The New Qualified Immunity

Aaron Nielson, Brigham Young University Law School
Christopher J Walker, Ohio State University - Main Campus

Available at: https://works.bepress.com/christopher_walker/25/
ARTICLES

THE NEW QUALIFIED IMMUNITY

AARON L. NIELSON* & CHRISTOPHER J. WALKER†

ABSTRACT

In 2009, the Supreme Court changed the procedures for a significant aspect of constitutional litigation. In Pearson v. Callahan, the Court rejected a rigid requirement that in assessing qualified immunity, courts must first address whether a constitutional right was violated and, if so, only then address whether that right was clearly established. After Pearson, where the right is not clearly established, courts have discretion to either dismiss the claim without going further or decide the constitutional question for the benefit of future litigants.

By analyzing over 800 published and unpublished qualified immunity decisions, this Article offers the first comprehensive study on the effects of Pearson in the federal courts of appeals. The results are revealing. Most important, this Article shows that Pearson’s procedural rule may affect the substantive development of constitutional law in at least three ways. First, the data suggest

* Associate Professor of Law, J. Reuben Clark Law School, Brigham Young University.
† Assistant Professor of Law, Michael E. Moritz College of Law, The Ohio State University. Many thanks to Kent Barnett, Lisa Bernstein, Emily Garcia-Uhlig, Tara Leigh Grove, John Harrison, Michael Heise, Daniel Hemel, Randy Kozel, Nancy Leong, James Lindgren, Lee Kovarsky, Joshua Matz, Gillian Metzger, Janet Moore, Lisa Larrimore Ouellette, Jeff Pojanowski, Richard Re, Fred Smith, Michael Solimine, Dan Tokaji, Amanda Tyler, and Andrew Woods; to the participants at the BYU/University of Utah Legal Scholars Retreat, the Seventh Annual Junior Faculty Federal Courts Workshop, the University of Chicago Legal Scholarship Workshop, the University of Cincinnati Law Faculty Workshop; to our research assistants Andrew Bean, Jade Bollinger, Trevor Crowley, Roman Harper, James Heilpern, Bryant Hendriksen, Ellysa Hendriksen, Steven Hilton, Jarom Jones, Austin Martineau, Perris Nelson, Robert Patterson, Rebecca Perez, Richard Storms, Mark Tyler, Morgen Weeks, and Lani Wilson for help with case analysis; to Marie Ozanne, J. Paul Norton, and Steven Naber for assistance with statistical analysis. This study was funded in part by The Ohio State University Center for Interdisciplinary Law and Policy Studies.
that concerns about “constitutional stagnation” may contain some truth. Specifically, although appellate courts are still deciding constitutional questions most of the time, they may not be deciding certain types of questions. Second, there is disparity among circuits regarding whether and how courts are reaching constitutional questions after Pearson. Because circuit courts frequently follow each other’s cases, this disparity may give certain circuits an outsized voice regarding constitutional law. And third, it is possible that Pearson may have an asymmetric impact on constitutional doctrine because of the potential overlap between judges’ substantive constitutional views based on their judicial ideologies and their procedural willingness to decide constitutional questions. Over the long run, this asymmetry between judges may shift the substance of constitutional precedent.

All of this suggests that the Supreme Court may be wise to revisit Pearson. To promote a more consistent development of constitutional law, this Article recommends that qualified immunity’s procedural standard evolve once more to require courts to give reasons for their exercise of Pearson discretion—akin to administrative law’s reasoned-decisionmaking requirement. Although Pearson sets forth a number of factors courts should consider when determining whether to exercise their discretion to decide constitutional questions, courts rarely provide their reasoning. This Article demonstrates why that should change.

TABLE OF CONTENTS

INTRODUCTION ..................................................................................3

I. THE PATH TO PEARSON .................................................................8
   A. The Nature of Qualified Immunity ..............................................8
   B. The Procedural Conundrum .......................................................11
   C. The Court’s Five-Part Sequencing Zig Zag ...............................15
   D. Post-Pearson Concerns ...........................................................23

II. AN EMPIRICAL STUDY ON POST-PEARSON QUALIFIED IMMUNITY .27
   A. Prior Empirical Studies ............................................................27
   B. Study Methodology .................................................................30
   C. Study Findings and Implications ..............................................33

III. THE POST-PEARSON NEED FOR REASON GIVING .......................52
   A. Administrative Law’s Reason-Giving Doctrines .......................53
   B. The Reasons for Giving Reasons .............................................56
   C. Reason Giving in the New Qualified Immunity ........................60

CONCLUSION ..................................................................................65
INTRODUCTION

No one may know for sure precisely what happened the night of August 23, 2006. What we do know is that Ryan Aikala, a police officer responding to a call, entered Jayzel Mattos’s home and ultimately used his Taser on her. Ms. Mattos later sued Officer Aikala for using excessive force in violation of the Fourth Amendment. The Ninth Circuit en banc agreed that if the facts were as Ms. Mattos alleged, her constitutional rights were violated. Nevertheless, the court also held that no jury would hear her claim. The Ninth Circuit reasoned that even if Ms. Mattos’s allegations were true, the right she claimed was not “clearly established.” Officer Aikala therefore was entitled to qualified immunity.1

Qualified immunity cases are common. Over just the last few years, the Supreme Court has relied on qualified immunity to dismiss suits addressing political protests,2 high-speed car chases,3 and allegedly pretextual detentions of suspected terrorists.4 Both the nature and volume of these cases illustrate why qualified immunity is “the most important doctrine in the law of constitutional torts.”5 The tension at the heart of the doctrine is obvious: On one hand, government officials sometimes suffer no personal liability even when they violate constitutional rights. But at the same time, the threat of punishing an officer for violating previously unknown rights could chill legitimate governmental action. The Court’s management of this tension has generated a great deal of commentary and criticism.6

Consider a couple recent examples ripped from the headlines. In his 2014 book Six Amendments, retired Justice John Paul Stevens urges that the Constitution be amended such that it not “be construed to provide any state,  

---

1. Mattos v. Agarano, 661 F.3d 433, 438–39, 448–52 (9th Cir. 2011) (en banc), cert denied, 132 S. Ct. 2684 (2012). See also Carol J. Williams, 9th Circuit Finds Police Sun Gun Use Excessive in Two Cases, L.A. TIMES (Oct. 17, 2011), http://articles.latimes.com/2011/oct/17/local/la-me-court-tasers-20111018. By way of disclosure, one of the authors (Nielson) was cert.-stage counsel for a party in a different case raising a similar claim before the same en banc court.
state agency, or state officer with an immunity from liability for violating any act of Congress, or any provision of th[e] Constitution.” 7 Also in 2014, Erwin Chemerinsky opined in the New York Times that qualified immunity is to blame—at least in part—for violence in Ferguson, Missouri, and elsewhere. 8 Despite such criticism, however, the Court has recently reiterated, unanimously, that “government officials [need] breathing room to make reasonable but mistaken judgments”—especially in situations that require a “split-second decision.” 9 Indeed, “[b]ecause of the importance of qualified immunity ‘to society as a whole,’ the Court often corrects lower courts when they wrongly subject individual officers to liability.” 10

Qualified immunity, however, is more than just substantively controversial; it also creates a procedural puzzle. This immunity shields government officials from personal liability whenever an alleged right was not “clearly established.” This means that a plaintiff seeking damages from an individual officer must clear two hurdles. First, she must be able to show that her constitutional right was violated. And second, she must be able to show that “a reasonable person would have known” of the violation at the time. 12 Hence the puzzle: Because many constitutional issues arise in cases subject to qualified immunity, if courts were simply to resolve such claims on the ground that there is no clearly established right, then the constitutional rights may never be clearly established—especially when new fact patterns and technologies are at issue. This dilemma has been dubbed “constitutional stagnation.” 13 Yet few judicial principles are as entrenched as Justice Brandeis’s warning that a court should “not pass upon a constitutional question . . . if there is also present some other ground upon which the case may be disposed of” 14—a rule Alexander Bickel included

8. Erwin Chemerinsky, How the Supreme Court Protects Bad Cops, N.Y. Times (Aug. 27, 2014), http://nyti.ms/1ASeUKc (“Taken together, these rulings have a powerful effect. They mean that the officer who shot Michael Brown and the City of Ferguson will most likely never be held accountable in court. How many more deaths and how many more riots will it take before the Supreme Court changes course?”).
among his “passive virtues” for judging. With qualified immunity, the urge to prevent constitutional stagnation and the rule against reaching constitutional questions unnecessarily are at loggerheads.

The Supreme Court has long struggled with this puzzle. Most recently, in 2009, the Court changed the procedures governing qualified immunity. In Pearson, the Court unanimously overruled Saucier v. Katz, which had required that courts “must” first decide whether the Constitution was violated and only then decide whether the constitutional right at issue was clearly established. Rather than requiring Saucier’s rigid “order of battle,” Pearson leaves sequencing to the “sound discretion” of the lower courts. Pearson thus effectuates Justice Breyer’s forceful charge—based on concerns about judicial resources and the dangers of unnecessary constitutional decisions—to “end the failed Saucier experiment now.”

Whereas Saucier gave courts no flexibility at all, Pearson now gives courts maximalist discretion.

Pearson was controversial when decided and “remains controversial” today. This is unsurprising. Pearson poses thorny theoretical questions. Many scholars and judges fear, for instance, that without Saucier, constitutional law will “stagnate as lower courts flee from the merits.” Reflecting the same point but from a different perspective, Judge Harvey Wilkinson celebrates Pearson as a signal that “[t]he trend toward constitutional avoidance seems, finally, to be taking hold.” Some contend that Saucier had an important psychological component—that forcing courts to decide constitutional questions first affected whether they imposed liability. Others reject that view. Many also worry that courts

---

18. Pearson, 555 U.S. at 236.
19. Morse, 551 U.S. at 432 (Breyer, J., concurring in part and dissenting in part).
21. Pfander, supra note 6, at 1613 (collecting authorities).
22. Id. at 1605.
25. Pfander, supra note 6, at 1605 & n.20.
will get bogged down in debates about when to decide constitutional questions.26

These theoretical objections to Pearson are important. But they are only theories. Pearson is now over five years old. It has been applied to thousands of claims. The time has come to evaluate Pearson’s actual impact on constitutional litigation. Accordingly, this Article offers the first comprehensive analysis of post-Pearson qualified immunity. Drawing on a data set of over 800 published and unpublished circuit court decisions that cite Pearson, this Article sheds empirical light on the theoretical concerns that Pearson prompts. The results are revealing. Most important, the data to date suggest that Pearson’s procedural rule may have substantive effects on constitutional law in at least three ways.

First, concerns about constitutional stagnation, while often overstated, appear to have at least some empirical foundation. To be sure, notwithstanding Pearson, courts of appeals still resolve constitutional claims most of the time (nearly three-fourths of the time in the cases reviewed)—even when the putative right is not clearly established (nearly two-thirds of the time). Courts, however, also appear to find constitutional violations yet grant qualified immunity less frequently now (less than one-tenth of the time) than they did before Pearson. This suggests that because of Pearson, when courts are confronted with claims that may constitute violations of not yet clearly established constitutional rights, they sometimes decline to clarify constitutional doctrine. The substantive consequences are obvious.

Second, there is disparity among circuits regarding whether and how courts are reaching constitutional questions. There is reason to fear that such disparity may portend geographic distortions in the development of constitutional law. Moreover, because appellate courts frequently rely on out-of-circuit precedent, those circuits that use Pearson discretion to decide more constitutional questions may, at least at the margins, have an outsized voice regarding the meaning of the Constitution.

Third, although no scholarship to date has identified this risk, it appears that Pearson might have an asymmetric impact on constitutional doctrine. While, to be sure, there are methodological limitations to this analysis, the data suggest that judges who hold certain substantive views may be more willing to decide constitutional questions than judges who hold different substantive views. In particular, for instance, as a category

(which says nothing about any particular judge), judges nominated by a Democratic President appear more likely than Republican-nominated judges both to find new constitutional rights and to decide constitutional questions. In other words, a judge’s propensity to use Pearson discretion to decide constitutional questions may not be substantively neutral. This matters because if judges with certain viewpoints decide constitutional questions more often than judges with different viewpoints, the substantive content of constitutional doctrine will tilt because of Pearson.

Accentuating these substantive effects, courts seldom provide explanations for how they use their new Pearson discretion. When deciding whether to exercise discretion, the courts provided reasons in about one in ten instances. This number is starker when broken down between instances in which courts decide to answer the constitutional question as opposed to avoid it. The rate of reason giving in the former is less than four percent, whereas it is about fifteen percent in the latter. In short, it is fair to conclude that this decisionmaking process is a black box, despite the list of more than a dozen factors set out in Pearson itself.27

These pathologies suggest that the Supreme Court may need to revisit Pearson. Returning to Saucier, however, seems unwise, for all the reasons that led the Court to overrule Saucier in the first place. Conversely, it is unlikely that the Court is inclined to prohibit judges from deciding constitutional questions when granting qualified immunity, particularly given the constitutional stagnation concerns discussed above. We thus propose a middle ground that may mitigate some of the problems created by Pearson without incurring anew the full costs of Saucier. Our idea is simple: drawing on administrative law principles, the Court should require lower courts—both trial and appellate courts—to give reasons when exercising Pearson discretion. Although no silver bullet, requiring reason giving should improve the judicial process without burdening already busy courts with a return to Saucier.

This Article proceeds as follows. Part I provides an overview of qualified immunity, the procedural conundrum it creates, and the winding path to Pearson. Part II, in turn, presents the methodology, findings, and implications of our empirical study. Part III focuses on one key recommendation for addressing the findings uncovered in the cases reviewed: the Supreme Court should require lower courts to give reasons

27. See Pearson, 555 U.S. at 236–42 (discussing factors).
for exercising (or not) their Pearson discretion to reach constitutional questions.

I. THE PATH TO PEARSON

Pearson changed the character of qualified immunity by reworking the procedures that govern it. Pearson, however, was not the Supreme Court’s first word on the subject. The Court has long struggled with qualified immunity’s procedural puzzle. To understand why Pearson is significant, one must appreciate the doctrine of qualified immunity, the procedural puzzle that doctrine creates, and the Supreme Court’s cases grappling with that puzzle.

