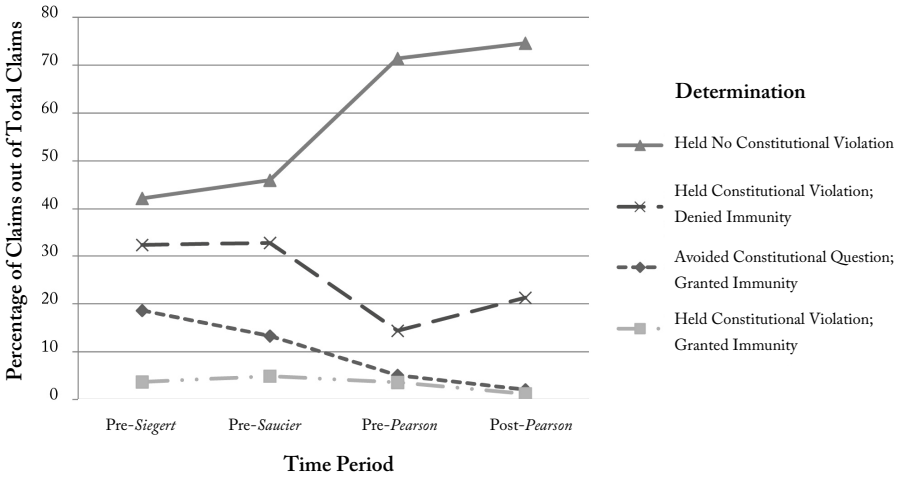
FIGURE 3. Distribution of District Court Qualified Immunity Determinations: Denied Claims Only[162]



160. *Id.* at 710 tbl.1.
161. *Id.*
162. All data points, except the post-*Pearson* points, can be found in *id.*

When the percentages are calculated using all claims, the above-noted trends remain. Further, the percentage of claims in which the plaintiff prevailed increased from 14.4 percent[163] to 21.2 percent.[164] These trends are summarized in Figure 4.

FIGURE 4. Distribution of District Court Qualified Immunity Determinations: All Claims[165]



The trends in the district court data are surprising. The large percentage increase in avoidance visible in the circuit sample is not present in the district sample. Avoidance has even decreased slightly. District courts are not choosing to use their discretion to avoid constitutional determinations as hypothesized.

163. *Id.* at 711 tbl.3.

164. *See* Figure 4. This increase may not be significant. The 14.4 percent number was peculiar in Leong's data because it represented a significant decrease from the pre-*Saucier* and pre-*Siegert* levels and because a similar decrease was not visible in the circuit samples. *See* Leong, *supra* note 43, at 691.

165. All data points, except the post-*Pearson* points, can be found in Leong, *supra* note 43, at 711 tbl.3. It should be noted that an error appears in Leong's table—61.4 should appear as 71.4 percent.

3. Statistical Tests

The analyses and findings discussed in Parts III.B.1 and III.B.2 indicate that *Pearson's* apparent effect on circuit court qualified immunity determinations has been an increase in constitutional avoidance. In order to determine if this apparent effect is an actual one, and not a result of normal variation, I performed a chi-square test of independence on the pre- and post-*Pearson* circuit court claims in which the defendant prevailed (Table 1).

As previously noted, the proportion of claims in which a circuit court found no violation and granted immunity dropped by 5.5 percent (from 8.8 percent to 3.3 percent), the proportion of claims in which a circuit court only found no violation fell by 12.9 percent (from 85 percent to 72.1 percent), and constitutional avoidance increased by 18.4 percent (from 6.2 percent to 24.6 percent). There is a highly significant probability that this increase in constitutional avoidance among circuit courts, and the corresponding decrease in other determinations, is the result of *Pearson* ($p < .001$).

