

AN ARTICLE III DEFENSE OF MERITS-FIRST  
DECISIONMAKING IN CIVIL RIGHTS LITIGATION: THE  
CONTINUED VIABILITY OF *SAUCIER V. KATZ*

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INTRODUCTION

On March 24, 2008, the United States Supreme Court granted certiorari in *Pearson v. Callahan*,<sup>1</sup> a search and seizure case from the Tenth Circuit.<sup>2</sup> In granting certiorari on the Fourth Amendment question presented in *Pearson*, the Court took the unusual step of asking the parties to submit briefing on an issue that neither of them had raised: “Whether the Court’s decision in *Saucier v. Katz*, 533 U. S. 194 (2001), should be overruled?”<sup>3</sup>

*Saucier* was the culmination of a string of civil rights cases in which the Supreme Court had first suggested,<sup>4</sup> and then mandated,<sup>5</sup> a particular order of decisionmaking in suits brought under 42 U.S.C. § 1983.<sup>6</sup> In these

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<sup>1</sup> 128 S. Ct. 1702 (2008).

<sup>2</sup> *Callahan v. Millard County*, 494 F.3d 891 (10th Cir. 2007), *cert. granted sub nom. Pearson v. Callahan*, 128 S. Ct. 1702 (2008).

<sup>3</sup> *Pearson*, 128 S. Ct. at 1702-03.

<sup>4</sup> *See, e.g., County of Sacramento v. Lewis*, 523 U.S. 833, 841 n.5 (1998).

The District Court granted summary judgment to Smith on the basis of qualified immunity, assuming without deciding that a substantive due process violation took place but holding that the law was not clearly established in 1990 so as to justify imposition of § 1983 liability. We do not analyze this case in a similar fashion because, as we have held, *the better approach* to resolving cases in which the defense of qualified immunity is raised is to determine first whether the plaintiff has alleged a deprivation of a constitutional right at all. Normally, it is only then that a court should ask whether the right allegedly implicated was clearly established at the time of the events in question.

*Id.* (emphasis added).

<sup>5</sup> *See, e.g., Wilson v. Layne*, 526 U.S. 603, 609 (1999) (“A court evaluating a claim of qualified immunity ‘must first determine whether 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 at the time of the alleged violation.’” (quoting *Conn v. Gabbert*, 526 U.S. 286, 291 (1999))).

<sup>6</sup> 42 U.S.C. § 1983.

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

*Id.* The rule also applies to actions brought under *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971). For example, both *Saucier v. Katz*, 533 U.S. 194 (2001), and *Siegert v. Gilley*, 500

cases the Court has persistently, and often forcefully,<sup>7</sup> stated that lower federal courts considering constitutional tort claims against public officials should review the merits of those claims before considering the proffered defense of qualified immunity:

A court required to rule upon the qualified immunity issue must consider . . . this threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right? This *must be* the initial inquiry.<sup>8</sup>

As the grant of certiorari in *Pearson* makes clear, this once-obscure aspect of the Supreme Court's civil rights jurisprudence has become a bone of considerable contention in recent years. In two separate decisions during the 2007 term Justice Steven Breyer criticized *Saucier*'s ordinal mandate. In *Scott v. Harris*<sup>9</sup> he argued that the fact-dependency of qualified immunity cases

supports the argument that we should overrule the requirement, announced in *Saucier v. Katz*, that lower courts must first decide the "constitutional question" before they turn to the "qualified immunity question." Instead, lower courts should be free to decide the two questions in whatever order makes sense in the context of a particular case.<sup>10</sup>

Similarly in *Morse v. Frederick*,<sup>11</sup> Justice Breyer stated that "[t]he relative ease with which we could decide this case on the qualified immunity ground, and thereby avoid deciding a far more difficult constitutional question, underscores the need to lift the rigid 'order of battle' decisionmaking requirement that this Court imposed upon lower courts."<sup>12</sup>

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U.S. 226 (1991), involved suits against federal officials. For the sake of clarity, I refer to these suits generically as § 1983 actions.

<sup>7</sup> This order of decisionmaking has not always been popular with the lower federal courts. *See, e.g., County of Sacramento*, 523 U.S. at 841 n.5.