A. The Nature of Qualified Immunity

Qualified immunity is a doctrine with old antecedents but a modern twist.28 Speaking generally, at common law, officers sometimes had something akin to immunity for acts taken in good faith.29 That old notion that “a policeman’s lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does” (upon reasonable mistake)30 took on new importance with the 1961 decision in Monroe v. Pape.31 That case, on its face, did not involve qualified immunity at all. Instead, Monroe breathed new life into 42 U.S.C. § 1983 by allowing citizens to bring claims against state and local officials for violations of constitutional rights.32 The Monroe Court held that the post–Civil War Congress “meant to give a remedy to parties deprived of constitutional rights, privileges, and immunities by an official’s abuse of his position.”33

30. Pierson, 386 U.S. at 555.
32. See, e.g., Crawford–El v. Britton, 93 F.3d 813, 830 (D.C. Cir. 1996) (en banc) (“As a result [of Monroe and similar decisions], the 296 federal civil rights actions against government officials filed in 1961 have exploded into over 40,000 by 1988, over half of which were filed by prisoners. In just the period between 1975 and 1984, the number of prisoner civil rights cases increased by approximately 200 percent, from 6,606 to a staggering 18,856. In contrast, there were only 21 cases decided under § 1983 in its first 50 years.” (internal citations omitted)), rev’d on other grounds, 523 U.S. 574 (1998).
33. Monroe, 365 U.S. at 172.
Prior to Monroe, Section 1983 had been “relatively dormant”34 because many assumed the statute to only apply to conduct authorized by state law but contrary to federal law.35 Monroe rejected that narrow reading and allowed suit even where the officer acted contrary to state law.36 Ten years later came Bivens v. Six Unknown Named Agents, which recognized an implicit cause of action in many ways similar to Section 1983 for money damages against federal officials.37

Whether Monroe and Bivens were rightly decided continues to be debated.38 What is not contested, however, is that these two cases constitute much of the backbone of modern civil rights litigation, especially in federal court, where litigation, absent diversity jurisdiction, requires both a federal question and a federal cause of action.39 Because of these cases, suits against officers have skyrocketed. Indeed, they now constitute a major portion of the federal judiciary’s docket.40

Increased civil rights litigation, however, created new institutional tensions. Although personal liability is a powerful tool to vindicate constitutional rights, the worry is that sometimes it can be too powerful, leading to over-deterrence and other ills. Officers, for instance, can be sued, even when they could not have known at the time that they were violating the Constitution. And because Bivens and Section 1983 allow money damages, officers—fearing financial devastation—may act with more caution than society wants. Similarly, because officers are often

38. See, e.g., Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 75 (2001) (Scalia, J., concurring) (“Bivens is a relic of the heady days in which this Court assumed common-law powers to create causes of action . . . ”); Crawford-El v. Britton, 523 U.S. 574, 611 (1998) (Scalia, J., dissenting) (arguing that Monroe was wrongly decided because it “converted an 1871 statute covering constitutional violations committed ‘under color of any statute, ordinance, regulation, custom, or usage of any State,’ into a statute covering constitutional violations committed without the authority of any statute, ordinance, regulation, custom, or usage of any State” (internal citations omitted)).
indemnified by their employers, constitutional litigation with retroactive damages could threaten the government’s coffers in unpredictable ways. Such consequences have long troubled the judiciary. Hence, as Justice Powell famously explained, there must be “a balance between the evils.”

Qualified immunity is the instrument of that balancing. It is similar to a good faith defense, but focuses on objective reasonableness, not subjective belief. This objective focus facilitates early dismissal, thus saving many officers from having to stand for civil trial. Indeed, minimizing the burdens of litigation is a “driving force” behind modern qualified immunity.

The doctrine of qualified immunity consequently exists at the pivot point between “two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.” Even a constitutional tortfeasor is not liable for “conduct that does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” This means, controversially, that not all constitutional violations can ground an action for damages. On the other hand, this immunity “may tend to facilitate constitutional development by reducing the cost of new rules of constitutional law. Courts might hesitate if they perceived that a new rule would saddle governments,” which often indemnify individual officers, “with the burden of paying substantial monetary awards.”

44. See, e.g., 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.’ Accordingly, ‘we repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation.’” (citations omitted)). See also Chen, supra note 28, at 273 (explaining that at common law, “assessments were properly made by a trier of fact, which meant that good faith immunity claims could not be resolved without a trial”).
45. Pearson, 555 U.S. at 231.
46. Harlow, 457 U.S. at 818.
47. Pfander, supra note 6, at 1615 (citing John C. Jeffries, Jr., The Rights-Remedy Gap in
Accordingly, qualified immunity involves two distinct questions. First, “[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the officer’s conduct violated a constitutional right?” And second, “if a violation could be made out on a favorable view of the parties’ submissions,” was the right “clearly established” in a particularized sense, meaning that it must have been “clear to a reasonable officer that his conduct was unlawful in the situation he confronted”? Unless a plaintiff clears both of these hurdles, she will not obtain monetary damages. Qualified immunity is thus just that—immunity for officers, so long as the qualifications are met.

B. The Procedural Conundrum

Few issues of constitutional law are as divisive as “whether the law should recognize a qualified immunity defense at all” and, if so, in what form. Qualified immunity, however, is more than just substantively contested; it also is procedurally problematic. Because a plaintiff must satisfy both parts of the test, a court often could dismiss a civil rights suit without reaching the merits of the constitutional claim. This is particularly true for situations involving new technologies, like Tasers, or new factual or political settings. After all, it is difficult to find “clearly established” law in cases of first impression. So what is a court confronting a novel claim to do? There are at least two options—neither ideal.

First, a court could simply rule against the plaintiff without reaching the constitutional question. In ordinary cases, where a plaintiff cannot satisfy the whole of its burden, a busy court often just dismisses the suit.
without addressing all the elements of the claim. The same could happen in suits for constitutional torts. The downside of this option, however, is it could “stunt the development of the law and allow government officials to violate constitutional rights with impunity.”53 Because a great deal of constitutional litigation occurs in cases subject to qualified immunity, many rights potentially might never be clearly established should a court “skip ahead to the question whether the law clearly established that the officer’s conduct was unlawful in the circumstances of the case.”54 The danger, in short, is one of “constitutional stagnation.”55

To be sure, constitutional stagnation would not be inevitable in all cases. Constitutional questions can and often do come before a court in other ways than through Section 1983 or Bivens claims for damages. A plaintiff, for instance, can seek an injunction against an ongoing constitutional wrong.56 Likewise, criminal defendants seeking to suppress evidence through the exclusionary rule may tee-up constitutional arguments.57 And Section 1983 claims against municipalities—as opposed to individual officers—do not implicate qualified immunity at all.58

These options, however, are not perfect substitutes for an ordinary suit for damages. Constitutional wrongs, for example, are often complete before suit is brought, thus potentially mooting any claim for declaratory or injunctive relief.59 And one can imagine officers violating constitutional rights but not gaining evidence thereby (for instance, by using excessive force to make arrests), thus negating the exclusionary rule’s bite. The test to bring suit against a municipality, likewise, is quite “onerous”—for instance, there must be an unlawful “policy” and not simply respondeat

53. Beermann, supra note 20, at 149.
56. See, e.g., Ex parte Young, 209 U.S. 123, 189 (1908) (allowing a claim for injunctive relief against state officials); United States v. Lee, 106 U.S. 196, 213 (1882) (same for federal officials).
superior liability”—thereby discouraging such suits from being brought at all. The upshot is that although constitutional questions can and do arise in numerous contexts, civil suits for damages often play a pivotal role in the development of constitutional doctrine.

Second, even when the right is not clearly established, a court could decide the constitutional question anyway—thereby setting markers down for future litigants. A court taking this path could reason that although the plaintiff would not be benefited, it is necessary to decide the constitutional question so that doctrine remains fresh as technology and circumstances evolve.

This path, however, has problems of its own. Most obviously, an answer to a question that will not benefit a party before the court appears to be classic dictum. Dictum, however, is discouraged. Indeed, the “cardinal principle of judicial restraint” is that “if it is not necessary to decide more, it is necessary not to decide more.” And even if some judges, in ordinary cases, might be willing to write a bit of dicta for a good cause—and not all judges are—there surely is something unsettling about resolving unnecessarily constitutional questions. Chief Justice Marshall’s stern admonition that constitutional questions should only be answered when “indispensably necessary to the case” is not lightly brushed aside.

Indeed, some have gone so far as to condemn unnecessary constitutional answers in qualified immunity cases as nothing less than “advisory opinions.” Decisions finding both no clearly established law

---

63. See Judicial Dictum, BLACK’S LAW DICTIONARY (10th ed. 2014) (“An opinion by a court on a question that . . . is not essential to the decision . . . .”)
64. PDK Labs., Inc. v. DEA, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring in part and concurring in the judgment). See also EMILY’s List v. FEC, 581 F.3d 1, 40 (D.C. Cir. 2009) (Brown, J., concurring in part and dissenting in part) (“A good rule of thumb is we often do more for the law when we do less with the law.”). See generally CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 3–4 (1999).
65. Cf. William W. Van Alstyne, A Critical Guide to Marbury v. Madison, 1969 DUKE L.J. 1, 7 (1969) (explaining that because the Court ruled against Marbury on jurisdictional grounds, there was no need to discuss whether he was entitled to the commission).
68. See, e.g., Beermann, supra note 20, at 151 (noting arguments of others) (citation omitted).
and no constitutional violation could be justified as alternative holdings.\footnote{69}{See, e.g., United States v. Wright, 496 F.3d 371, 375 n.10 (5th Cir. 2007) (explaining that it is “well-settled that alternative holdings are binding, they are not dicta”).}

But what do we make of an opinion that says with one breath that a plaintiff has lost because the right was not clearly established, but with the next goes on to opine that the plaintiff’s rights were nonetheless violated? If that is not an advisory opinion, it is but a stone’s throw away from being one.\footnote{70}{Beermann argues they are not advisory opinions because the constitutional question arises as a natural part of the adjudication. See Beermann, supra note 20, at 154.}

Even if such an “unnecessary” decision is not technically precluded by Article III, it surely raises prudential concerns.

The trouble, however, runs deeper. Setting aside constitutional avoidance, deciding such questions requires considerable judicial resources. Judges, alas, often do not have a lot of time to spare. Indeed, when confronted with a heavy docket of criminal cases, a good judge might decide she has a duty to the accused not to dither with civil cases,\footnote{71}{See, e.g., Walker v. Cavalry Portfolio Servs., LLC, No. 2:12-CV-221, 2013 U.S. Dist. LEXIS 60079, at *5 (E.D. Tenn. Feb. 21, 2013) (“Because criminal cases must be given priority over civil cases, the court’s civil docket suffers.”).}

especially when the dithering will have no real-world impact on a plaintiff’s suit because the law is not clearly established. Justice Breyer’s dismissal of the enterprise as “wasting judicial resources” may be too strong,\footnote{72}{Morse v. Frederick, 551 U.S. 393, 430 (2007) (Breyer, J., concurring in the judgment in part and dissenting in part).}

but there is surely something to the critique, especially when issues are poorly briefed or buried under a pile of intricate (and unproven) facts.\footnote{73}{Id. at 430–31.}

Faced with the reality of “limited time and resources,” courts resolving constitutional questions in qualified immunity cases may end up making “bad law” due to the docket’s other demands.\footnote{74}{Leong, supra note 59, at 680–81 (citing Scott v. Harris, 550 U.S. 372, 387–88 (2007) (Breyer, J., concurring)).}

If these problems were not troubling enough, deciding questions where the judgment does not require it may create additional problems. At the outset of a case, a defendant may not fiercely litigate the constitutional issue if she is confident the right at issue is not clearly established. For reasons Jack Beermann has noted, that risk is not particularly “serious”: lawyers are reluctant to pull their punches.\footnote{75}{Beermann, supra note 20, at 157.}

But what could be serious is the effect that qualified immunity has on appeal. If an officer has defeated personal liability in the district court on the ground that the right was not
clearly established, why should she have standing to challenge a court’s further determination that his conduct violated the Constitution? To be sure, *Camreta v. Greene*, discussed below, holds that some officers have such standing (because the constitutional decision will have a prospective impact on the officer’s job), but the analysis is not straightforward, particularly if the officer has left government employment or the conduct is unlikely to recur for that particular officer. And even if standing could be formally satisfied, one wonders if such an officer would have the same incentive to vigorously protest the constitutional decision on appeal, especially if doing so will require expending much money or effort. A half-hearted appeal, however, may be the worst of all worlds; it would create binding precedent, but without the full benefits of an adversarial appellate process. None of this is good.

C. The Court’s Five-Part Sequencing Zig Zag

The Supreme Court has long wrestled with this procedural puzzle. The Court’s approach has varied and indeed double-backed on itself. There have been at least five chapters in the Court’s jurisprudence.

1. Sequencing Silence

Until 1991, the Supreme Court expressed no opinion on the sequence that courts ought to employ in deciding qualified immunity cases. The lower courts, however, confronted the question, and they were divided. The Fifth Circuit, for instance, urged (but did not require) courts within its boundaries to decide the constitutional question first, and only then reach the issue of “clearly established.” Other courts, however, “felt free to choose either to address the substantive constitutional question at the outset, or to proceed first to the ‘clearly established’ prong of the qualified immunity analysis.” Although it does not appear that any appellate court actually forbade deciding constitutional questions where the right at issue was not clearly established (which is somewhat surprising given Justice Brandeis’s *Ashwander* principle), there was no single procedural rule. The law, in short, muddled along.

---

77. *Id.* at 2041–42 (Kennedy, J., dissenting).
78. *Id.* at 2042 (“When an officer is sued for taking an extraordinary action, such as using excessive force during a high-speed car chase, there is little possibility that a constitutional decision . . . will again influence that officer’s conduct.”).
79. See Hughes, *infra* note 34, at 407.
81. Hughes, *infra* note 34, at 408 (collecting citations).
2. Sequencing Preference

The Supreme Court first weighed in on this procedural issue in 1991. There, in Siegert v. Gilley, the Court suggested that the constitutional question should be resolved first. As Chief Justice Rehnquist explained for the Court, “[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.”\(^{82}\) This language, although under-theorized (\textit{why}, after all, is that order “necessary”?), suggested that courts should not jump to the “clearly established” prong without first addressing the constitutional question. The Court’s reasoning, however, was far from pellucid, nor was its vote unanimous. Justice Kennedy, for one, wrote separately to suggest that should a right not be clearly established, it may be inappropriate “to reverse the usual ordering of issues to tell the trial and appellate courts that they should resolve the constitutional question first.”\(^{83}\)

The \textit{Siegert} recommendation, moreover, did not quell the confusion in the lower courts. The Court therefore later expanded its recommendation in \textit{County of Sacramento v. Lewis}.\(^{84}\) In that case, the Court reemphasized that although no order of battle was fixed, lower courts were strongly encouraged to decide the constitutional question first. Justice Souter, writing for the Court, explained that to avoid constitutional stagnation, “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.”\(^{85}\) Again, however, the Court was divided. Justice Stevens wrote separately to state his view that where the constitutional “question is both difficult and unresolved, I believe it wiser to adhere to the policy of avoiding the unnecessary adjudication of constitutional questions.”\(^{86}\)

3. Sequencing Requirement

\textit{Lewis}’s “better approach,” however, was not long for this world. The Court soon turned its suggestion that courts \textit{ought} to decide the constitutional question first into a command that they \textit{must} do so. In 1999, the Court in \textit{Conn v. Gabbert} stated, “A court must first determine whether

\begin{itemize}
\item \(^{83}\) \textit{Id.} at 235 (Kennedy, J., concurring in the judgment).
\item \(^{84}\) \textit{County of Sacramento v. Lewis}, 523 U.S. 833 (1998).
\item \(^{85}\) \textit{Id.} at 841 n.5.
\item \(^{86}\) \textit{Id.} at 859 (Stevens, J., concurring in the judgment).
\end{itemize}
the plaintiff has alleged the deprivation of an actual constitutional right at all, and if so, proceed to determine whether that right was clearly established.”87 “Gone was any permissive language.”88

And then came the watershed in 2001: Saucier v. Katz.89 There, the Court held that constitutional questions must be decided first. Notwithstanding his reluctance in Siegert to impose a rigid sequencing requirement, Justice Kennedy, writing for the Court in Saucier, was clear that “[i]n a suit against an officer for an alleged violation of a constitutional right, the requisites of a qualified immunity defense must be considered in proper sequence.”90 And that sequence required “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?”91 Needless to say, “[i]f no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity.”92 But “if a violation could be made out on a favorable view of the parties’ submissions, the next, sequential step is to ask whether the right was clearly established.”93 The Court justified this mandatory sequence on the basis of constitutional stagnation: “The law might be deprived of [constitutional] explanation were a court simply to skip ahead to the question whether the law clearly established that the officer’s conduct was unlawful in the circumstances of the case.”94

4. Sequencing Criticism

The Saucier rule, however, was never warmly embraced. From essentially the moment the Court mandated the two-step sequence, a diverse coalition of Justices, lower court judges, and scholars began criticizing it. This widespread disapproval later played a key role in Pearson’s determination that stare decisis did not shield Saucier.95

Saucier, for instance, seemingly never commanded the respect of all the Justices. A good example of this divide is Bunting v. Mellen, which

---

88. Hughes, supra note 34, at 412.
90. Id. at 200.
91. Id. at 201.
92. Id.
93. Id.
94. Id.
involved the constitutionality of prayer at the Virginia Military Institute. The lower court had found the practice unconstitutional but held that the officers involved were entitled to qualified immunity. The officers, although not obligated to pay damages, nonetheless sought review because they believed they were correct on the constitutional issue. The Court denied review, but not before spawning two separate opinions criticizing Saucier. Justice Stevens—joined by Justices Breyer and Ginsburg—concurred in the decision to deny review but wrote separately to call Saucier an “unwise judge-made rule.” In dissent, Justice Scalia—joined by Chief Justice Rehnquist—also attacked Saucier as conceptually confusing.