TABLE 1. Distribution of Circuit Court Qualified Immunity Determinations and Chi-Square Results: Denied Claims Only[166]

Determination	Distribution of Claims		
	Pre-*Pearson*	Post-*Pearson*	Total
Avoided Constitutional Question; Granted Immunity	6.2%	24.6%	15.7%
Held Constitutional Violation; Granted Immunity	8.8%	3.3%	6.0%
Held No Constitutional Violation	85.0%	72.1%	78.3%
Total Claims	113	122	235

Chi-square = 16.9, df = 2, $p < .001$

One would expect that *Pearson's* grant of discretion to lower courts to avoid constitutional determinations would lead to an increase in constitutional avoidance. That the rate of avoidance has slightly decreased in the district courts appears to indicate that *Pearson* has not had an effect on district court qualified

166. The pre-*Pearson* data can be found in *id.* at 710 tbl.2.

immunity determinations. In order to determine if this apparent effect is an actual one, another chi-square test was performed on the pre- and post-*Pearson* district court claims in which the defendant prevailed (Table 2).

As previously noted, the proportion of claims in which a district court found no violation and granted immunity dropped by 2.9 percent (from 4.5 percent to 1.6 percent), and the proportion of claims in which a district court only found no violation increased by 6.6 percent (from 89.1 percent to 95.7 percent), while constitutional avoidance *decreased* by 3.7 percent (from 6.4 percent to 2.7 percent). These changes appear not to be statistically significant (p = .063).

TABLE 2. Distribution of District Court Qualified Immunity Determinations and Chi-Square Results: Denied Claims Only[167]

Determination	Distribution of Claims		
	Pre-*Pearson*	Post-*Pearson*	Total
Avoided Constitutional Question; Granted Immunity	6.4%	2.7%	4.4%
Held Constitutional Violation; Granted Immunity	4.5%	1.6%	2.9%
Held No Constitutional Violation	89.1%	95.7%	92.7%
Total Claims	156	187	343

Chi-square = 5.54, df = 2, p = .063

Although not statistically significant, with a p value of .063, there is still some probability that *Pearson* has had an effect on district court qualified immunity determinations. The strongest evidence that *Pearson* has not had an effect on district court qualified immunity determinations remains the fact that district courts have reacted in exactly the opposite way that one would expect: The rate of avoidance actually decreased after *Pearson* in the district court sample. Therefore, the most noteworthy result of the chi-square tests performed in this Subpart is that there is a significantly high probability that

167. The pre-*Pearson* data can be found in *id.* at 711 tbl.3.

Pearson has had an actual effect on the rate at which circuit courts avoid constitutional determinations.

IV. EXPLANATIONS AND IMPLICATIONS

A. The Response to *Pearson*

The circuit courts appear to have responded to *Pearson* in the way the Supreme Court intended. The Court granted discretion in *Pearson* because lower courts were best equipped to determine when sequencing should be employed.[168] Implicit in the Court's holding is that courts should abandon sequencing when it is not appropriate.[169] Although the data here do not confirm that circuit courts are choosing appropriate claims, it does demonstrate that they have begun choosing to abandon sequencing.

This trend is beneficial to the articulation of constitutional law. Sequencing may have led to a lopsided increase in the percentage of claims in which courts found that no violation occurred, some of which were made under conditions amenable to the creation of bad or useless law.[170] As circuit courts have begun avoiding constitutional questions, the percentage of claims in which a court determined that no right was violated has decreased. Further, if circuit courts are choosing to exercise their discretion to avoid constitutional determinations for appropriate claims, the risk of creating bad law will also have decreased.

The positive trend visible in circuit courts may continue. Avoidance is now resting near pre-*Saucier*, post-*Siegert* levels when sequencing was considered preferable rather than mandatory. *Pearson*'s view toward avoidance is more positive than *Siegert*'s.[171] The *Pearson* era may therefore more closely resemble the pre-*Siegert* era, and avoidance may eventually reach levels similar to the pre-*Siegert* era.

168. Pearson v. Callahan, 555 U.S. 223, 242 (2009).

169. *Id.* at 236–41 (discussing the cases in which sequencing is inappropriate). Courts seem to agree that *Pearson* advises avoidance in some cases as well as granting discretion. *See, e.g.*, Swanson v. Town of Mountain View, Colo., 577 F.3d 1196, 1199 (10th Cir. 2009) ("Because we conclude the conduct here did not violate *clearly established* constitutional rights, we take the advice of *Pearson* and address that issue first.").