As in any action under § 1983, the first step is to identify the exact contours of the underlying right said to have been violated. The District Court granted summary judgment to Smith on the basis of qualified immunity, assuming without deciding that a substantive due process violation took place but holding that the law was not clearly established in 1990 so as to justify imposition of § 1983 liability. We do not analyze this case in a similar fashion because, as we have held, the better approach to resolving cases in which the defense of qualified immunity is raised is to determine first whether the plaintiff has alleged a deprivation of a constitutional right at all. Normally, it is only then that a court should ask whether the right allegedly implicated was clearly established at the time of the events in question.

*Id.* (citations omitted).

<sup>8</sup> *Saucier*, 533 U.S. at 201 (internal citations omitted) (emphasis added). Although the merits-first "rule" is associated with *Saucier*, it actually became a mandate for the first time in the little-cited case *Conn v. Gabbert*, 526 U.S. 286, 291 (1999).

<sup>9</sup> 127 S. Ct. 1769 (2007).

<sup>10</sup> *Id.* at 1780 (Breyer, J., concurring) (citations omitted).

<sup>11</sup> 127 S. Ct. 2618 (2007).

<sup>12</sup> *Id.* at 2641 (Breyer, J., concurring in the judgment in part and dissenting in part).

Clearly Justice Breyer is not alone on the Court in his distaste for *Saucier*'s merits-first order of decisionmaking. In both of his 2007 opinions he pointed to criticism of the rule that had been leveled by a number of his brethren and by commentators.<sup>13</sup> At least five justices have questioned *Saucier*'s ordinal mandate,<sup>14</sup> and the grant of certiorari in *Pearson* indicates that the doctrine's days may in fact be numbered.<sup>15</sup>

A number of scholars, myself included, have made prudential arguments in favor of merits-first decisionmaking in civil rights cases.<sup>16</sup> We have argued that deciding the merits of a constitutional claim first both cla-

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<sup>13</sup> *Id.* at 2642.

Finally, several Members of this Court have previously suggested that always requiring lower courts first to answer constitutional questions is misguided. See *County of Sacramento v. Lewis*, 523 U.S. 833, 859, 118 S. Ct. 1708, 140 L.Ed.2d 1043 (1998) (Stevens, J., concurring in judgment) (resolving the constitutional question first is inappropriate when that "question is both difficult and unresolved"); *Bunting v. Mellen*, 541 U.S. 1019, 1025, 124 S. Ct. 1750, 158 L.Ed.2d 636 (2004) (Scalia, J., dissenting from denial of certiorari) ("We should either make clear that constitutional determinations are not insulated from our review . . . or else drop any pretense at requiring the ordering in every case"); *Saucier, supra* at 210, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (Ginsburg, J., concurring in judgment) ("The two-part test today's decision imposes holds large potential to confuse"); *Siebert v. Gilley*, 500 U.S. 226, 235, 111 S. Ct. 1789, 114 L.Ed.2d 277 (1991) (Kennedy, J., concurring) ("If it is plain that a plaintiff's required malice allegations are insufficient but there is some doubt as to the constitutional right asserted, it seems to reverse the usual ordering of issues to tell the trial and appellate courts that they should resolve the constitutional question first").

*Id.*

<sup>14</sup> See, e.g., Michael L. Wells, *The Order of Battle in Constitutional Litigation*, 60 SMU L. REV. 1539, 1540-41 (2007) (describing opposition to *Saucier* from lower court judges, Justices of the Supreme Court, and amicus curiae). As Wells notes, Chief Justice Rehnquist, one of the critics of the decision, is now deceased. *Id.* at 1541.

<sup>15</sup> Although there were several holdings in *Saucier*, it is generally understood that the Court was asking the parties to brief the case's order-of-decisionmaking mandate. E.g., *Purtell v. Mason*, 527 F.3d 615, 622 (7th Cir. 2008) ("The Supreme Court recently granted certiorari to consider whether *Saucier* should be overruled. *Pearson v. Callahan*, 128 S. Ct. 1702, 170 L. Ed. 2d 512, 76 U.S.L.W. 3510 (2008) (directing the parties to 'brief and argue the following question: 'Whether the Court's decision in *Saucier v. Katz*, 533 U.S. 194, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001) should be overruled?'). In the meantime, of course, we continue to apply the sequential approach it prescribed.").

<sup>16</sup> See, e.g., Wells, *supra* note 14, at 1568.

*Saucier*'s order-of-battle rule—requiring courts to resolve the substantive constitutional issue before the immunity question—may seem to be highly vulnerable to objections based on constitutional avoidance, as it flatly rejects the avoidance norm in favor of more rather than fewer rulings on constitutional issues. This Article's aim has been to examine and reject the constitutional avoidance attack on *Saucier*.