Bunting was not an isolated incident. Over the next few years, these concerns were repeated in numerous separate Supreme Court opinions. Justice Breyer was perhaps the bluntest, writing in 2007 that he “would end the failed Saucier experiment now.”

Nor was this criticism limited to the Supreme Court—“the rule of Saucier [also] generated considerable criticism from both commentators and judges.” Judge Alex Kozinski, for instance, condemned Saucier as fermenting “the publication of a lot of bad constitutional law that is, effectively, cert.-proof.” Judge Pierre Leval in turn dismissed Saucier as “involv[ing] so many and such serious problems that I am not sure where to begin.” Judge Jeffrey Sutton, though “see[ing] the virtue in telling lower courts that they should generally answer the constitutional question before the clearly established question,” nonetheless “wonder[ed] whether it makes sense to mandate that they do so in all cases, no matter the costs, no matter the ease with which the second question might be answered.” And Judge Michael Boudin bemoaned the “uncomfortable exercise where, as

97. Id. at 1022–23 (Scalia, J., dissenting from denial of certiorari).
98. Id. at 1022.
99. Id. at 1019 (Stevens, J., respecting denial of certiorari).
100. Id. at 1025 (Scalia, J., dissenting from denial of certiorari).
102. Morse, 551 U.S. at 432 (Breyer, J., concurring in part and dissenting in part).
103. Id. at 431 (collecting sources).
104. Clement v. City of Glendale, 518 F.3d 1090, 1093 n.4 (9th Cir. 2008) (Kozinski, J.).
105. Leval, supra note 66, at 1277.
here, the answer whether there was a violation may depend on a kaleidoscope of facts not yet fully developed.”

Indeed, this deep discomfort with Saucier began seeping into the actual resolution of lower court cases. In particular, it appears that some lower courts concluded that the Court could not have meant what it said and so crafted exceptions to Saucier. In short, “application of the rule [from Saucier was] not always . . . enthusiastic.”

5. Sequencing Discretion

Given the criticism heaped on Saucier, the decision to overrule it “was no great surprise.” The vehicle to do it was Pearson, decided by the Court in 2009. Pearson was an otherwise “routine section 1983 case against police officers who conducted a warrantless search of Callahan’s home.” The constitutional question was whether an informant—who had been invited into a person’s home could consent to police entry. The case thus implicated the consent-once-removed doctrine in Fourth Amendment law.

The Tenth Circuit, following the Saucier protocol, held that the consent-once-removed doctrine used by the officers violated the Constitution and, more provocatively, that the constitutional question was clearly established. That latter determination was especially suspect because there was no Supreme Court or Tenth Circuit precedent on point. Instead, the panel relied on abstract ideas like “the clearly established right to be free in one’s home from unreasonable searches and arrests.” Given this reasoning, John Jeffries has dismissed the Tenth Circuit’s analysis as flatly wrong: if such approach were “followed generally,” it “would

108. See Leong, supra note 59, at 682 (chronicling that the First, Second, Sixth, and Seventh Circuits created Saucier exceptions in published decisions whereas “several other courts . . . disregarded the sequencing requirement in select unpublished opinions”). Accord Hughes, supra note 34, at 416.
110. Beermann, supra note 20, at 142.
111. Id. at 163.
112. See Pearson, 555 U.S. at 227.
115. Jeffries, supra note 5, at 856 (quoting Callahan v. Millard County, 494 F.3d 891, 898 (10th Cir. 2007)).
effectively eliminate the defense of qualified immunity from the law of constitutional torts.” 116

Unsurprisingly, the officers petitioned for certiorari. The Supreme Court granted their petition, but then sua sponte raised a separate question: “Whether the Court’s decision in Saucier v. Katz, 533 U.S. 194 (2001), should be overruled.” 117 That additional question, with its far-reaching implications, turned a routine case into a critical one. In response to the Court’s question, many amici submitted briefs. A coalition of more than thirty states ranging from Texas to Massachusetts filed a brief criticizing Saucier. 118 The United States filed a brief to the same effect. 119 At the same time, other players emerged to defend Saucier. Both the American Civil Liberties Union and the Liberty Legal Institute, for instance, filed briefs in its defense. 120

The Court’s decision, however, was unanimous—Saucier had to go. 121 Justice Alito, writing for the Court, explained that it is folly to always require deciding constitutional questions, no matter a case’s particular circumstances. 122 He reasoned that sometimes Saucier “results in a substantial expenditure of scarce judicial resources on difficult questions,” for instance in those “cases in which it is plain that a constitutional right is not clearly established but far from obvious whether in fact there is such a right. District courts and courts of appeals with heavy caseloads are often understandably unenthusiastic about what may seem to be an essentially academic exercise.” 123

The Pearson Court, however, did not forbid deciding the constitutional question where the asserted right is not clearly established. To the contrary, Justice Alito commended the Saucier approach as “often

116.  Id. See also City & County of San Francisco v. Sheehan, 135 S. Ct 1765, 1775 (2015) (“Qualified immunity is no immunity at all if ‘clearly established’ law can simply be defined as the right to be free from unreasonable searches and seizures.”).
120.  See Brief for the ACLU as Amici Curiae Supporting Respondent, Pearson, 555 U.S. 223 (No. 07-751); Brief for the Liberty Legal Institute as Amici Curiae Supporting Respondent, Pearson, 555 U.S. 223 (No. 07-751).
121.  See Pearson, 555 U.S. at 227.
122.  Id. at 236.
123.  Id. at 236–37.
beneficial.” The Court therefore split the difference, leaving the sequence up to the individual judge or judges. The Court explained that judges “should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand.”

The Court also compiled considerations to help guide whether a court should proceed to the constitutional question. The Court, for instance, listed a number of (overlapping) factors that cut in favor of deciding the constitutional question, namely, whether: (1) there would be “little if any conservation of judicial resources” in not deciding it; (2) it would be “difficult to decide whether a right is clearly established without deciding precisely what the existing constitutional right happens to be”; (3) applying the “two-step procedure” would “promote[] the development of constitutional precedent”; and (4) the question is not one that “frequently arise[s] in cases in which a qualified immunity defense is unavailable.”

Pearson also lists factors (again, overlapping) that cut against such a path, where: (1) doing so would entail a “substantial expenditure of scarce judicial resources on difficult questions that have no effect on the outcome of the case”; (2) it is “plain that a constitutional right is not clearly established but far from obvious whether in fact there is such a right”; (3) the court has a “heavy caseload[]”; (4) further “litigation of constitutional issues [would] waste[] the parties’ resources”; (5) the “constitutional question is so factbound that the decision provides little guidance for future cases”; (6) “the question will soon be decided by a higher court”; (7) deciding the constitutional question would depend on an “uncertain interpretation of state law”; (8) “the parties have provided very few facts to define and limit any holding on the constitutional question”; (9) “the briefing of constitutional questions is woefully inadequate”; (10) deciding the question “may make it hard for affected parties to obtain appellate review of constitutional decisions that may have a serious prospective effect on their operations”; and (11) considerations of “constitutional avoidance” are apt.

124. Id. at 236.
125. Id. at 242 (“Our decision does not prevent the lower courts from following the Saucier procedure; it simply recognizes that those courts should have the discretion to decide whether that procedure is worthwhile in particular cases.”).
126. Id. at 236.
127. Id.
128. Id. at 236–41.
After overruling *Saucier* and setting forth these factors, the Court held that the officers in *Pearson* were entitled to immunity.\footnote{129} The Court’s opinion then ended: “Because the unlawfulness of the officers’ conduct in this case was not clearly established, petitioners are entitled to qualified immunity.”\footnote{130} The Court offered no “explanation for not reaching the merits.”\footnote{131} Based on how the Court ended its opinion, whether to reach the constitutional question appears “completely discretionary.”\footnote{132}

6. Reconsidering *Pearson* Discretion

After *Pearson*, the Court resolved a related question in *Camreta v. Greene*: whether an officer who prevailed on qualified immunity but lost on the constitutional question has standing to appeal. Writing for a fractured court, Justice Kagan explained that appellate standing exists where the constitutional decision will have a prospective impact on the officer.\footnote{133} Importantly, however, although Justice Scalia concurred because he thought precedent compelled the outcome, “strange though they may be,” he wrote separately to cast doubt on whether the Court should ever decide unnecessary constitutional questions.\footnote{134} He explained that he “would be willing to consider” a petition urging the Court “to end the extraordinary practice of ruling upon constitutional questions unnecessarily when the defendant possesses qualified immunity.”\footnote{135} In the same vein, Justice Kennedy, joined by Justice Thomas, dissented, suggesting it “might” be “necessary” for the Court “to reconsider . . . issu[ing] unnecessary merits determinations in qualified immunity cases with binding precedential effect.”\footnote{136} It is unclear whether other Justices share this appetite. Reviewing Westlaw’s Supreme Court Petitions for Writ of Certiorari database, it does not appear that any litigant has yet asked the Court to take up the issue. Given what was said in *Camreta*, however, it may only be a matter of time.

Despite the calls in *Camreta* to reconsider *Pearson* discretion, the Court has continued to exercise such discretion to reach constitutional questions. For instance, in 2014, the Court in *Plumhoff v. Rickard* considered whether officers used excessive force when they repeatedly shot

---

\footnote{129} *Id.* at 244–45.
\footnote{130} *Id.* at 245.
\footnote{131} Beermann, *supra* note 20, at 167.
\footnote{132} *Id.* at 168.
\footnote{133} *Camreta v. Greene*, 131 S. Ct. 2020, 2029 (2011).
\footnote{134} *Id.* at 2036 (Scalia, J., concurring).
\footnote{135} *Id.*
\footnote{136} *Id.* at 2043 (Kennedy, J., dissenting).
at (and ultimately killed) a suspect who was involved in a high-speed car chase.\textsuperscript{137} The Sixth Circuit had held that the conduct violated the Fourth Amendment and that the right was clearly established.\textsuperscript{138} The Court reversed on both issues. Writing for the Court, Justice Alito reiterated “that the \textit{Saucier} procedure ‘is often beneficial’ because it ‘promotes the development of constitutional precedent and is especially valuable with respect to questions that do not frequently arise in cases in which a qualified immunity defense is unavailable.’”\textsuperscript{139} Then, “[h]eeding [its] guidance in \textit{Pearson},” the Court concluded that reaching the question would help “‘develop[] constitutional precedent’ in an area”—excessive force—“that courts typically consider in cases in which the defendant asserts a qualified immunity defense.”\textsuperscript{140}

Although no one dissented from the Court’s judgment, Justice Ginsburg did not join the Court’s resolution of the constitutional merits, and Justice Breyer joined only part of that merits resolution.\textsuperscript{141} All agreed, however, that qualified immunity was appropriate. And no one expressed disagreement with the continuing validity of \textit{Pearson} discretion. Similarly, just last Term in \textit{City and County of San Francisco v. Sheehan}, the Court—again with Justice Alito writing—declined to decide a constitutional question because the briefing was inadequate, instead simply concluding that an officer’s “failure to accommodate” mental illness during an arrest did not “violate[] clearly established law.”\textsuperscript{142} Although Justices Scalia and Kagan dissented on other grounds, no one on the Court quarreled with the Court’s articulation of the \textit{Pearson} rule.

\textbf{D. Post-\textit{Pearson} Concerns}

The \textit{Pearson} Court was unanimous that \textit{Saucier} was a mistake. The academy, however, has not been so sanguine. Numerous theoretical objections have been raised to \textit{Pearson}. This Part discusses these objections.

1. Law Stagnation

The most common criticism of \textit{Pearson} is that “constitutional tort law will stagnate as lower courts flee from the merits.”\textsuperscript{143} In particular, the

\begin{itemize}
  \item \textsuperscript{138} \textit{Id.} at 2018.
  \item \textsuperscript{139} \textit{Id.} at 2020 (quoting Pearson v. Callahan, 555 U.S. 223, 236 (2009)).
  \item \textsuperscript{140} \textit{Id.} (quoting \textit{Pearson}, 555 U.S. at 236).
  \item \textsuperscript{141} \textit{Id.} at 2016 n.*.
  \item \textsuperscript{142} \textit{City & County of San Francisco v. Sheehan}, 135 S. Ct. 1765, 1775 (2015).
  \item \textsuperscript{143} Pfander, supra note 6, at 1605. Accord Karen Blum et al., \textit{Qualified Immunity Developments:}
worry is that “judges with discretion will clear their dockets by not deciding difficult constitutional issues,” even though “hard constitutional cases may be the ones that need to be decided in order to provide guidance in areas of uncertainty . . .”

Commentators express particular alarm about *Pearson*, moreover, because the Court is also limiting the exclusionary rule, most notably in *Hudson v. Michigan*. As Professor Pamela Karlan has explained, “if the Court constrains the scope of the exclusionary rule, criminal defendants will not” help avoid constitutional stagnation because their incentive to raise constitutional arguments would be diminished. Judge Kenneth Ripple has echoed this concern, urging judges to decide constitutional questions even in “factbound” cases of criminal procedure, such as executing warrants, because after *Hudson* “criminal trials, and appeals from those proceedings, rarely will yield judicial determinations about the reasonableness of the force employed in the execution of the warrant.”

This means that if courts do not exercise their discretion to decide questions in such contexts, there would be a “significant possibility that conscientious law enforcement officers will be deprived of needed judicial guidance concerning the manner in which warrants must be executed.” Nancy Leong has taken this argument one step further, arguing that it is


144. Beermann, supra note 20, at 171 (discussing Michael L. Wells, The “Order-of-Battle” in Constitutional Litigation, 60 SMU L. Rev. 1539, 1565 (2007)). See also Williams, supra note 51, at 1316 (arguing that *Pearson* “promises to hinder the development of constitutional rights by making it that much easier to dismiss cases on the clearly established prong”).


148. Id. at 115.
essential that rights-making occur in more than one context to avoid “a narrow and distorted vision of rights.”  

2. Psychological Impact

On another front, some argue that finding a constitutional violation first predisposes a judge to finding that the law was not clearly established. Relying on cognitive psychology research, Professor Leong has most effectively articulated this concern:

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.

3. Unchanneled Discretion

Another thoughtful argument is “that Pearson fails to provide lower courts with adequate guidance about when to reach and when to avoid the merits.” Indeed, Jack Beermann argues that “[l]eaving to the standardless, unreviewable discretion of courts the decision whether to reach the constitutional merits before determining whether a right is clearly established is arguably worse than mandating that they do it every time or that they never do it.” After all, Pearson’s “new regime invites strategic behavior by courts and litigants who, in each case, are left to determine whether it would be beneficial to reach the merits or to try to influence whether the merits are reached.”


150. Leong, supra note 59, at 670–71. See also Pfander, supra note 6, at 1614 (noting that “some scholars suspect that judges forced to reach the merits may be reluctant to deny recovery on qualified immunity grounds”). Cf. Nancy Leong, Rethinking the Order of Battle in Constitutional Torts: A Reply to John Jeffries, 105 Nw. U. L. REV. 969, 973–77 (2011) [hereinafter Leong, Rethinking the Order of Battle in Constitutional Torts] (responding to Jeffries’ criticism). But see Jeffries, supra note 13, at 122–25 (criticizing argument).