170. *See supra* Part II.B.2.

171. *Compare Pearson*, 555 U.S. at 236–41 (listing scenarios in which sequencing is not appropriate, and determining that lower courts "are in the best position to determine the order of decisionmaking"), *with* Siegert v. Gilley, 500 U.S. 226, 232–33 (1991) (praising the "desirability" of sequencing).

On the other hand, district courts have not followed *Pearson*'s implicit recommendation, and the benefits of avoidance have not been realized.

Pearson is peculiar among cases that overrule precedent. *Pearson* makes what was once a mandatory procedure discretionary. The recommendation to avoid constitutional questions in appropriate cases is not enforceable. Therefore, a court can still operate exactly as it did before *Saucier* without being reversed by a higher court. In these circumstances, district courts can continue without avoiding constitutional determinations. District courts' current inattentiveness to *Pearson*'s implicit recommendation is troubling. However, what remains to be seen is whether this inattentiveness will disappear over time. If it does not, then the problems associated with mandatory sequencing will remain at the district court level.

These conclusions are only part of the story, however. This assessment is based only on the sequencing arguments as they have been articulated thus far. Many of these arguments are sound, as argued in Part II, and it is clear that avoidance has many benefits. However, the data also require rethinking the sequencing debate.

B. The Diverging Motivations of District and Circuit Courts: Sequencing and the Future of Constitutional Law

Regardless of whether district courts will begin to avoid constitutional questions in the future, their divergence with circuit courts offers a unique opportunity for analysis. By identifying how the motivations of circuit and district courts differ, we can also identify why a court would avoid a constitutional determination. Identifying the motivations for avoidance, in turn, tells us much about what was correct about the sequencing debate of the past and what we should ask about qualified immunity in the future. In particular, two important conclusions should be drawn.

First, the concern that mandatory sequencing wastes resources is overstated. One of the Supreme Court's motivations for abandoning sequencing in *Pearson* was that mandatory sequencing wasted both court and party resources on a constitutional investigation that would not change the outcome of the case.[172] However, I contend that this claim is substantially overstated.[173] It is to the

172. *See Pearson*, 555 U.S. at 236–37.
173. *See supra* Part II.B.1.

advantage of litigants to argue the constitutional issue.[174] Moreover, the burden on the court of investigating both questions is also smaller than *Pearson* would suggest because the two questions are interrelated and similarly fact bound.[175] These arguments for the minimal nature of the burden placed on courts by a constitutional analysis are supported by the data in the present study.

District courts are more burdened by case management than are circuit courts, and district courts are exclusively burdened by factual development.[176] As a result, if sequencing wasted research and analysis time, district courts, with less time than circuit courts, should be quite willing to skip a constitutional analysis. Moreover, if sequencing required greater factual development, then in order to avoid further management of discovery procedures and further factual analysis, district courts should jump at the opportunity to avoid a constitutional analysis. Circuit courts, working from an established factual record, would not have a similar motive. In short, if constitutional determinations waste resources, then district courts should be more motivated, not less motivated, to avoid constitutional determinations than circuit courts. However, the present study indicates that district courts have not begun to avoid constitutional determinations, while circuit courts have begun to do so. Consequently, it seems likely that mandatory sequencing does not significantly waste resources.

Second, the difference between district courts and circuit courts demonstrates that the sequencing debate should now be focused on the implications of sequencing for the production of constitutional precedent. District courts and circuit courts operate in different institutional environments.[177] District court judges are heavily involved in the management and factual development of a particular case in ways that circuit courts are not.[178] Circuit courts, on the other hand, have the capacity to promulgate precedent binding district courts. Undoubtedly, both circuit and district courts are concerned with resolving the particular problem a case presents. However, given these institutional differences, circuit courts are likely more concerned with the precedential value of a decision, while district courts are likely more concerned with the value of a decision in resolving a particular dispute. This difference helps explain the divergent response to *Pearson*.