*Id.* See also Sam Kamin, *Harmless Error and the Rights/Remedies Split*, 88 VA. L. REV. 1, 50 (2002) ("[I]f the question of the entitlement to qualified immunity is addressed before the substance of a plaintiff's claim, [then] the contours of the law will never become well-defined, and the entitlement of defendants to qualified immunity will continue in perpetuity."); John M.M. Greabe, *Mirabile Dictum!: The Case for "Unnecessary" Constitutional Rulings in Civil Rights Damages Actions*, 74 NOTRE DAME L. REV. 403, 411 (1999) ("The qualified immunity defense, because it encourages merits bypasses, is thus a substantial impediment to the development of new constitutional law in civil rights damages actions."); Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1733, 1797-98 (1991) ("A quite different objection is that decisions like *Teague* and *Harlow* tend to 'freeze' existing constitutional law and thereby deprive the courts of their intended role under the separation of powers.").

rifies and prevents the ossification of constitutional law<sup>17</sup> and that balancing the costs and benefits of the Court's prudential avoidance doctrines weighs in favor of resolving the constitutional question before turning to the remedial question.<sup>18</sup>

Professor Thomas Healy has argued, however, that “[u]nnecessary constitutional rulings in qualified immunity and habeas cases violate the ban on advisory opinions because a decision on the constitutional issue has no effect on the outcome of the dispute.”<sup>19</sup> This Article addresses this constitutional challenge to merits-first adjudication,<sup>20</sup> a claim that is likely to arise when the Court revisits the issue during the October 2008 term. This Article's analysis of the constitutional criticism of merits-first adjudication suggests a slight but important modification in the Supreme Court's order-of-decisionmaking jurisprudence, a change that should also assuage those, such as Justice Breyer, who are concerned about inefficiencies in the current order of decisionmaking in constitutional tort adjudication.

This Article proceeds as follows. Part I begins by placing *Saucier's* order-of-decisionmaking jurisprudence into the broader context of the Supreme Court's rights/remedies discourse. This Part demonstrates that, in the various contexts in which it arises, the Supreme Court has resolved the order-of-decisionmaking question in virtually all of the ways possible: in some contexts it has mandated merits-first adjudication, in other contexts it has mandated remedy-first adjudication, in still others it has permitted low-

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<sup>17</sup> See, e.g., Kamin, *supra* note 16, at 49.

[I]f the entitlement to qualified immunity were determined before the merits of the underlying case, difficult issues and close cases would almost never be decided on the merits in damages actions. To say that a case is close is to say that the law is not well established; to say that the law is not well-established is to say that the defendant is entitled to qualified immunity; to say that the defendant is entitled to qualified immunity is to say that the Court need not resolve the merits of the close case. This nearly circular analysis could serve to stagnate the substance of constitutional law almost indefinitely. It is only when the Court first looks at the substance of each constitutional claim brought before it and then looks to whether the plaintiff will be entitled to benefit that qualified immunity can have [a] progressive influence on the law . . . .

*Id.* (citations omitted). See also Greabe, *supra* note 16, at 408-11 (describing the “law-freezing” effect of what he calls “merits-bypass”).

<sup>18</sup> See, e.g., Wells, *supra* note 14, at 1568.

[T]he strength of the avoidance policy depends on an assessment of its costs and benefits in a given context. In the constitutional tort context, the benefits are slight, because the court must reach some tentative conclusions about the substantive law in resolving the immunity issue and because these cases concern oversight of street-level officials rather than nullification of statutes and broad policies. The costs are high, because deciding immunity issues first stunts the growth of substantive law to the detriment of the vindication and deterrent goals of constitutional tort law.

*Id.*

<sup>19</sup> Thomas Healy, *The Rise of Unnecessary Constitutional Rulings*, 83 N.C. L. REV. 847, 920 (2005).

<sup>20</sup> This Article is part of a larger project. Future articles will address the relationship between dicta and the ban on advisory opinions and the requirement that a federal court decide no more than the narrowest question before it.

er courts to employ a flexible approach, encouraging them to decide the remedial and substantive parts of a case in the order that best suits the facts. The conclusion drawn from this ordinal mish-mash is that the Supreme Court has neither recognized order of decisionmaking as a recurring issue across various areas of law nor, as a result, carefully theorized the question.

Part II lays out and rebuts the constitutional challenge to merits-first adjudication, namely that it violates Article III's ban on advisory opinions. This section next demonstrates that deciding the merits of a case in which a remedy is unavailable violates the ban on advisory opinions only where it is apparent *from the outset* that no remedy will be available to the plaintiff.