151. Pfander, supra note 6, at 1605. Accord Leong, Rethinking the Order of Battle in Constitutional Torts, supra note 150, at 970.

152. Beermann, supra note 20, at 143. Accord Leong, supra note 59, at 671 (“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.”).

153. Beermann, supra note 20, at 143.
To be sure, this concern should not be overstated. The *Pearson* opinion offers numerous factors courts should consider. That the case uses a standard and not a rule may be problematic, but standards are hardly uncommon and may sometimes be inevitable. Of course, the *Pearson* Court could have articulated in greater detail why it exercised its discretion the way that it did, but it did offer guidelines. The Supreme Court’s post-*Pearson* cases, moreover, often do offer such explanation.

4. More Litigation Against Local Governments

An argument pressed against *Pearson* in the litigation itself is that overruling *Saucier* will result in more litigation against municipalities. The theory is that “[t]o the extent that a rule permitting courts to bypass the merits makes it more difficult for civil rights plaintiffs to pursue novel claims, they will have greater reason to press custom, policy, or practice [damages] claims against local governments” which are not entitled to qualified immunity as a defense.

The *Pearson* Court made quick work of this argument: “We also do not think that relaxation of *Saucier*’s mandate is likely to result in a proliferation of damages claims against local governments.” Regardless of “[w]hether the *Saucier* procedure is mandatory or discretionary,” it is logical that a plaintiff will consider “the possibility that the individual defendant will be held to have qualified immunity, and presumably the plaintiff will seek damages from the municipality as well as the individual employee if the benefits of doing so (any increase in the likelihood of recovery or collection of damages) outweigh the . . . costs” of expanding the litigation.

159. *Id.*
160. *Id.*
5. Additional Litigation Challenging Standards

A related concern is that without *Saucier*’s rigid rule, the lower courts will be flooded with arguments about whether the case is an appropriate vehicle to decide the constitutional question—i.e., that overruling *Saucier* would “spawn ‘a new cottage industry of litigation . . . over the standards for deciding whether to reach the merits in a given case.’”161 The *Pearson* Court also dismissed this contention: “It does not appear that such a ‘cottage industry’ developed prior to *Saucier*, and we see no reason why our decision today should produce such a result.”162

II. AN EMPIRICAL STUDY ON POST-*PEARSON* QUALIFIED IMMUNITY

The theoretical concerns regarding *Pearson* are not frivolous. But they also are unproven. *Pearson* is now over five years old. The time has come to test whether common criticisms hold up. Using a data set of over 800 federal appellate cases from 2009 through 2012, we evaluate how *Pearson* is being systemically applied. Before presenting our study’s methodology, findings, and implications, this Part begins by briefly outlining prior empirical studies of qualified immunity.

A. Prior Empirical Studies

Many of the theoretical concerns outlined in Part D found some support in the pre-*Pearson* data. Three studies were conducted about qualified immunity under *Saucier*. Two, moreover, were conducted shortly after *Pearson*.163

1. Leong Study

Nancy Leong examined a random sample of one hundred published and unpublished federal district court cases and one hundred published and unpublished federal circuit court cases from three time periods—two years before *Siegert*, two years before *Saucier*, and the first two years after *Saucier*.164 Professor Leong found that appellate courts avoided reaching constitutional questions in about one half (48.1%) of the pre-*Siegert* cases compared to about one in twenty (6.2%) in the post-*Saucier* 2006–2007

161. *Id.* (quoting Brief for National Ass’n of Counties et al. as Amici Curiae Supporting Petitioners at 29, 30, *Pearson*, 555 U.S. 223 (No. 07-751)).
162. *Id.*
period.¹⁶⁵ She further found, however, no statistically significant change post-Saucier in reaching constitutional questions and declaring new constitutional rights: it was 5.7% pre-Siegert and 8.8% in 2006–2007 post-Saucier.¹⁶⁶ Instead, the expansion of constitutional law was in courts finding no constitutional violation—from 46.2% pre-Siegert to 84.9% in 2006–2007 post-Saucier.¹⁶⁷ Based on these findings, Professor Leong concluded 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.”¹⁶⁸

2. Hughes Study

Paul Hughes examined every published circuit court decision involving qualified immunity from 1988 (109 cases), 1995 (146 cases), and 2005 (159 cases).¹⁶⁹ Hughes found that courts avoided reaching constitutional questions in about one third (34.2%) of cases in 1988, to one quarter (25.8%) in 1995, to 1.2% in 2005.¹⁷⁰ Like the Leong study, Hughes found that most of the change resulted in more findings of no constitutional violation (20.7% in 1988 to 42.2% in 2005), but he also found an increase in reaching constitutional questions and declaring new constitutional rights: 2.7% in 1988, 2.7% in 1995, yet 10.2% in 2006 post-Saucier.¹⁷¹ From this data, Hughes concluded that Saucier “sequencing is needed for constitutional articulation. Abandoning sequencing would severely diminish the role of courts ‘to say what the law is.’”¹⁷²

3. Sobolski-Steinberg Study

Greg Sobolski and Matt Steinberg examined a random sample of 750 published circuit decisions from before 1991 through 2008.¹⁷³ They found that courts avoided reaching constitutional questions in about four in ten (38.0%) pre-Siegert cases, to three in ten (28.1%) pre-Saucier (but post-
Siegert) cases, to 5.9% in post-Saucier cases.\textsuperscript{174} Like the Leong and Hughes studies, Sobolski and Steinberg found that most of the change resulted in more findings of no constitutional violation (19.3% to 29.4% to 35.3%), but they also found an increase in declaring new constitutional rights: 3.6% pre-Siegert, 5.5% pre-Saucier, and 13.9% post-Saucier.\textsuperscript{175} The change in rights-restricting holdings, however, was not found to be statistically significant, whereas the change in rights-affirming outcomes was statistically significant.\textsuperscript{176}

4. The Rolfs Study

Colin Rolfs utilized roughly the same methodology as the Leong study, but examined only cases decided after Pearson from January 21 to September 7, 2009—collecting data from 100 randomly selected district court decisions and 100 randomly selected circuit court decisions.\textsuperscript{177} With respect to the published and unpublished circuit court decisions, Rolfs found that courts avoided reaching constitutional questions in about one in four (22.6%) cases.\textsuperscript{178} In this post-Pearson sample, circuit courts found no constitutional violation in roughly half (55.3%), and found constitutional violations (yet granted immunity) in only 2.5% of the cases.\textsuperscript{179} Rolfs concluded that “there is a significantly high probability that Pearson has had an actual effect on the rate at which circuit courts avoid constitutional determinations.”\textsuperscript{180}

5. The Jones-Yauch Study

Ted Sampsell-Jones and Jenna Yauch examined every published court of appeals case that cited Pearson in 2009 and 2010—for a total of 190 decisions.\textsuperscript{181} Sampsell-Jones and Yauch found that circuit courts avoided

\begin{itemize}
\item \textsuperscript{174} Id. at 545 tbl.1.
\item \textsuperscript{175} Id.
\item \textsuperscript{176} Id. at 546–48. Note that Sobolski and Steinberg use a different definition of rights-affirming to include decisions that find no qualified immunity and those that find a constitutional violation yet grant qualified immunity. Id. at 549 & tbl.3.
\item \textsuperscript{177} Colin Rolfs, Comment, Qualified Immunity After Pearson v. Callahan, 59 UCLA L. REV. 468, 489 (2011).
\item \textsuperscript{178} Id. at 491.
\item \textsuperscript{179} Id. at 491–92 & fig.2. The exact percentages are not included in the Comment, but Rolfs graciously provided them directly to the authors. Rolfs found more surprising results in the district court sample, with district courts finding no constitutional violation in 74.6% of sample and finding constitutional violation (yet qualified immunity) in only 1.25% of sample, with avoidance of the question in only 2.1% of the cases (and denying qualified immunity in the remaining 21.25%). Id. at 495 & fig.4.
\item \textsuperscript{180} Id. at 497–98.
\item \textsuperscript{181} Ted Sampsell-Jones & Jenna Yauch, Note, Measuring Pearson in the Circuits, 80 FORDHAM L. REV. 623, 625 (2011).
\end{itemize}
reaching constitutional questions in about one in five (19.5%) cases.\footnote{182}{Id. at 628 tbl.1.} In this sample of cases from the first two calendar years after \textit{Pearson} was decided, circuit courts found no constitutional violation in 34.7% of the cases, and found a constitutional violation (yet granted immunity) in 7.9% of the cases.\footnote{183}{Id.} Sampsell-Jones and Yauch concluded that, “[o]n a whole, it appears that courts continue to follow the \textit{Saucier} sequence most of the time, although they exercised their \textit{Pearson} discretion in a substantial minority of the cases.”\footnote{184}{Id. at 629.}

B. Study Methodology

In designing our empirical study, our goal was to assess how federal appellate courts are applying \textit{Pearson}. To do this, we used Westlaw to define our universe of cases. Specifically, we reviewed all 916 federal court of appeals decisions in Westlaw—both published and unpublished—issued starting in 2009 through the end of 2012 that cited \textit{Pearson}, and then excluded those cases that did not involve direct application of qualified immunity.\footnote{185}{We focused on the years 2009 to 2012 for several reasons. First, those cases created a data set large enough that statistically significant findings could emerge. Second, because our methodology relies on citations to \textit{Pearson}, the closer in time cases are to \textit{Pearson}, the more likely appellate courts cited \textit{Pearson} directly instead of circuit-specific precedents. And third, we wanted to make sure that no cases in our data set would come before the Supreme Court while one of us (Nielson) was a clerk there. We did not include cases resolved by an en banc court because they presented different coding dynamics. There were fewer than fifteen such cases, some of which are particularly noteworthy because, for instance, the courts found constitutional violations but denied relief. \textit{See} Mattos v. Agarano, 661 F.3d 433 (9th Cir. 2011) (en banc); Morgan v. Swanson, 659 F.3d 359 (5th Cir. 2011) (en banc).} In other words, adopting the methodology used by Professor Leong, we only included cases in which:

\begin{enumerate}
\item a plaintiff brought at least one constitutional or federal statutory claim seeking money damages against an individual government-official defendant;
\item the defendant raised a qualified immunity defense against that claim; and
\item the court decided the merits of either the constitutional or statutory claim, the qualified immunity claim, or both.\footnote{186}{Leong, \textit{supra} note 59, at 685–86.}
\end{enumerate}

This generated a list of 844 cases. It should be noted that our methodology differs from most of the prior studies discussed in Part II.A,
as we did not look for every circuit decision that involved qualified immunity but instead focused on decisions that actually cite *Pearson* (similar to the Jones-Yauch study). And we looked at both published and unpublished decisions—similar to the Leong and Rolfs studies but unlike the Sobolski-Steinberg, Hughes, and Jones-Yauch studies. We focused on cases that cite *Pearson* because we were most curious about the effect of *Pearson* on the exercise of discretion, and cases that cite *Pearson* seemed most useful for that purpose. This approach is not without methodological limitations, as we do not capture the entire universe of qualified immunity decisions issued during the relevant time period, and at least in theory—and in our experience, likely only in theory—cases that cite *Pearson* could be materially different from those that do not in terms of the judgments produced.\(^{187}\)

Our study focuses on appellate courts because those courts, including the Supreme Court, can define clearly established law—a power not available to district courts.\(^ {188}\) Indeed, “[t]he whole point of the *Saucier* procedure was to allow the Courts of Appeals and the Supreme Court to create clearly established law, even when the defendant is immune.”\(^ {189}\) To be complete, we further broke down the cases by both claim and defendant. Many cases, for instance, involve multiple defendants, multiple claims (by which we mean an independent potential constitutional violation considered by the appellate court, regardless of whether the potential violation was labeled as a separate count in a party’s complaint), or both.
For such cases we followed Leong’s methodology: for those cases that “involved the same claim brought against multiple defendants,” we listed the claims “separately only where the court reached different results for different defendants.” This approach yielded 1,460 separate claims among the 844 cases citing Pearson for qualified immunity.

Needless to say, this methodology—while necessary for completeness—creates judgment calls, for not all panels analyze potential claims with the same degree of granularity or even clarity. Indeed, it is sometimes difficult to determine whether a court is resolving a claim on the constitutional merits or on qualified immunity grounds, especially for unpublished decisions. We attempted to minimize problems caused by imprecision in the source material and coding by implementing a three-stage review process: first, under our supervision, two sets of law student research assistants reviewed each case and noted any disagreement; second, one of us (Nielson) reviewed all of the cases; and then the other (Walker) randomly reviewed ten percent of the coded claims as well as any cases the primary reviewer had flagged as needing further review. Even so, it is inevitable that some imprecision exists. Imprecision in coding the source material is one reason we reviewed such a large number of cases, thereby reducing the significance of any particular case.

190. Leong, supra note 59, at 686. In other words, if the same claim was resolved against multiple defendants in the same way, we only counted that as a single claim for the purpose of our analysis. But if the claim is that Defendants X and Y both violated the Fourth Amendment and the court found qualified immunity as to X but not Y, that case would be coded twice. Similarly, if more than one claim was brought against an individual officer and analyzed separately by the court (for instance, if a plaintiff alleged that an officer violated both the Equal Protection Clause and the First Amendment), each claim was counted separately, as would be multiple potential violations of the Fourth Amendment (for instance, if the court analyzed entry into a home separately from the arrest). Combining these principles could lead to a single case being counted numerous times.

191. For instance, we coded Dunn v. Castro, 621 F.3d 1196 (9th Cir. 2010), four times because the court’s analysis suggested four separate claims, despite the factual overlap. See also Padilla v. Yoo, 678 F.3d 748 (9th Cir. 2012) (counted for five claims); Quinn v. Roach, 326 F. App’x 280 (5th Cir. 2009) (same). By way of comparison, Weinberger v. Grimes, No. 07-6461, 2009 U.S. App. LEXIS 2693 (6th Cir. Feb. 10, 2009), presumably could have involved more than a dozen claims had the panel broken its analysis out in a more targeted fashion.

192. By way of example, it is not entirely clear in Fowler v. Burns, 447 Fed. App’x 659 (6th Cir. 2011), whether the Sixth Circuit decided a constitutional claim or just applied qualified immunity. We concluded that the court simply applied qualified immunity because that seems most consistent with the court’s statements and analysis, even though the court’s reasoning went a long way toward suggesting there was probable cause.

193. Unlike past studies, moreover, we further broke down the data by circuit and by the nominating presidents of the judges comprising the panel. We also evaluated the claims by source of federal law, e.g., Fourth Amendment, Fifth Amendment, federal statute. Constitutional claims brought against state officials under Section 1983 were not coded as Fourteenth Amendment claims when the only basis for doing so would be the incorporation doctrine. Instead, we looked at the underlying
In determining whether a court found a constitutional violation, we took account of the case’s procedural posture. For instance, if a case was resolved by the district court on a motion to dismiss, the appellate court’s conclusion that the facts, as alleged, would equate to a constitutional violation would be coded as finding a constitutional violation, even though, on remand, the district court could determine that the plaintiff could not satisfy its factual burden. Likewise, if a district court rejected qualified immunity on the ground that there were genuine issues of material fact, and the appellate court concluded it lacked jurisdiction to review the interlocutory order because it agreed that material facts were disputed, that too would be coded as finding a constitutional violation.

Finally, we focused specifically on whether the appellate court referred to any of the factors articulated in Pearson to guide its discretion and, if so, which ones. To minimize arbitrariness in this determination, we determined to only code a case as relying on one of the Pearson factors if there was a direct quotation from, an unmistakable paraphrase of, or a clear allusion to Pearson in the court’s decision. We also noted if the court provided any other reasons.