174. *See supra* Part II.B.1.
175. *See supra* notes 89–95.
176. *See* Pauline T. Kim et al., *How Should We Study District Judge Decision-Making?*, 29 J.L. & POL'Y 83, 89–94 (2009).
177. *See id.*
178. *See id.* at 93–94.

The discretion *Pearson* grants allows a court to determine whether constitutional precedent should be promulgated even when the case can be otherwise resolved. Since circuit courts are more concerned with the value of a decision as precedent, they should be more likely to consider whether they wish to promulgate constitutional precedent or not. As circuit courts must consider this question more often, they should more often decide that precedent should not be promulgated, and they therefore should avoid constitutional determinations more often than do district courts. This helps explain the data, and it supports the argument that the primary motivation for a court to avoid a constitutional determination is whether or not the court believes it *should* create constitutional precedent.

This conclusion reflects the sequencing debate to some extent, but its implication is broader. Much of the sequencing debate has been narrowly focused on those cases in which mandatory sequencing is inappropriate because the precedent created will be bad or useless. As the data indicate, courts are motivated to avoid constitutional questions by a concern over the sort of precedent they wish to create. However, it seems naïve to expect that a court's calculation of what constitutes valuable constitutional precedent would be limited to considering only the factors *Pearson* and commentators have considered relevant.

Pearson allows courts to avoid creating constitutional law. By controlling when to create constitutional law, courts can also control the content of the body of constitutional law. This control is arguably less constrained than is the substance of what a court articulates. Courts are bound by precedent when deciding substantive constitutional issues. However, once a court has decided that the right was not clearly established, they are entirely unconstrained in deciding whether constitutional law should be made. Therefore, if we wish to understand the future of constitutional law in section 1983 and *Bivens* actions, we would do well to understand how courts intend to use this freedom.

CONCLUSION

What will be the result of the greater control courts now exercise over the direction of constitutional law? Further study is required before any definite answer can be given. However, the important implication of the study—that a court's willingness to engage in a constitutional analysis depends on its interest in creating precedent—does allow some predictions to be made. Despite having some foundation, these predictions remain speculative. They should be taken not as established consequences, but as guides for future investigation.

The first possible consequence is reminiscent of the fears that, without mandatory sequencing, there would be insufficient constitutional articulation.[179] Without sufficient articulation, law can never become clearly established, and officials can repeatedly violate rights and claim qualified immunity.[180] *Pearson* discretion should avoid this possibility for the most part. If courts are particularly concerned with the value of their precedent, they can consider when repeated abuse is likely and make constitutional rulings in those cases.[181] However, there may be certain sorts of cases in which courts have little interest in establishing precedent.[182] These sorts of cases would become constitutional blind spots, with little constitutional development and the possibility of repeated abuse. While large scale constitutional stagnation is unrealistic, stagnation in particular areas could still occur after *Pearson*.

The second possible consequence, which is perhaps more difficult to measure, is that *Pearson* could cause changes in particular areas of constitutional law to be swifter and more deliberate. A judge with a particular interest in directing change in an area of law will be more willing to undertake a constitutional analysis in cases on that topic, while other judges less interested in directing change will be less willing to do so. As a result, particular areas of law may begin to be shaped by fewer judges overall, but those judges will likely have a more deliberate plan. With fewer judges and with an emphasis on change, particular areas of law could develop more consciously and quickly.

As these possibilities reveal, this Comment is only a beginning—an indication of the way we should investigate the effect of *Pearson*. It is also an indication of the importance of the investigation, since it can substantially inform our understanding of the future of constitutional law.

179. *See supra* Part II.A.2.

180. *See supra* notes 74–80 and accompanying text.

181. *See supra* Part II.C.

182. For example, in reviewing cases for the study, cases in which plaintiffs challenged prison conditions often contained unusually numerous, poorly articulated claims. It seems likely that in the face of a large number of poorly described claims, a court would be tempted to avoid constitutional development in prison litigation.