Part III concludes by proposing that federal courts should proceed to an evaluation of the merits of a plaintiff's claim unless it is clear from the pleadings that she has no colorable claim to a remedy. In the run-of-the-mill case, where the unavailability of a remedy does not become apparent until the merits of the case have been closely examined, the Constitution simply does not require remedy-first adjudication. The Article concludes by urging the Supreme Court not to overturn *Saucier's* order-of-decisionmaking rule. The doctrine is both constitutionally permitted and serves important goals in the realm of civil rights adjudication.

## I. BACKGROUND—AN ORDINAL MISH-MASH

Surveying the various contexts in which order-of-decisionmaking questions arise in constitutional adjudication, it becomes clear that the Supreme Court has taken a muddled, often contradictory, approach to resolving the issue. Despite structural similarities in the way these issues are presented to courts, the Supreme Court has resolved the order-of-decisionmaking question<sup>21</sup> in these cases in as disparate—and, I argue, unprincipled—a way as is possible. In some cases the Court has mandated that merits be considered before remedies, in other cases the Court has embraced flexibility, while in still others it has mandated that the entitlement to a remedy be adjudicated first.<sup>22</sup>

Tracing through these decisions, attention must be paid to the important role that the federal courts play, not simply in resolving disputes between adverse parties, but, as Chief Justice Marshall stated in *Marbury v. Madison*,<sup>23</sup> in announcing what the law is.<sup>24</sup> Professors Richard Fallon and

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<sup>21</sup> Some courts and commentators refer to this as the “order of battle” question. *See, e.g.*, Wells, *supra* note 14. I prefer the less martial “order of decisionmaking.”

<sup>22</sup> *See, e.g.*, *Saucier*, 533 U.S. at 201 (merits considered before remedies); *Morse v. Frederick*, 127 S. Ct. 2618, 2642 (2008) (embracing flexibility); *Teague v. Lane*, 489 U.S. 288, 300 (1989) (mandating that the entitlement to a remedy be adjudicated first).

<sup>23</sup> 5 U.S. (1 Cranch) 137 (1803).

<sup>24</sup> *Id.* at 177.

Daniel Meltzer have enunciated the importance of this expository role in their comprehensive article on new law and constitutional remedies:

[T]here exists a substantial body of case law, rising almost to the level of a general tradition, in which adjudication and constitutional adjudication in particular, functions more as a vehicle for the pronouncement of norms than for the resolution of particular disputes . . . . Simply as a routine matter, the Supreme Court, in common with the lower federal courts, may choose to discuss either or both of alternative grounds for reaching a decision. Likewise federal courts have wide latitude in deciding whether to use the facts of a case as a springboard for promulgating a broader rule of decision than resolution of the dispute at hand minimally requires. Other cases and doctrines equally reflect the legitimacy and importance of norm declaration.<sup>25</sup>

As it has crafted its order-of-decisionmaking jurisprudence (such as it is), the Supreme Court has occasionally relied on the importance of this expository function, while in other cases it has ignored it entirely.

A. *Decide the Merits First*

In a number of substantive contexts the Supreme Court has mandated—with varying degrees of firmness—that the merits of a constitutional claim be reached before a court turns to the plaintiff's entitlement to a remedy. In these cases, the Supreme Court has deviated from the general proposition that courts should avoid unnecessary constitutional adjudication<sup>26</sup> and encouraged the lower courts to decide the substantive question presented even if deciding the remedial question first might resolve the matter. In so doing, the Court has trumpeted, often explicitly, the importance of norm-announcement over the competing principle of constitutional avoidance, focusing on the value of creating clear rules to guide lower courts and public officials rather than on the importance of deciding the narrowest question presented or avoiding constitutional adjudication where at all possible.

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<sup>25</sup> Fallon & Meltzer, *supra* note 16, at 1800-01. See also Robert J. Pushaw, Jr., *Article III's Case/Controversy Distinction*, 69 NOTRE DAME L. REV. 447, 490-95 (1994) (arguing that the federal courts exist both to resolve disputes and to expound on law and that in cases (as opposed to controversies) the role of exposition was of paramount importance to the authors of Article III); Owen Fiss, *Forward: The Forms of Justice*, 93 HARV. L. REV. 1, 29 (1979) ("I doubt whether dispute resolution is an adequate description of the social function of courts. To my mind, courts exist to give meaning to our public values, not to resolve disputes. Constitutional adjudication is the most vivid manifestation of this function, but it also seems true of most civil and criminal cases, certainly now and perhaps for most of our history as well.")