C. Study Findings and Implications

The study findings are organized into four main categories. First, the overall, nationwide findings will be presented with respect to reaching constitutional questions and exercising Pearson discretion similar to the studies outlined in Part II.A. Part II.C.2 disaggregates the findings by circuit—focusing on the Fifth, Sixth, and Ninth Circuits—to demonstrate the disparities in exercising Pearson discretion among circuits. Part II.C.3 presents the findings broken down by the party of the judges’ nominating president in attempt to shed some light on the effects of ideology on the exercise of discretion. Finally, Part II.C.4 documents the dearth of reason giving with respect to the decision to reach the constitutional question.

1. Pearson Discretion and Constitutional Stagnation

Unsurprisingly, after the Pearson Court announced that courts no longer have to decide the constitutional question in all cases, the lower courts have embraced that new discretion. As set forth in Figure 1, in our post-Pearson sample of 844 published and unpublished circuit decisions that encompass 1,460 total claims, federal courts of appeals exercised their constitutional amendment at issue, such as the First or Fourth Amendment. Similarly, we considered whether the plaintiff sued only individual officers or whether claims were also brought against the governmental entity. The findings concerning these data are not squarely addressed in this Article.
discretion under *Pearson* to reach constitutional questions with respect to about half of the claims considered (45.5% or 665 claims).

**FIGURE 1. Post-Pearson Qualified Immunity**

Roughly a quarter of the time (26.7% or 390 claims) courts did not choose to exercise their discretion, opting instead to just declare that the right was not clearly established as was made permissible per *Pearson*. (We label this option “not exercising *Pearson* discretion” for ease of reference, recognizing that the decision not to reach a constitutional question is still, in a sense, an exercise of discretion provided by *Pearson*.) The remainder (27.7% or 405 claims) involved claims in which the court determined it lacked any *Pearson* discretion because the constitutional right was clearly established at the time of the violation. In other words, in those cases the court denied qualified immunity. It is only when a court grants qualified immunity that *Pearson* discretion comes into play. Limiting the cases reviewed to the 1,055 claims where *Pearson* discretion is available, courts exercised their discretion to decide the constitutional question nearly two-thirds of the time (63.0% or 665 claims).

That circuit courts continued to reach constitutional questions even when they ultimately decided the rights were not clearly established does not tell us that much about the effect of *Pearson* on law stagnation. We need to know how the courts answered those questions. In other words, were the courts recognizing violations of constitutional rights (what we call “pure *Saucier*” determinations)? Or were they using their *Pearson* discretion to declare no constitutional violation by the government actor—
thus developing constitutional law but not expanding individual rights? As depicted in Figure 2, courts were mostly doing the latter. When circuits decided to exercise their *Pearson* discretion to reach the constitutional question, in less than one in ten instances (8.0% or 53 claims) did the court exercise discretion in a rights-expanding or pure *Saucier* manner by finding a constitutional violation (that was not clearly established). In the other instances, the court held that there was no constitutional violation (78.4% or 521 claims), or advanced alternative holdings that there was no constitutional violation and that, in all events, any such right was not clearly established (13.7% or 91 claims).

**FIGURE 2. Exercise of Pearson Discretion**

It thus appears that circuit courts are using their *Pearson* discretion when deciding cases at a robust rate. Most of the time (nearly two-thirds of the time, per our sample), the court addresses the constitutional question and does not simply say that the right was not clearly established. This suggests that, at least as a general matter, fears of constitutional stagnation may be overblown; cases involving qualified immunity can still be used to decide a great number of novel questions of constitutional law and more often than not are so used.

On the other hand, if one is concerned not only with courts reaching constitutional questions, but also with courts finding constitutional violations where the law is not clearly established (in other words, in the pure *Saucier* manner), the numbers may be less encouraging. In only one in twenty instances (5.0% or 53 claims) in which qualified immunity was granted did the court recognize a constitutional violation that was not clearly established but that, because of the court’s decision, would be in
future cases. This means that in the overwhelming majority of cases in which courts opt to use their discretion to decide the constitutional merits, they are concluding that no right has been violated.

To be sure, assessing whether Pearson discretion has increased the risk of constitutional stagnation requires a comparison between pre- and post-Pearson judicial decisionmaking. As discussed in Part II.A, several empirical studies were conducted before Pearson and two were conducted on cases decided shortly after Pearson. These studies do not provide perfect comparisons, as the methodologies differ. For instance, like this study, the Leong and Rolfs studies analyze both published and unpublished circuit decisions, whereas the Hughes, Sobolski-Steinberg, and Jones-Yauch studies look only at published decisions.\textsuperscript{194} Each study analyzes cases from different time periods before and after Saucier and Pearson,\textsuperscript{195} which may matter. Similarly, whereas most of the prior studies draw on random samples of cases that contained certain keys words,\textsuperscript{196} our study, like the Jones-Yauch study, looks at every case within the defined population (and time period) but that population is limited to those decisions that cite Pearson.

With those qualifications in mind, comparing the studies’ findings provides some (albeit limited) context on the development of constitutional law before and after Pearson, as well as before and after Saucier—the Supreme Court precedent that required courts to answer constitutional questions in every case.\textsuperscript{197} Table 1 provides that purely descriptive comparison.\textsuperscript{198}

\begin{itemize}
\item \textsuperscript{194} Compare Leong, supra note 59, at 685 n.88, and Rolfs, supra note 177, at 489, with Hughes, supra note 34, at 419 & n.112, and Sampsell-Jones & Yauch, supra note 181, at 627, and Sobolski & Steinberg, supra note 173, at 540 n.88.
\item \textsuperscript{195} See Hughes, supra note 34, at 419 (109 randomly selected cases from 1988, 146 from 1995, and 159 from 2005); Leong, supra note 59, at 684-86 (100 randomly selected cases from each of two years before Siegert, two years before Saucier, and two years after Saucier (2006-2007)); Rolfs, supra note 177, at 489 (100 randomly selected post-Pearson cases from January 21, 2009 to September 7, 2009); Sampsell-Jones & Yauch, supra note 181, at 627–28 (190 circuit court decisions that cite Pearson from calendar years 2009 and 2010); Sobolski & Steinberg, supra note 173, at 539–40 (random sample of 750 cases from before 1991 through December 15, 2008).
\item \textsuperscript{196} See Hughes, supra note 34, at 419; Leong, supra note 59, at 685; Rolfs, supra note 177, at 489; Sobolski & Steinberg, supra note 173, at 540.
\item \textsuperscript{197} Saucier v. Katz, 533 U.S. 194, 201–02 (2001).
\item \textsuperscript{198} See Hughes, supra note 34, at 423; Leong, supra note 59, at 711 tbl.4; Rolfs, supra note 177, at 492, 493 fig.2; Sampsell-Jones & Yauch, supra note 181, at 628 tbl.1; Sobolski & Steinberg, supra note 173, at 545 tbl.1.
\end{itemize}
As these comparisons suggest, circuit courts unsurprisingly opt not to reach constitutional questions as often; indeed, this result flows directly from Pearson. What matters, however, is how often courts do so. The data suggest that courts decline to decide constitutional questions at a rate similar to the pre-Saucier period—in around one in four cases, as opposed to less than six percent during the Saucier regime. The overall rate of reaching constitutional questions accordingly has decreased after Pearson; it would be shocking if it were otherwise. This decrease by itself is not necessarily problematic. For the reasons given by the Pearson Court, some cases are poor vehicles to decide constitutional questions because, for instance, they are poorly briefed. Presumably no one thinks it is a bad thing that those cases are not being resolved on constitutional grounds.

Moreover, it is not obvious that civil libertarians should prefer Saucier. Imagine a world in which courts keep declining to clarify a point of law regarding a certain practice. Police might avoid that practice, or use it sparingly, because of the legal uncertainty. But if the practice is declared constitutional, police may no longer be reluctant to use it broadly.

Nonetheless, as to constitutional stagnation in the pure Saucier sense, the concern about post-Pearson stagnation appears well founded: all of the post-Pearson studies—ours and the Jones-Rauch and Rolfs studies—found that circuit courts found constitutional violations of rights that were not clearly established in 3.6%, 7.9%, and 2.5%, respectively, of the total claims reviewed, whereas the three pre-Pearson studies found rates ranging

---


200. See, e.g., Christensen v. Park City Mun. Corp., 554 F.3d 1271, 1278 (10th Cir. 2009) (declining to decide poorly briefed constitutional question).
from 6.5% to 13.9% during the Saucier mandatory sequencing regime. Our findings suggest something has changed.

The implications of these findings for substantive constitutional law are important. Pure Saucier cases are often difficult—as they should be. Finding a constitutional violation that has not been identified before is one of the most momentous things a judge can do. Such cases are often contentious. For instance, to return to the example used in the Introduction, the en banc Ninth Circuit’s holding that Officer Aikala’s use of a Taser on Ms. Mattos violated the Fourth Amendment but that the right was not “clearly established” prompted fierce dissent. Indeed, then-Chief Judge Kozinski warned that the majority’s constitutional “mistake will be paid for in the blood and lives of police and members of the public.”

Hence, it is possible that courts—perhaps for the sake of comity on the bench or simply because of the call of other work—may decide not to resolve difficult constitutional questions. For instance, in one case, a prisoner’s “ovary and lymph nodes were removed without her consent during a radical hysterectomy.” A divided panel concluded that the doctors did not violate any clearly established law. The majority’s decision to just apply qualified immunity rather than reach the constitutional question obviously can be defended. But one could imagine other panels resolving the constitutional question too, as the Supreme Court did in Plumhoff v. Rickard. The risk, post-Pearson, is that this type of constitutional question—i.e., a contentious one—may fall through the cracks more often after Pearson than before it.

In sum, post-Pearson constitutional law continues to develop, but the finding of constitutional violations (when granting qualified immunity)—the pure Saucier development of constitutional law—has decreased. The data thus provide at least some support for the post-Pearson constitutional stagnation theory discussed in Part I.D.

201. See Hughes, supra note 34, at 423; Leong, supra note 59, at 711 tbl.4; Rolfs, supra note 177, at 493 & fig.2; Sampsel-Jones & Yauch, supra note 181, at 628 tbl.1; Sobolski & Steinberg, supra note 173, at 545 tbl.1.
203. Id. at 458 (Kozinski, C.J., dissenting).
204. Sama v. Hannigan, 669 F.3d 585, 587 (5th Cir. 2012).
205. Id. at 591–95. See also id. at 595–601 (Haynes, J., dissenting).
207. See, e.g., Reed v. Allen, 379 Fed. App’x 879, 883 (11th Cir. 2010); Ruiz v. Sotelo, 338 Fed. App’x 665, 666 (9th Cir. 2009); Turkmen v. Ashcroft, 589 F.3d 542, 549–50 (2d Cir. 2009); Ashker v. Schwarzenegger, 339 Fed. App’x 751, 752 (9th Cir. 2009).
2. Circuit Disparities in Exercise of Pearson Discretion

In addition to shedding light on Pearson’s effect on constitutional stagnation generally, we also explore the disparities among the circuits in their exercise of Pearson discretion and how those disparities could affect the substantive development of constitutional law. To illustrate these disparities, we focus on three of the circuits with the largest number of claims in the cases reviewed and where one might expect to find differences in the exercise of discretion (perhaps because of the ideological makeups of those circuits): the Fifth, Sixth, and Ninth Circuits. Figure 3 depicts how these circuit courts have ruled on qualified immunity claims, compared to the national average.

The disparities among these three circuits—and in comparison to the national average—are stark in many respects. For instance, there is substantial variation in the rate at which the circuits decide to exercise their Pearson discretion to reach constitutional questions, with the Fifth Circuit leading the way in exercising discretion 57.6% of the time, compared with 47.7% for the Sixth Circuit and 36.0% for the Ninth Circuit. Compared to the national average (46.4%), both the Fifth and Ninth Circuits’ rates are statistically significant (p < 0.05)—just in opposite directions. With respect to instances where the circuits decide not to exercise their Pearson discretion (and just hold that any asserted right is not clearly established), the Ninth Circuit leads the way at 37.7%, followed by the Fifth Circuit at 20.1% and then the Sixth Circuit at 14.5%. Compared to the national average (26.6%), both the Fifth and Ninth Circuits’ rates are statistically significant, again in opposite directions; and so is the Sixth Circuit’s rate. Finally, the Sixth Circuit denied qualified immunity (finding a clearly

---

208. Of the 1,460 claims reviewed, there were 139 claims from the Fifth Circuit, 262 claims from the Sixth Circuit, and 289 claims from the Ninth Circuit. All the other circuits had fewer claims than the Fifth Circuit, with the exception of the Tenth Circuit at 141 claims.

209. To assess statistical significance for circuit outcomes (p < 0.05), we compare each individual circuit court to the national average. Here, the national average is the average of the percentage for each circuit, excluding the D.C. Circuit because it handled far fewer claims (only a dozen) in the sample and seems to be an outlier. If circuit identity does not matter, the circuits as a whole exercising Pearson discretion should all conform—more or less—to the national average. We used Prism software to run parts of a whole comparisons (actually a two-tailed binomial distribution given the input value versus the expected output value, which is why we arrive at a P-value) on the positive values observed from one group in the data against the positive values observed from the other group in the data. Chi-square tests were also performed to compare all circuit courts with respect to the probabilities that they exercised each of the three types of decisions depicted in Figure 3 as well as the two types of decisions depicted in Figure 4. The chi-squared tests do not allow for examination of each circuit individually, but the overall conclusions are consistent with those from the binomial test. There is statistically significant evidence to suggest that each type of decision is not independent of the circuit.
established right that was violated) 37.8% of the time, compared with 22.3% for the Fifth Circuit and 26.3% for the Ninth Circuit. Only the Sixth Circuit’s denial rate is statistically significant compared to the national average (27.0%).

**FIGURE 3.** Circuit-by-Circuit Disparities in Post-Pearson Qualified Immunity

![Graph showing circuit-by-circuit disparities in post-Pearson qualified immunity](image)

The disparities among the circuits are somewhat surprising. Among the three circuits, the Sixth Circuit, for instance, is the most likely to deny qualified immunity, whereas the Fifth Circuit is the most likely to exercise Pearson discretion to decide constitutional questions. The Ninth Circuit, by contrast, is the most likely of the three to not exercise Pearson discretion to reach constitutional questions. Each of these findings of departures from the national circuit average is statistically significant.

The disparities among the circuits are similarly pronounced when one considers how the circuits exercise their Pearson discretion when they decide to answer the constitutional question. Figure 4 presents those findings for the Fifth, Sixth, and Ninth Circuits, again compared to the national average.

There are no statistically significant differences between these circuits and the national average with respect to finding no constitutional violation. When exercising Pearson discretion to reach constitutional questions, the Fifth Circuit (at 98.7%), Sixth Circuit (at 99.2%), and Ninth Circuit (at 83.6%) found no constitutional violation at roughly the same rate as the national average of 90.5%.

But the differences in how the circuits

---

210. These percentages include both instances when the court found no constitutional violation.
exercise *Pearson* discretion to recognize new constitutional rights is quite pronounced. When exercising *Pearson* discretion to recognize new constitutional rights, the national average was 9.5%. The Fifth, Sixth, and Ninth Circuits all differ dramatically from the national average, by a statistically significant margin ($p < 0.05$). The Ninth Circuit leads the way among the three by finding constitutional violations at nearly twice the rate of the national average (16.4%). By contrast, the Fifth and Sixth Circuits are substantially below the national average at 1.3% and 0.8% respectively.