<sup>26</sup> For a thoughtful analysis of the concept of constitutional avoidance, see generally Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. REV. 1003 (1994).

### 1. Harmless Error

The harmless error rule is a mechanism by which an appellate court may uphold a defendant's criminal conviction despite the presence of error, even constitutional error, in the course of the defendant's trial.<sup>27</sup> If the reviewing court finds that error occurred at trial but is able to conclude further that the error likely did not affect the outcome, it will allow the defendant's conviction to stand.<sup>28</sup> Thus, a criminal defendant alleging error on appeal has a two-pronged test to satisfy—he must demonstrate both that error occurred at his trial and that he was prejudiced thereby.<sup>29</sup>

The general order-of-decisionmaking rule that the Supreme Court has adopted for harmless error cases is that a federal court is first to determine whether the constitutional violation alleged by a defendant occurred and is to turn to the question of prejudice only if the constitutional issue is resolved in his favor.<sup>30</sup> That is, the Supreme Court has stated that it is appropriate to begin with the merits of a defendant's constitutional claim in each instance, and that the determination of whether the error complained of was prejudicial should occur only after the court has concluded that error did in fact occur.<sup>31</sup>

The Supreme Court has not been entirely clear why this is the appropriate order of decisionmaking for harmless error cases. One argument for deciding the merits first could simply be based on common sense; if a defendant argues that an error occurred and that he was prejudiced thereby, that is the natural order in which the questions should be addressed.<sup>32</sup> It

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<sup>27</sup> See FED. R. CRIM. P. 52(a); e.g., *United States v. Hasting*, 461 U.S. 499, 507-10 (1983).

<sup>28</sup> The Supreme Court has determined that if the error that occurred at trial is of federal constitutional law then the reviewing court must reverse the conviction unless it is convinced beyond a reasonable doubt that the same result would have obtained in the absence of error; for non-constitutional errors by a state may make it more difficult for a criminal defendant to establish prejudice. See, e.g., *Chapman v. California*, 386 U.S. 18, 23-24 (1967).

<sup>29</sup> For a fuller discussion of the harmless error doctrine, see Kamin, *supra* note 16, at 9-26.

<sup>30</sup> *Lockhart v. Fretwell*, 506 U.S. 364, 369 n.2 (1993) ("Harmless error analysis is triggered only after the reviewing court discovers that an error has been committed.").

<sup>31</sup> *Jones v. United States*, 527 U.S. 373, 397 n.12 (1999) ("Assessing the error (including whether there was error at all) is essential to an intelligent resolution of whether such error was harmless.").

<sup>32</sup> See *Siegert v. Gilley*, 500 U.S. 226, 231 (1991) (holding that a party must first allege a request for which relief can be granted before the court can analyze pending constitutional issues); see also Greabe, *supra* note 16, at 425-26.

There is, of course, a "natural order" to the process by which qualified immunity issues are addressed. Clearly, the first question in this process is whether the complaint states a viable constitutional claim—i.e., whether it states a claim on which relief can be granted. Only if a court answers this question affirmatively does the qualified immunity issue even arise. Qualified immunity is an affirmative defense, and courts need not and (theoretically) do not reach affirmative defenses unless and until the plaintiff has stated a cognizable legal claim. Put another way, the qualified immunity inquiry is meaningful only in the presence of a viable constitutional claim, thus making the existence *vel non* of such a claim "an essential ingredient

would be strange indeed for a court to assert first that a defendant was prejudiced by conduct that occurred at trial, but that because that conduct was constitutional, he is not entitled to any remedy.<sup>33</sup> By contrast, the statement that a defendant's rights were violated but that he is entitled to no remedy because the conduct was harmless, while unsatisfying to the defendant, at least has the benefit of logic. In the same way that the question of duty is inherently prior to the question of breach in tort litigation, the determination of whether error occurred is logically prior to the question of whether the defendant was harmed by that error.

Another possible explanation for merits-first decisionmaking in this context is that resolution of the constitutional question is likely to have far broader application than the decision on the prejudice question. The errors that criminal defendants assert on appeal—that the prosecutor's closing was inappropriate, that the court impermissibly permitted the introduction of hearsay, that the defendant was denied the opportunity to effectively cross examine hostile witnesses—tend to arise again and again. Announcing a rule in a particular case that a prosecutor may not express her own views about the veracity of a defense witness,<sup>34</sup> for example, will guide future parties in countless subsequent cases.

By contrast, the decision that vouching for a witness, whether or not it was error, was not prejudicial to *this* defendant, is unlikely to have any application beyond the four corners of the opinion in which it appears. Prejudice is inherently fact-specific; criminal trials, like snowflakes and fingerprints, are unique. Conduct that is prejudicial in one case may or may not be harmless in another.<sup>35</sup> By contrast, conduct is generally either constitutional or it is not. By announcing that particular conduct is permitted or prohibited, the court creates a concrete rule that can govern conduct in untold future cases. This could reduce the volume of future litigation on that issue or could greatly simplify that litigation. In this manner, norm-announcement—

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in the process by which the court decides" whether a defendant is protected by qualified immunity.

*Id.* (citations omitted).

<sup>33</sup> For a critique of this position, see Healy, *supra* note 19, at 894 ("[Justice Clarence] Thomas did not explain why deciding whether an error occurred is essential to an intelligent resolution of the harmless error question, and his assertion seems questionable.").

<sup>34</sup> See, e.g., *Darden v. Wainwright*, 477 U.S. 168, 178-81 (1986) (approving the condemnation of a prosecutor's improper comments that demonstrated an emotional reaction to the case); *United States v. Young*, 470 U.S. 1, 17-19 (1985) (condemning a prosecutor for describing his personal beliefs on the evidence and honesty of a defendant's testimony during closing argument); *Griffin v. California*, 380 U.S. 609, 615 (1965) (holding that a prosecutor may not comment to the jury that a defendant's failure to take the stand is evidence of guilt); *Bergen v. United States*, 295 U.S. 78, 84-89 (1935) (holding that a prosecutor's comments to a jury that he had personal knowledge that a defense witness was dishonest is improper and prejudicial).

<sup>35</sup> There are some errors—those the court deems to be structural—that are not subject to harmless error analysis. See *Johnson v. United States*, 520 U.S. 461, 468-69 (1997) (providing examples of errors sufficiently serious to obviate the need to conduct harmless error analysis).

saying what the law is—has the capacity to *reduce* rather than increase the intrusion of courts onto the behavior of official actors.

## 2. Qualified Immunity

When a public official is sued for money damages under 42 U.S.C. § 1983 (or its federal analogue<sup>36</sup>) the Supreme Court has held that he is entitled to qualified immunity.<sup>37</sup> Unlike the absolute immunity enjoyed by selected public officials,<sup>38</sup> most public employees enjoy only this qualified immunity;<sup>39</sup> even if they have violated the plaintiff's federal rights,<sup>40</sup> a public official is not liable to that plaintiff unless a reasonable officer would have recognized that the conduct alleged violates the plaintiff's rights.<sup>41</sup> One of the principal purposes of qualified immunity, the Court has maintained, is to protect officers from individual liability where the law is unclear or unsettled.<sup>42</sup> Thus, a plaintiff seeking to recover under § 1983 will do so only if she is able to demonstrate both that her rights were violated and that those rights were sufficiently clear that a reasonable officer would have recognized that his conduct violated the Constitution.<sup>43</sup> Qualified im-

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<sup>36</sup> See, e.g., *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 388-89 (1971).

<sup>37</sup> *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (“We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”).

<sup>38</sup> See *Harlow*, 457 U.S. at 810-11 (recognizing absolute immunity for judicial, prosecutorial, and legislative functions); see also Alan K. Chen, *The Facts About Qualified Immunity*, 55 EMORY L.J. 229, 234 nn.20-22 (2006) (citing *Imbler v. Pachtman*, 424 U.S. 409, 431 (1976) (recognizing prosecutors absolute immunity); *Pierson v. Ray*, 386 U.S. 547, 554 (1967) (recognizing immunity for judges after the enactment of 42 U.S.C. § 1983); *Bogan v. Scott-Harris*, 523 U.S. 44, 54 (1998) (recognizing absolute immunity for local legislators)).

<sup>39</sup> Chen, *supra* note 38, at 235 n.28 (citing *Harlow*, 457 U.S. at 807 (“For executive officials . . . our cases make plain that qualified immunity represents the norm.”); Richard H. Fallon, Jr., *The “Conservative” Paths of the Rehnquist Court’s Federalism Decisions*, 69 U. CHI. L. REV. 429, 464 (2002)).