**FIGURE 4.** Circuit-by-Circuit Variation in the Exercise of *Pearson* Discretion

Put differently, in nearly one in five instances in which the Ninth Circuit decided to exercise *Pearson* discretion, it did so to recognize a new (or at least previously unclear) constitutional right. The Fifth and Sixth Circuits, by contrast, did so in about only one per 100 exercises of *Pearson* discretion. These are, of course, very small numbers, with only 17 pure *Saucier* exercises in the Ninth Circuit, and only one such exercise in both the Fifth and Sixth Circuits. But to the extent the numbers are generalizable, these circuit-by-circuit disparities may reveal a geographic distortion in the development of constitutional law. One could reasonably fear that constitutional law may develop quite differently in the various circuits, such that the Constitution means something different—and instances when the court adopted alternative holdings of no constitutional violation and no clearly established right. With respect to alternative holdings, the national average was 14.0%, with the Fifth Circuit at 17.5%, the Sixth Circuit at 10.4%, and the Ninth Circuit at 13.5%.
among the fifty states. And those differences can be tied at least in part to whether and how the circuits exercise their *Pearson* discretion differently to decide constitutional questions.

The potential substantive impact of this disparity is important for at least two reasons. First, law may be more developed in some parts of the country than in others. Such disuniformity is troublesome, especially for individuals and businesses (as well as government actors) that operate across circuits. The Supreme Court, of course, can resolve circuit splits. But the disuniformity here is not of a “circuit split” character. Instead of two circuits deciding the same merits question differently, one circuit may decide the issue on the constitutional merits, while another simply declines to reach the merits at all. That sort of divergence is unlikely to trigger Supreme Court review, but it nonetheless has important effects on the relevant communities. Second, the courts that decide constitutional questions should, all else being equal, have an outsized voice. Circuit courts often follow each other’s precedents; indeed, appellate procedure encourages such following.\(^1\) Courts that develop more constitutional precedent are more likely to have their precedent be adopted by other courts. Consider, for instance, if the same issue comes up in two circuits. One resolves it on the merits; the other resolves it as not clearly established. If a third circuit confronts the issue and opts to address the constitutional question (or, for instance, faces the constitutional question in the context of the exclusionary rule or the like, where leaving the question unanswered is not an option), there is a real chance that it will follow the law of the circuit that also addressed the constitutional question.\(^2\)

In sum, these findings suggest that the process *Pearson* facilitates could increase disuniformity between circuits and privilege the substantive views of those courts that are most active in deciding constitutional questions.\(^3\) These are important systemic results.

---

\(^1\) See, e.g., FED. R. APP. P. 35(b)(1)(B) (“[A] petition [for rehearing en banc] may assert that a proceeding presents a question of exceptional importance if it involves an issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals.”); 7th Cir. R. 40(e) (“A proposed opinion . . . adopting a position which would . . . create a conflict between or among circuits shall not be published unless it is first circulated among the active members of this court and a majority of them do not vote to rehear en banc the issue of whether the position should be adopted . . . ”).

\(^2\) In some cases, there may even be “deference mistakes,” in that a court misreads a case finding that no clearly established right was violated as finding that clearly there is no violation. See Jonathan S. Masur & Lisa Larrimore Ouellette, *Deference Mistakes*, 82 U. Chi. L. Rev. 643, 674–77 (2015) (discussing cases).

\(^3\) To be sure, these discrepancies could be explained by factors endogenous to our analysis; for
3. Potential Asymmetric Impact of Pearson Discretion

Concerns about distorted and inconsistent development of the law under Pearson discretion are exacerbated when one considers the role that judicial philosophy may play in the exercise of Pearson discretion. After all, as Professor Beermann hypothesized, Pearson discretion could “invite[] strategic behavior by courts and litigants who, in each case, are left to determine whether it would be beneficial to reach the merits or to try to influence whether the merits are reached.” 214 A judge’s philosophy could consciously or subconsciously influence the exercise of Pearson discretion. In particular, if some judges are less inclined to decide constitutional questions as a matter of philosophy or temperament, and if those judges have distinct viewpoints about the substance of constitutional doctrine, then one would expect Pearson to shift precedent away from those viewpoints. In other words, if some judges believe that “[t]he Saucier procedure . . . is not appropriate in most cases,” 215 while others take a more expansive view, 216 it is easy to see what the long-term consequence may be if those judges have even slightly different substantive viewpoints. 217

example, cases perhaps are more likely on average to be meritorious (or well briefed) in the Ninth Circuit, for any number of reasons. Likewise, preexisting circuit precedent obviously may influence whether a panel will find a violation of a clearly established right. Moreover, circuit precedent may make it more attractive for a panel to exercise Pearson discretion because the analytical leap to declare a new right is shorter than in another circuit without that initial precedent. Indeed, one could imagine a doctrinal “snowball” effect leading to more cases recognizing a violation in that jurisdiction. Our intuition is that such marked discrepancies across circuits are not likely explained by the character of the cases brought or preexisting circuit precedent, but the possibility merits consideration and further study. In other words, based on our analysis, although no firm conclusions should be reached, the data suggest that this potential source of substantive asymmetry warrants close analysis.

214. Beermann, supra note 20, at 143.


216. C.f. Atkins v. City of Chicago, 631 F.3d 823, 838 (7th Cir. 2011) (Hamilton, J., concurring in part and concurring in the judgment) (arguing that the panel should decide the constitutional question because doing so “is ‘often beneficial’ in promoting the development of constitutional precedent” and expressing sympathy for citizens who may be misidentified as violating parole who are “vulnerable to lengthy deprivations of liberty without due process of law and without effective remedy”); Jones v. Byrnes, 585 F.3d 971, 980 (6th Cir. 2009) (Martin, J., concurring) (“I . . . applaud the Court’s decision to address the constitutional question in this case even though not required under Pearson. I further encourage the district courts and future panels of this Court to follow suit in these kinds of cases by continuing to employ Katz’s analytical sequence.”).

217. C.f. Andrews v. Hickman County, 700 F.3d 845, 864–65 (6th Cir. 2012) (Sutton, J., concurring in part and in the judgment) (“I see no need . . . to decide whether these social workers violated the Fourth Amendment” because they “did not violate any clearly established rights of the Andrews family, and I would leave it at that.”); Estate of Henson v. Callahan, 440 F. App’x 352, 358–59 (5th Cir. 2011) (Owen, J., concurring) (similar); Hunt v. County of Orange, 672 F.3d 606, 617 (9th Cir. 2012) (Leavy, J., concurring) (similar).
This concern about asymmetric doctrine development exists even if it is hard to identify in the data. Every judge is unique. Those judges who lean minimalist generally, or at least do so in the context of constitutional litigation (or even certain types of constitutional litigation), presumably all have somewhat distinctive substantive views, at least sometimes. If those judges act on their minimalist impulses, their ability to influence constitutional doctrine is reduced.218 The empirical challenge, of course, is identifying such judges. Nonetheless, because such judges presumably exist, and because each judge has at least to some degree unique constitutional insights, the possibility of asymmetric constitutional development should be taken seriously regardless of what the data can show.

The data, however, are not silent. Even relying on crude indicia of potential minimalism, the data suggest that such asymmetric development may be occurring. Specifically, to explore this issue we used the nominating President’s political party affiliation as our guide. To be sure, there are many sound criticisms about evaluating judicial opinions based on the political party of the appointing President.219 Nevertheless, at least as a rough proxy, the party of a judge’s nominating president can shed some insight—especially, as here, “when looking at a large number of judges and decisions.”220

Likewise, our focus on the opinion author rather than the entire panel (or something else) is obviously far from perfect. After all, it is possible that when panels allocate opinion-writing assignments, certain judges prefer cases saying the right is not clearly established, while others prefer cases saying there was a violation, even though all the panel judges vote on the merits in the exact same way as one another. This possibility strikes us as implausible—indeed, if there were such a widespread preference, that

218. See generally SUNSTEIN, supra note 64, at 3–4 (defining minimalism as “saying no more than necessary to justify an outcome[,] and leaving as much as possible undecided”).


itself would merit attention—but it cannot be rejected out of hand. Conversely, analyzing each voting judge on the panel separately comes with its own set of methodological limitations due to judicial “panel effects” (that is, the fact that appellate courts work in three-judge panels), including the “collegial concurrence.”  

Our point here is not to discuss the wisdom of minimalism, nor to suggest that judges nominated by any particular party have a monopoly of it. We simply wish to illustrate how asymmetric development may occur, and using party affiliation might help to do that. Further research, of course, is necessary before drawing firm conclusions. Yet as a preliminary matter, Figure 5 depicts how circuit courts ruled on qualified immunity claims, broken down by the party affiliation of the President who nominated the opinion author. 

As Figure 5 details, the rate of exercising Pearson discretion is not different based on the party affiliation of the President who nominated the authoring judge: authors nominated by a Democratic president (“D judges”) and those nominated by a Republican president (“R judges”) both exercised Pearson discretion 43.3% and 45.0% of the time, respectively. The differences in the other two categories, however, are statistically significant ($p < 0.05$). In contrast to D judges, R judges were much more likely (27.4% to 18.0%) to decide not to exercise their Pearson discretion and just hold that the right was not clearly established—thus making no

221. See, e.g., Richard L. Revesz, Environmental Regulation, Ideology, and the D.C. Circuit, 83 Va. L. Rev. 1717, 1764 (1997); Sunstein, supra note 220, at 337–38 (2004). As outlined in note 222 infra, we rely solely on basic tests of statistical significance. As further research is undertaken, however, one should incorporate regression analysis, and it may be useful to employ semiparametric matching rather than standard regression analysis. See, e.g., Christina L. Boyd et al., Untangling the Causal Effects of Sex on Judging, 54 Am. J. of Pol. Sci. 389 (2010). In other words, our study’s tentative analysis should not be the final word on this issue.

222. To assess statistical significance for political affiliation ($p < 0.05$), we used the same methodology as that for circuit disparities, see supra note 209, except instead of comparing each individual circuit court to the national average, we assume that if there is no bias in the distribution, the results would be 50/50. That is, if observing opinions through the lens of political affiliation and assuming no bias, a judge nominated by a Democratic president would have the same odds of deciding a given question as a judge nominated by a Republican president. The results will split down the middle. If, however, the category does matter, the odds will be skewed in one direction. For determining statistical relevance, we compare the percentage of events occurring given a specific categorization and compare that to the expected value of 50/50. Some normalization was required (i.e., D to R), since there is a disparity between the total number of claims decided by each party. Otherwise, a 50/50 split is already skewed. This has some caveats, so normalization was always done in the most conservative manner possible. Moreover, chi-squared tests for independence were performed to assess whether there was statistical evidence to suggest that nominating party mattered as to the three types of decisions depicted in Figure 5 as well as the two types of decisions depicted in Figure 6. The results were consistent with those of the binomial test reported herein.
new constitutional law. This is consistent with the theory that R judges in the aggregate would be less likely to use Pearson discretion because the constitutional question is unnecessary to the judgment. To the extent that minimalism is correlated with substantive constitutional views, this dynamic would change the contours of constitutional doctrine. In particular, case-by-case pragmatists (or other judges unwilling to decide constitutional questions) would have less influence than judges looking to set bright-line rules.\textsuperscript{223}

\textbf{FIGURE 5.} Post-Pearson Qualified Immunity and Party Affiliation of Opinion Author’s Nominating President

Conversely, it is statistically significant that D judges were more likely (38.8\% to 27.1\%) to deny qualified immunity by finding a constitutional violation of a clearly established right. It may not be too surprising that D judges are more likely to find clearly established constitutional violations. Nor does this finding shed light on how the judges exercise their Pearson discretion. But it is somewhat surprising that there is no statistically significant difference between D and R judges with respect to their decision to exercise their discretion to reach constitutional questions they are no longer required to reach after Pearson. One may have thought that—just like R judges’ minimalist inclination to avoid constitutional rulings by just holding the right is not clearly established—D

judges would have been more likely to decide constitutional questions and thus develop constitutional law even when they are no longer so required.

This intuition, however, may be too simplistic, as judges generally may have incentives to reach constitutional questions unnecessarily to develop the law in a way that aligns with their views. In grossly oversimplified terms, some “conservative” judges may want to rule that the Constitution does not prohibit the government action at issue to allow such action to continue, whereas “liberal” judges may want to recognize more constitutional rights to restrict such government action in the future. Accordingly, perhaps the more important inquiry is how D and R judges rule when they decide to exercise their Pearson discretion. Figure 6 breaks down the exercise of Pearson discretion based on the political affiliation of the President who nominated the author of the opinion.

**FIGURE 6. Exercise of Pearson Discretion and Party Affiliation of Opinion Author’s Nominating President**

As Figure 6 depicts, the differences between D and R judges with respect to finding no violation were not statistically significant. When exercising Pearson discretion to reach constitutional questions, R judges found no violation in 93.3% of the cases, as opposed to 86.9% for D judges. So the hypothesis that “conservative” judges are more likely to exercise their Pearson discretion to create rights-restricting constitutional law cannot be suggested by our data. The same is not true, however, for the hypothesis that “liberal” judges are more likely to exercise their Pearson discretion to find constitutional violations and thus make rights that protect against government action. When exercising Pearson discretion to reach
constitutional questions, D judges found constitutional violations nearly twice as often as R judges (13.1% and 6.7%, respectively)—a statistically significant difference ($p < 0.05$).

Of course, the caveats mentioned at the outset should temper any firm conclusions: affiliation of the nominating President is not a perfect proxy for a judge’s philosophy; nor is the fact that the judge authored the opinion. And the limited number of pure Saucier cases may skew the results, at least somewhat. Nevertheless, if these proxies are sufficiently accurate, the data hint that Pearson may have consequences no one has predicted. In particular, there is a risk that Pearson’s procedural rule may have substantive significance because not all judges holding particular viewpoints are equally likely to exercise Pearson discretion in the same way. If true, this would create substantive asymmetry in constitutional doctrine. In particular, it may be the case that R judges are more likely, in the aggregate, to decide not to exercise their Pearson discretion (and just find any asserted right not clearly established)—thus allowing the law to stagnate. Conversely, when courts decide to exercise Pearson discretion, D judges may be more likely to find constitutional violations—thus developing constitutional law in a rights-making or pure Saucier manner.

Putting these two preliminary findings together creates a troubling possibility. Because of Pearson discretion, the development of constitutional law might be shifting away from those with certain substantive constitutional views and toward those with others. This shift would not be due to a change in the substantive views of the federal judiciary at large, but instead due to philosophical inclinations not to reach constitutional questions unnecessarily. This potential consequence is unexpected and has not been one of the concerns raised in response to Pearson. The issue certainly was not raised to the Court in Pearson.

224. One might not consider this asymmetry to be a bad thing. But the judicial process is benefited when the full spectrum of judges contribute to the dialogue. See, e.g., Ruth Bader Ginsburg, The Role of Dissenting Opinions, 95 MINN. L. REV. 1, 3 (2010). In short, this asymmetry is an unintended consequence of Pearson that merits close review. Cf. Melissa F. Wasserman, Deference Asymmetries: Distortions in the Evolution of Regulatory Law, 93 TEX. L. REV. 625, 645–46 (2015) (explaining that an unintended “asymmetry in judicial review” can lead to “troubling” consequences).