<sup>40</sup> Although § 1983 suits usually allege a violation of constitutional right, the statute permits suits for alleged statutory or constitutional harms. See, e.g., *Harlow*, 457 U.S. at 802, 818-19.

<sup>41</sup> *Id.* at 817-18 (“[G]overnment officials . . . generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”).

<sup>42</sup> *Id.* at 818 (“If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to ‘know’ that the law forbade conduct not previously identified as unlawful.”).

<sup>43</sup> *Saucier v. Katz*, 533 U.S. 194, 201 (2001) (stating that, if the plaintiff can make out a constitutional right that has been violated, the court must then determine whether that right was clearly established).

munity is an affirmative defense;<sup>44</sup> it falls to the defendant officer to demonstrate that her conduct was reasonable.

Beginning in *Siegert v. Gilley*<sup>45</sup> and continuing through *Saucier v. Katz*,<sup>46</sup> the Supreme Court has consistently stated that courts considering constitutional claims against public officials should consider the merits of those claims before considering the proffered defense of qualified immunity. For example, in *County of Sacramento v. Lewis*,<sup>47</sup> the Supreme Court re-affirmed that it meant what it had said in *Siegert* that the proper order of decisionmaking is to reach the merits of a constitutional claim first and to turn to the question of qualified immunity only if it is clear that the plaintiff had stated a claim of constitutional violation.<sup>48</sup>

The District Court granted summary judgment to Smith on the basis of qualified immunity, assuming without deciding that a substantive due process violation took place but holding that the law was not clearly established in 1990 so as to justify imposition of § 1983 liability. We do not analyze this case in a similar fashion because, as we have held, the better approach to resolving cases in which the defense of qualified immunity is raised is to *determine first whether the plaintiff has alleged a deprivation of a constitutional right at all. Normally, it is only then that a court should ask whether the right allegedly implicated was clearly established at the time of the events in question.*<sup>49</sup>

In other words, entitlement to a remedy becomes relevant in this context only after the merits of the claim of right have been evaluated. As the Court explained more forcefully in *Saucier v. Katz*:

A court required to rule upon the qualified immunity issue *must* consider . . . this threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right? This must be the initial inquiry. In the course of determining whether a constitutional right was violated on the premises alleged, a court might find it necessary to set forth principles which will become the basis for a holding that a right is clearly established. *This is the process for the law's elaboration from case to case, and it is one reason for our insisting upon turning to the existence or nonexistence of a constitutional right as the first inquiry.* The law might be deprived of this explanation were a court simply to skip ahead to the question whether the law clearly established that the officer's conduct was unlawful in the circumstances of the case.<sup>50</sup>

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<sup>44</sup> *Harlow*, 457 U.S. at 818 (stating that qualified immunity must be pled as an affirmative defense for an alleged constitutional violation); *Gomez v. Toledo*, 446 U.S. 635, 640-41 (1980) (holding that qualified immunity must be plead affirmatively under 42 U.S.C. § 1983).

<sup>45</sup> 500 U.S. 226 (1991).

<sup>46</sup> 533 U.S. 194 (2001).

<sup>47</sup> 523 U.S. 833 (1998).

<sup>48</sup> *Id.* at 841 n.5.

<sup>49</sup> *Id.* (emphasis added).

<sup>50</sup> *Saucier*, 533 U.S. at 201 (internal citations omitted) (emphasis added). Although the merits-first "rule" is associated with *Saucier*, it actually became a mandate for the first time in the little-cited case *Conn v. Gabbert*, 526 U.S. 286, 293 (1999).

Here, the Court both mandated its previously announced order-of-decisionmaking and, unlike in the harmless error context, explained its reasons for doing so. The merits of a claim must be evaluated before the entitlement to a remedy is determined, the Court explained, to prevent ossification of constitutional law. Were the Court to rule in all close cases that the right asserted by the plaintiff was not clearly established, the law might never become defined and no plaintiff, regardless of how deserving, would ever be entitled to a recovery.<sup>51</sup> When courts decide the merits first, the Court reasoned, the governing law is announced and clarified.<sup>52</sup> Future defendants are given the opportunity to comport their behavior to the law and future plaintiffs are entitled to recover if they do not.<sup>53</sup>

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<sup>51</sup> For a fuller discussion of the concern that a proper remedial structure can encourage constitutional innovation, see John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 90 (1999).