225. To be sure, Professor Leong has argued that Pearson discretion is a good development, as Saucier mandatory sequencing had “led disproportionately to the articulation of law-narrowing constitutional rights” because it “engender[ed] cognitive disincentives for judges to recognize a constitutional violation yet grant qualified immunity.” Leong, supra note 150, at 970. She has not, however, focused on how Pearson discretion could actually distort the development of constitutional law in the other direction.
In short, constitutional precedent after Pearson may suffer from substantive asymmetries, and it certainly suffers from disparate exercise of discretion across circuits. And though our analysis here is particularly tentative, there is some reason to think that at least certain judges with distinct substantive views also are more likely not to decide constitutional questions when the rights at issue are not clearly established. The consequence of this can be a gradual evolution of precedent away from the views of those judges.\footnote{226}

4. Pearson Discretion and the Lack of Reason Giving

A glaring result from the data is that courts often failed to provide any explanation for exercising (or not) their Pearson discretion. The numbers here are extraordinary. Of the 1,460 claims in the cases reviewed, the circuit courts denied qualified immunity in 405 of them and thus, under Pearson, had discretion in the remaining 1,055 claims whether to reach the constitutional question. In less than one in ten of those instances (8.1% or 85 claims) did the court provide any reason for why it had decided to exercise (or not) its Pearson discretion. When giving reason, courts more often than not (69.4% or 59 claims) included at least one reason expressly provided in the Pearson opinion.

Perhaps reflecting the Pearson Court’s lopsided articulation of reasons—four in favor of deciding the constitutional question and eleven against it\footnote{227}—the rate of reason giving also varied depending on which way the court exercised its Pearson discretion. Of the 665 claims where the court exercised its Pearson discretion to decide the constitutional question, the court gave a reason with respect to only 25 claims (3.8%). Conversely, of the 390 claims where the court decided to avoid the constitutional question, the court provided a reason in 60 claims (15.4%). That is more than a fourfold increase in reason giving.

To be sure, as noted above, the reasons given for or against reaching the constitutional question did not all come from the Pearson list. With respect to the 25 claims where courts gave reasons for reaching the constitutional question, 64.0% of the time at least one Pearson reason was

\footnote{226. Another potential path to asymmetry is through published versus unpublished decisions. If certain judges are opting to find violations in unpublished decisions, while other judges do so in published ones, and if those groups of judges have different views of substantive law, then again the law may tilt away from the judges who use more non-precedential decisions. The significant, but under-theorized, role unpublished opinions play in qualified immunity doctrine will be addressed in greater detail in subsequent work.}

\footnote{227. See Pearson v. Callahan, 555 U.S. 223, 236–42 (2009).}
provided. At 32.0%, the leading reason from *Pearson* was that the “two-step procedure promotes the development of constitutional precedent,” followed at 20.0% both that it is “difficult to decide whether a right is clearly established without deciding precisely what the constitutional right happens to be” and that “questions that do not frequently arise in cases in which a qualified immunity defense is unavailable.” The remaining *Pearson* reason—that is, “little if any conservation of judicial resources” by not deciding constitutional question—appeared 12.0% of the time. In a little over half (56.0%) of the cases where reasons were given did courts include a reason not included in *Pearson*. Whereas other reasons vary, the predominant one was that the district court had exercised *Pearson* discretion that way, so the circuit court was just following suit. Figure 7 depicts these percentages for each of the *Pearson* reasons for deciding constitutional questions (plus the “other” reasons).

**FIGURE 7. Reasons Given for Exercising Discretion to Decide Constitutional Question**

With respect to the 60 claims in which courts gave reasons for not exercising their discretion to decide the constitutional question, 71.7% of the time the court provided at least one reason from *Pearson*. Figure 8 details the percentages for each of the eleven *Pearson* reasons (plus “other”) used in the 60 claims in which courts gave any reason for not deciding the question.
The big winners, at 28.3% and 25.0% respectively, are the reasons “substantial expenditure of scarce judicial resources on difficult questions that have no effect on the outcome of the case” and “plain that a constitutional right is not clearly established but far from obvious whether in fact there is such a right.” The next highest are the general rule of constitutional avoidance (at 11.7%) and the factbound nature of the constitutional question (at 10.0%). The other nine Pearson reasons were all present in less than one tenth of the 60 claims, with waste of parties’ resources and a decision likely soon from a higher court never being cited. In 40.0% of instances a reason not listed in Pearson was cited. These reasons varied, but, again, a recurring theme was that the circuit court was just following the district court’s sequencing.

**Figure 8. Reasons Given When Deciding to Avoid Constitutional Question**

In sum, there is remarkably little commentary in the cases regarding how Pearson discretion should be exercised. Some of the dearth of reason giving, of course, may be attributed to Pearson itself. As set forth in Part I.C.5, the Pearson Court laid out the factors, but it did not discuss them when deciding the qualified immunity question in the case actually before it. Even so, it is strange that the factors laid out in Pearson are so seldom even invoked, much less thoughtfully applied (at least as articulated), by the lower courts.

---

229. See Beermann, supra note 20, at 167.
III. THE POST-PEARSON NEED FOR REASON GIVING

Whereas the core constitutional stagnation fear expressed about *Pearson* discretion is probably exaggerated, the facts on the ground nevertheless show that *Pearson* is not perfect. There appears to be some stagnation with respect to rights-making; variation across the circuits; and the potential of substantive asymmetries. All of this suggests that the Supreme Court might need to revisit *Pearson*. Indeed, following *Camreta*, there may be some appetite to require lower courts to decide whether the alleged right is clearly established and, if it is not, to stop the analysis there.230 Others, however, may press for a return to *Saucier*, as many scholars advised when *Pearson* was decided.231 Neither of those options is perfect, nor, in any event, likely. Accordingly, we urge a middle path: the Court should require lower courts—both trial and appellate courts—to give reasons for exercising (or not) their *Pearson* discretion to reach constitutional questions.

We are not writing on a blank slate, but borrow from long-settled principles of administrative law that stress the danger that arises when decisionmakers fail to contemporaneously explain why they have elected to exercise their discretion in a particular way.232 The value of reason giving is not limited to administrative law but has been explored in the law more generally,233 and we are not the first to import it into civil litigation.234 In fact, in his initial response to *Pearson*, Jack Beermann advanced a reason-

---

230. See *Camreta* v. Greene, 131 S. Ct. 2020, 2043 (2011) (Kennedy, J., dissenting) (noting that “the Court might find it necessary to reconsider its special permission that the Courts of Appeals may issue unnecessary merits determinations in qualified immunity cases with binding precedential effect”). See also id. at 2036 (Scalia, J., concurring) (indicating willingness to consider whether “to end the extraordinary practice of ruling upon constitutional questions unnecessarily when the defendant possesses qualified immunity”).

231. See *supra* Part I.D.


giving recommendation: “At a minimum, in light of the strong reasons for reaching the constitutional merits, courts should be required to give reasons for not doing so.”

This Part builds on Professor Beermann’s recommendation in light of the post-Pearson empirical realities of the new qualified immunity. This Part begins by introducing the reasoned-decisionmaking requirement as it has developed in administrative law. Part III.B surveys the reasons for giving reasons from administrative law and elsewhere. Part III.C concludes by fleshing out how a reason-giving requirement would improve post-Pearson qualified immunity. We do not claim that reason giving is a cure-all to counteract all of Pearson’s costs, but we do suggest that it can minimize those costs without introducing excessive new costs of its own. A reason-giving requirement, in short, can achieve some of the benefits of Saucier in a much less burdensome way.

A. Administrative Law’s Reason-Giving Doctrines

Federal agencies often have a great deal of discretion. Indeed, some agencies are authorized to regulate entire industries with little direction from Congress. This vast discretion has prompted the creation of various safeguards to govern how that discretion is exercised to prevent its abuse. One of the most important of those safeguards is the requirement that agencies contemporaneously explain in writing their use of discretion. As Jodi Short explains, “[a]dministrative-law doctrine places reason giving at the center of agency policymaking and judicial review.”

This well-known fact about the administrative process comes to mind because the broad lawmaking discretion Congress has given to federal agencies is, in many respects, like the broad discretion the Pearson Court has given to the lower courts. This suggests that there may be a role for reason giving in the qualified immunity context too.

To appreciate why Pearson’s grant of discretion may be benefited by a reason-giving requirement, it is important to understand how reason

---

235. Beermann, supra note 20, at 175. Accord Leong, supra note 150, at 970 (“I agree with the result in Pearson; my chief complaint is that the Court provided insufficient guidance to lower courts as to when they should decide the constitutional question.”).

236. See, e.g., Nielson, supra note 232, at 770.

237. See, e.g., id. at 792–93.

238. See, e.g., id. at 775.

239. Short, supra note 232, at 1817. Accord Stack, supra note 232, at 957 (“Explicit reason-giving [is] a major part of the industry of the administrative state.”).
giving works in the agency context. In particular, three separate reason-giving requirements in administrative law merit brief discussion here.

1. APA Statement of Basis.

Enacted in 1946, the Administrative Procedure Act ("APA") requires federal agencies in certain actions (i.e., where a hearing is required) to include "a statement of . . . findings and conclusions, and the reasons or basis thereof, on all material issues of fact, law, or discretion presented on the record." Congress enacted the APA with its reason-giving requirement because it was concerned that agency "power was not sufficiently safeguarded and sometimes was put to arbitrary and biased use." The APA further provides that a reviewing court may set aside an agency action if found to be "without observance of procedure required by law." This review provision arguably provides an enforcement mechanism for the APA's reason-giving requirement. As discussed below, however, the Supreme Court has instead grounded such authority in the APA's separate arbitrary-and-capricious standard of review.

2. Chenery/Overton Park Reason-Giving Requirement

Even before the APA, however, the Court had articulated a reason-giving requirement for federal agencies. In 1943, the Chenery I Court explicitly departed from the ordinary "rule" in the civil litigation context that a trial court's decision "must be affirmed if the result is correct 'although the lower court relied upon a wrong ground or gave a wrong reason.'" Instead, the Court held that in suits involving agencies, "[t]he grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based." A few years later, when the case returned to the Supreme Court a second time, the Chenery II Court provided a more precise articulation of the administrative law's special reason-giving requirement: "That rule is to the effect that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency."

In 1971, the Court tied this reason-giving requirement to the APA in Citizens To Preserve Overton Park, Inc. v. Volpe, holding that the APA

requires agencies to “disclose the factors that were considered” and their “construction of the evidence.” 246 The Chenery principle is one of the most important in all of administrative law because it prevents reviewing courts from finding an independent reason beyond what the agency offered to uphold agency action. 247

3. “Hard Look” Review

The APA further provides that a reviewing court must set aside agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 248 In recent decades, the Court has interpreted this language to mandate a heightened reasoned-decisionmaking requirement. In particular, in Motor Vehicle Manufacturers Ass’n v. State Farm Mutual Automobile Insurance Co., the Court explained:

[A]n agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. 249

This form of review has now been dubbed “hard look” review. Because of hard look review, “the agency must examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’” 250


244. Chenery I, 318 U.S. at 87.


Under hard look review, Robin Effron explains, “the validity of a decision is measured by the nature and quality of the reasons given by the decisionmaker, rather than by reasons or arguments that could be supplied post hoc by a reviewing tribunal.” Moreover, as Kevin Stack has documented, “the Supreme Court has extended the demand for reasons to virtually every form of agency action and every conceivable type of deficiency in an agency’s stated justification for its action.” Hard look review’s reason-giving requirement is one of the most important safeguards against agency abuses of discretion.

B. The Reasons for Giving Reasons

It is not without cause that these reason-giving requirements have developed in administrative law (and elsewhere). In fact, the reasons for giving reasons may seem self-evident, and it is fair to say “the virtues of giving reasons has a long and rich intellectual history that engages any number of public and private actors” including “the legislator, the judge, the administrator, and the citizen-observer.” But to appreciate why the Supreme Court should impose a reason-giving requirement when courts exercise their Pearson discretion, it is helpful to discuss briefly a number of reason giving’s most potent benefits.

1. Encourage Rational Decisionmaking

Perhaps the primary objective of a reason-giving requirement is to encourage the decisionmaker to make rational, consistent decisions, considering all of the relevant factors. The idea is that a procedural requirement, by focusing attention on a particular danger, should foster better substantive outcomes. The practice of giving reasons, in other words, should improve the quality of decisionmaking. As Martin Shapiro has explained: “A decisionmaker required to give reasons will be more likely to weigh pros and cons carefully before reaching a decision than will a decisionmaker able to proceed simply by fiat.”


252. Stack, supra note 232, at 962.

253. Effron, supra note 234, at 713.

254. Martin Shapiro, The Giving Reasons Requirement, 1992 U. CHI. LEGAL F. 179, 180. Accord Effron, supra note 234, at 714 (“The decisionmakers themselves benefit from reason giving insofar as it clarifies one’s own thinking and illuminates facts or conclusions that might need additional support.”).
Carefully considering the reasons for a particular decision, moreover, helps separate out legitimate from illegitimate reasons. Justice Kennedy has underscored this point in the context of personal bias and due process:

The judge inquiries into reasons that seem to be leading to a particular result. Precedent and *stare decisis* and the text and purpose of the law and the Constitution; logic and scholarship and experience and common sense; and fairness and disinterest and neutrality are among the factors at work. To bring coherence to the process, and to seek respect for the resulting judgment, judges often explain the reasons for their conclusions and rulings. There are instances when the introspection that often attends this process may reveal that what the judge had assumed to be a proper, controlling factor is not the real one at work.255

Likewise, Professor Short explains that there is a second way in which giving reasons disciplines, or brings rationality to, internal decisionmaking: “Reasons given to support one decision tend to shape and constrain an agency’s future decisions through a path-dependent logic.”256 In other words, even if those reasons do not bind by precedent in a subsequent decision, social practice encourages the decisionmaker to follow the principles articulated in the prior case. Frederick Schauer has captured this principle well: “In everyday social practice, to provide a reason for an act is paradigmatically to provide, if only implicitly, a general prescription—a rule, standard, or guideline—encompassing that act.”257

2. Constrain the Exercise of Discretion

A duty to provide reasons, however, has additional benefits beyond forcing introspection in the decisionmaker. It also allows external forces—including ordinary citizens—to better understand (and so perhaps check) how discretion is used. In this way, a reason-giving requirement can help keep discretion within the bounds of rationality.258 Indeed, *Chenery*’s reason-giving principle is motivated by this concern—i.e., “both to bolster

257. Schauer, *supra* note 233, at 642. To be sure, the precedent-creating effect of giving reasons is one reason why Professor Schauer cautions against reason giving as a general rule of law. *Id. See also* Cass R. Sunstein, *Incompletely Theorized Agreements in Constitutional Law*, 74 SOC. RES. 1, 2 (2007) (suggesting that full explanations may not always be ideal in constitutional law as “incompletely theorized agreements on certain rules and doctrines help to ensure a sense of what the law is, even amid large-scale disagreements about what, particularly, accounts for those rules and doctrines”). As further discussed in Part III.C, Pearson discretion does not strike us as one of those areas where the lack of reasoning is a good thing, especially in light of the asymmetries uncovered by our empirical study.
the political accountability of the agency’s action and to prevent arbitrariness in the agency’s exercise of its discretion.”

Although Professor Stack’s rationale sounds in political accountability and the proper separation of powers between different branches of government—something that may not be at play in an intra-branch delegation such as *Pearson* discretion—the benefits of a reason-giving requirement are not so limited. One way to think of these constraints, as Professor Short suggests, is through a sociological theory of reason giving: “What reason giving does...is create social relationships and organizational structures that tend to channel the exercise of agency discretion within politically and socially acceptable parameters.”

3. Facilitate Further Judicial Review

Of course, one of the most direct ways that reason giving constrains the exercise of discretion is that it allows for more meaningful review by judges. Jerry Mashaw, for instance, declares that “reason giving is demanded as a facilitator of judicial review,” and explains that “[i]t is also a protector of judicial review.”

This insight is a key driver behind hard look review. Because agencies must give reasons, a reviewing court can hold the decisionmaker accountable for its exercise of discretion by ensuring that he or she has “examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’” Judicial review is important not only because it ensures that specific agency decisions are well thought, but also because the prospect of judicial review forces agencies to do a better job on all

---


260. Constitutional structure suggests the Supreme Court has a supreme or supervisory role over the lowers courts. *See generally* JAMES E. PFANDE, ONE SUPREME COURT: SUPREMACY, INFERIORITY, AND THE JUDICIAL POWER OF THE UNITED STATES 148–49 (2009). In other words, there does not appear to be a serious constitutional argument against the Court imposing a reason-giving requirement on the lower courts. To the contrary, such a requirement may further constitutional values by ensuring the Court plays a supervisory role over the consistent development of constitutional law among the lower courts. *Cf.* Tara Leigh Grove, *The Structural Case for Vertical Maximalism*, 95 CORNELL L. REV. 1, 4 (2009) (“[i]n our current judiciary, the [Supreme] Court can review only a fraction of the lower federal and state court cases raising federal questions. The Court must therefore make the most of the cases it does hear by issuing broad (maximal) decisions that guide the lower courts in the many cases that it lacks the capacity to review.”).


decisions: “The effect of such judicial opinions within the agency reaches beyond those who were concerned with the specific regulations reviewed.”264

4. Enhance Legitimacy of Decisionmaking

Not only does reason giving facilitate judicial review and public scrutiny, but it also provides greater assurance to litigants that the most important arguments have gotten a full hearing. Hence, Professor Mashaw explains that requiring reasons “increases the power of participants . . . to force [decisionmakers] to consider problems and issues that they raise by submitting comments.”265 It also improves the dialogue both within the government and between the government and the public.266 In so doing it “demonstrates respect for the governed subject.”267

Such respect may take on added importance in the qualified immunity context, where federal courts exercise discretion to decide the constitutionality of acts committed by state officials against the backdrop of federalism concerns (or federal officers against the backdrop of separation of powers). Reason giving also provides assurances to the public at large “that decisionmaking processes are fair such that the process for reaching a decision is relatively predictable, even if the outcome of every decision is not.”268 This demonstrated rationality is considered by many administrative law scholars to be “the touchstone of legitimacy in the liberal, administrative state.”269

5. Foster Development of Workable Standards.

At the same time, giving reasons does not simply improve the outcome of a particular case. It also fosters the development of general principles that guide decisionmaking in subsequent cases: “To provide a reason in a particular case is thus to transcend the very particularity of that case.”270 As Professor Beermann explains, “[e]ven if no standard is created immediately to guide the decision of whether to reach the merits, a

265. Mashaw, supra note 262, at 111.
266. See Short, supra note 232, at 1823. See also Donald J. Kochan, Constituencies and Contemporaneity in Reason-Giving: Thoughts and Direction After T-Mobile, 37 Cardozo L. Rev. 1, 30 (2015) (“Reason-giving requirements not only aid judicial review, but also facilitate other public and private processes and serve multiple constituencies.”).
267. Id. at 1822.
268. Effron, supra note 234, at 714 (first and second emphasis omitted).
269. Mashaw, supra note 232, at 25.
270. Schauer, supra note 233, at 641.
requirement that courts give reasons could foster the development, in a common law manner, of a set of practices that could ultimately crystallize into governing standards.”

C. Reason Giving in the New Qualified Immunity

The reasons for reason giving discussed above should have a great deal of purchase in the context of qualified immunity. Where there is an “explicit grant of discretion”—which is Pearson to a tee—and “an explicit list of policies” at play—which again reflects Pearson—then a court should be required to “give reasons on the record for its decision.” Such a requirement would encourage more rational decisionmaking by ensuring that all the relevant pros and cons for exercising Pearson discretion are considered; it would facilitate further judicial review and external dialogue with interested parties; and it would encourage the development of better governing standards. For all the reasons that reason giving makes sense in the context of administrative law, there is good cause to think reason giving also makes sense in the context of qualified immunity.

For instance, reason giving would help alleviate a number of the potential problems with the current broad discretion provided by Pearson. It is reasonable to think that the potential asymmetries discussed above would be lessened as judges more carefully think about the reasons for exercising Pearson discretion and fear more searching judicial review. Similarly, latent ideological biases would be better uncovered as “the introspection that often attends [the reason-giving] process may reveal that what the judge had assumed to be a proper, controlling factor is not the real one at work.” Likewise, discrepancies across circuits may be reduced as judges in all circuits give more attention to the problem. In this way, Pearson’s pathologies can be somewhat mitigated.

To be sure, a reason-giving requirement would not eliminate these pathologies entirely. There is no guarantee, for instance, that courts will devote real thought to the tension that prompted Saucier; they may simply check the box. This is a concern that is sometimes raised in administrative law, where it is not always clear the reasons an agency gives reflect its real thinking. But just because reason giving is not a silver bullet is not a
reason to reject it. It is asking too much to expect perfectly consistent and rational decisionmaking in all cases, no matter the procedures used. Just because the effectiveness of requiring reasons has its limits, therefore, does not mean that such a requirement could not improve the process overall, despite those limits. In the real world, perfection should not be the baseline.

At the same time, the costs of such a reason-giving requirement would not be onerous. Saucier was criticized because it could place heavy burdens on already busy courts. Our recommendation avoids that trap. It should not take a lot of time for a court to analyze the Pearson factors, nor to explain its decision in writing. And the benefits should substantially outweigh any costs. A reason-giving requirement would eliminate some of the stark inconsistencies in decisionmaking among the lower courts that this study has uncovered. Pearson's pathologies, in other words, could be eliminated by overruling Pearson and returning to Saucier. The Saucier approach, however, does not strike the correct balance, for all the reasons the Court has already given. Our proposal, we believe, better accommodates the full range of competing interests. (Another way, of course, to avoid Pearson's pathologies would be to forbid deciding constitutional questions when the right at issue is not clearly established. Because of law stagnation concerns, it seems unlikely that the Supreme Court will take that step.)

Accordingly, similar to the reason-giving requirements in administrative law, the Supreme Court should require trial and appellate courts to articulate the reasons for exercising (or not) their Pearson discretion. Courts should consider all relevant factors, address important arguments raised by the parties, and then articulate a “satisfactory

Rulemaking, 87 CORNELL L. REV. 486, 514–15 (2002). Indeed, Mathilde Cohen has suggested that judges may sacrifice sincerity, as well as other values, when forced to give reasons. See Mathilde Cohen, When Judges Have Reasons Not to Give Reasons: A Comparative Law Approach, 72 WASH. & LEE L. REV. 483, 489 (2015) [hereinafter Cohen, When Judges Have Reasons Not to Give Reasons] ("[A]lthough reason-giving is important, it is often in tension with other values of the judicial process, such as guidance, sincerity, and efficiency."). See also Mathilde Cohen, Sincerity and Reason Giving: When May Legal Decision Makers Lie?, 59 DEPAUL L. REV. 1091, 1096–97 (2010) (urging caution about requiring actual reasons). Whether to require reasons in any particular context merits careful consideration. But where, as here, broad discretion is given over important subjects, we suggest that the cost-benefit analysis begins to tilt toward reason giving, especially when the costs of giving reasons is not exorbitant. The fact that judges sometimes may not provide the real reason for exercising discretion does not mean, moreover, that requiring reasons never makes sense. Potential insincerity is simply another cost to be weighed against the benefits.

explanation” for their decision that includes “a ‘rational connection between the facts found and the choice made.’” Such reasons need not be elaborate. As discussed in Part I.C.5, the Pearson Court has already identified a number of factors that could be relevant. Courts should be required to consider those factors, but they need not address each one in every case—only those factors that are implicated by the particular circumstances before the Court. No doubt additional factors will be identified as courts begin giving reasons, as courts respond to the reasons given by other courts, and as litigants respond to the reasons given and suggest more of their own. A court need not engage in lengthy discussion, so long as the opinion demonstrates a rational connection between the relevant factors and the choice made.

To be clear, although we look to administrative law to understand the value of requiring reasons, we do not recommend wholesale incorporation of administrative law’s reasoned-decisionmaking rule. Courts should be required to provide reasons, in writing, for the exercise (or not) of their Pearson discretion. But unlike the Chenery principle in administrative law, the reviewing court in the qualified immunity context need not remand if inadequate or improper reasons are given. As Mathilde Cohen has wisely noted, scholars should pay more attention to the specific cost and benefits of requiring reasons in particular contexts—and the costs of remands are significant for parties and the institutional judiciary. Accordingly, instead of the full-throated rule from Chenery, in this context, it is more effective for the reviewing court to indicate why the lower court’s reasoning is incorrect and substitute its judgment for that of the lower court.

Although such an approach would provide less incentive for lower courts to fully engage in reason giving (though, of course, this point should not be overstated, since few judges enjoy having their work criticized in print by an appellate panel, even if the panel ultimately affirms the judgment), the efficiency gains of not remanding outweigh any such losses.


277. See, e.g., Cohen, When Judges Have Reasons Not to Give Reasons, supra note 274, at 536 (noting that judges give more or fewer reasons depending on the costs and benefits inherent in the specific context at issue).

278. For similar reasons, it is probably not necessary—at least as a preliminary matter—to establish a deferential standard of review to a court’s decision whether to exercise Pearson discretion. It is worth noting, however, that the predominate non-Pearson reason offered in the cases reviewed is that the district court had exercised it that way. See supra Part II.C.4. Moreover, we do not mean to suggest that the failure to give (adequate) reasons would be an independent ground to appeal. The standing rules that have developed in the qualified immunity context would still apply.
Moreover, we find it unlikely that courts will systematically ignore a reason-giving requirement, even if failure to give reasons is not a reversible error. Before Pearson, courts were required to address both steps of qualified immunity. Sometimes, however, courts did not do so, regardless of what Saucier said. Nonetheless, almost always, the lower courts followed the Supreme Court. We expect the same would happen here. By way of further example, sometimes courts write cursory opinions that make it difficult for higher courts to engage in review. Yet such explanatory failure need not result in reversal—though, presumably, appellate criticism of it would result in greater clarity going forward.

To provide an example of how this reason-giving process would unfold, consider the Court’s decision in Plumhoff v. Rickard. The Court considered whether officers used excessive force in a high-speed car chase. The Court explained “that the Saucier procedure . . . is especially valuable with respect to questions that do not frequently arise in cases in which a qualified immunity defense is unavailable.” Then the Court analyzed whether the issue of excessive force is likely to arise outside of the qualified immunity context and concluded it is not. This analysis was not lengthy or cumbersome, but yet the Court confronted the procedural puzzle at the heart of qualified immunity and showed its reasoning.

Likewise, last Term, in Sheehan, the Court explained why it declined to decide the constitutional question: the briefing was inadequate. The discussion was not lengthy, but it made its point.

---

279. See Hughes, supra note 34, at 416; Leong, supra note 59, at 682.
281. Id. at 2020-22.
282. Id. at 2020 (quoting Pearson v. Callahan, 555 U.S. 223, 236 (2009)).
283. Id. (“Heeding [its] guidance in Pearson,” the Court determined that reaching the constitutional question would be “‘beneficial’ in ‘develop[ing] constitutional precedent’ in an area that courts typically consider in cases in which the defendant asserts a qualified immunity defense.” (quoting Pearson, 555 U.S. at 236)).
285. City & County of San Francisco v. Sheehan, 135 S. Ct. 1765, 1775 (2015) (“The real question, then, is whether, despite these dangerous circumstances, the officers violated the Fourth Amendment when they decided to reopen Sheehan’s door rather than attempting to accommodate her disability. Here, we come to another problem. San Francisco, whose attorneys represent Reynolds and Holder, devotes scant briefing to this question. Instead, San Francisco argues almost exclusively that even if it is assumed that there was a Fourth Amendment violation, the right was not clearly established. This Court, of course, could decide the constitutional question anyway. See [Pearson, 555 U.S. at 242] (recognizing discretion). But because this question has not been adequately briefed, we decline to do so.”).
There also are numerous examples of circuit courts that have conducted the sort of analysis that we have in mind. Consider, for instance, *Christensen v. Park City Municipal Corp.*, in which the Tenth Circuit declined to decide the constitutional question. Writing for the panel, then-Judge Michael McConnell explained that “[t]his case is a prime example of when the discretion to avoid the first half of the *Saucier* two-step should be exercised,” because “[t]o attempt to answer *Saucier*’s first question would require us to opine on an open and significant issue of constitutional law on an inadequate record, without benefit either of a district court holding or of relevant briefing.” Such reason giving only took a few lines in the court’s opinion. But it is clear to a reader that the court carefully considered what it was doing.

Likewise, in *Costello v. City of Burlington*, three separate opinions considered whether to resolve the constitutional question. Again, the analysis was not lengthy, but it was thoughtful. The same could be said for *Dean v. Blumenthal*, where the Sixth Circuit explained:

> We invert the once-mandatory *Saucier* sequence because, as discussed below, it is clear that a constitutional right to receive campaign contributions was not clearly established, but it is ‘far from obvious whether in fact there is such a right.’ We also do not believe that a challenge to a practice that has been defunct for over six years, where injunctive relief is moot and where damages are speculative, presents an appropriate opportunity to explore the complexities of a difficult constitutional question.

Other examples could be identified as well, many of which involve insightful opinions from both the majority and the dissent. This is the sort of dialogue in which courts should be engaged. Although reason giving is not a panacea for all contexts and sometimes can be more costly than it is

---

286. *Christensen v. Park City Mun. Corp.*, 554 F.3d 1271, 1278 (10th Cir. 2009).
287. *Id.* at 1278.
288. *Costello v. City of Burlington*, 632 F.3d 41, 48 (2nd Cir. 2011) (“Costello could then immediately return to Church Street, and resume screaming, as he is inspired to do; the police would have no incremental guidance from the courts on what to do; the next police officer who enforced Burlington’s noise ordinance would be the defendant in Costello’s next lawsuit; in that suit, the district court would have no guidance from this appeal; nor would we, on the next appeal—and this judicial proceeding, beginning to end, would be a waste of everyone’s time. This is not a case in which prudence counsels kicking the can down the road.”). *See also id.* at 49 (Calabresi, J., concurring); *id.* at 52 (Pooler, J., dissenting).
289. *Dean v. Blumenthal*, 577 F.3d 60 (2d Cir. 2009) (per curiam) (citation omitted).
290. *See*, e.g., *Elwell v. Byers*, 699 F.3d 1208 (10th Cir. 2012); *Jones v. Byrnes*, 585 F.3d 971 (6th Cir. 2009); *Weise v. Casper*, 593 F.3d 1163 (10th Cir. 2010).
worth, in this particular context, the aggregate quality and consistency of decisionmaking would improve—without the costs of returning to Saucier.

CONCLUSION

Qualified immunity is one of the most important doctrines for the development of constitutional law. And Pearson is one of the most important decisions concerning how qualified immunity works. Pearson has been criticized because it upset the procedures that had been in place to regulate qualified immunity. This has prompted theoretical claims that Pearson will harm constitutional litigation. Are those theories valid? This Article offers a step toward answering that question with actual data.

Looking at how Pearson is applied, it appears that circuit courts are deciding constitutional questions more often than not, thus mitigating some of the fear that Pearson would lead to constitutional stagnation. That said, courts appear to be finding constitutional violations at a lower rate after Pearson, which lends some credence to stagnation concerns. Moreover, the data reveal new concerns about Pearson’s pathologies. Unexpectedly, Pearson’s procedural rule might have an asymmetric impact on the substance of constitutional law. Similarly, great disparities exist among the various circuits on whether and how courts reach constitutional questions—thus leading to a geographically uneven development of constitutional doctrine.

The findings from this study no doubt suggest a number of problems with the new qualified immunity that will require further refinement. But the Supreme Court’s first modification should be to require trial and appellate courts to provide reasons for exercising (or not) their Pearson discretion. To date, appellate courts hardly ever give reasons for how they exercise their discretion. The federal judiciary can do better. The time has come for the Court to write the next chapter on qualified immunity.