Put simply, limiting money damages for constitutional violations fosters the development of constitutional law. Most obviously, the right-remedy gap in constitutional torts facilitates constitutional change by reducing the costs of innovation. The growth and development of American constitutionalism are thereby enhanced. More importantly, the fault-based regime for damages liability biases constitutional remedies in favor of the future. Limitations on damages, together with modern expansions in injunctive relief, shift constitutional adjudication from reparation toward reform.

*Id.* For the role that order of decisionmaking plays in that process, see Kamin, *supra* note 16, at 72 (“[S]o long as these doctrines are used as threshold questions (so long as the entitlement to a remedy is decided before the substance of a claim), they will permit courts to avoid answering important questions of constitutional law.”). See also Greabe, *supra* note 16, at 406-07.

[A]t least in civil rights damage actions where the availability of a meritorious qualified immunity defense might tempt a court to bypass the merits of a pleaded constitutional claim of first impression, courts—particularly appellate courts—should, because of the deleterious by-products of law-freezing, spurn temptation and address the pleaded claim.

*Id.*

<sup>52</sup> In the past, the Supreme Court also justified this order of decisionmaking as the one most likely to relieve an official defendant of the burdens of defending an unmerited suit at the earliest moment possible. See, e.g., *Wilson v. Layne*, 526 U.S. 603, 609 (1999) (“This order of procedure is designed to ‘spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn out lawsuit.’” (quoting *Siegert v. Gilley*, 500 U.S. 226, 232 (1991))). More recent cases have not emphasized that goal, likely because it is rarely served by merits-first adjudication. See, e.g., *Saucier*, 533 U.S. at 201.

This is the process for the law’s elaboration from case to case, and it is one reason for our insisting upon turning to the existence or nonexistence of a constitutional right as the first inquiry. The law might be deprived of this explanation were a court simply to skip ahead to the question whether the law clearly established that the officer’s conduct was unlawful in the circumstances of the case.

*Id.* See also *Scott v. Harris*, 127 S. Ct. 1769, 1774 (2007).

Although this ordering contradicts “[o]ur policy of avoiding unnecessary adjudication of constitutional issues,” we have said that such a departure from practice is “necessary to set forth principles which will become the basis for a [future] holding that a right is clearly established.”

*Id.* (citations omitted). In most cases the surest way to relieve a public defendant of the burdens of suit is to evaluate her claims of qualified immunity.

<sup>53</sup> See Jeffries, *supra* note 51, at 90.

Limitations on damages, together with modern expansions in injunctive relief, shift constitutional adjudication from reparation toward reform. Resources are directed away from cash

Consider, for example, the Supreme Court's 1999 *Wilson v. Layne* decision.<sup>54</sup> Layne and other federal and local officials executed a search warrant late one night at the Wilsons' home.<sup>55</sup> The officers brought with them a reporter and a photographer from the Washington Post.<sup>56</sup> The Wilsons later sued the officers, alleging that the presence of the members of the press made the officers' search of their home unreasonable under the Fourth Amendment.<sup>57</sup> The district court refused to enter judgment for the officers on the basis of qualified immunity and the officers took an interlocutory appeal to the Fourth Circuit Court of Appeals.<sup>58</sup> The circuit court, without deciding whether a Fourth Amendment violation had occurred, concluded that the unsettled state of the law entitled the officers to qualified immunity.<sup>59</sup> The Wilsons appealed to the United States Supreme Court which found first that a constitutional violation had occurred<sup>60</sup> and second that the Fourth Circuit had properly granted the defendants qualified immunity.<sup>61</sup>

Because the Supreme Court, unlike the court of appeals, decided the constitutional question presented to it, it is now clear that law enforcement officials may not bring members of the press into private homes when executing warrants. Law enforcement officials are thus put on notice that such conduct violates the rights of homeowners, and future plaintiffs will likely recover from officers who do so. Without a decision on the merits of the constitutional claim, the law would be denied this clarity; officials would not know what the law requires of them and qualified immunity would continue to bar recovery indefinitely.

The merits-first order of decisionmaking thus quite explicitly trumpets the importance of norm-announcement over dispute resolution or constitutional avoidance. In these cases the Supreme Court demonstrates its awareness that lower federal courts, burdened with crowded dockets, are anxious to dispose of constitutional tort litigation by resolving the easier qualified immunity question.<sup>62</sup> However, the Court—which elsewhere defers to the

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compensation for past injury and toward the prevention of future harm. The result is a rolling redistribution of wealth from older to younger, as the societal investment in constitutional law is channeled toward future progress and away from backward-looking relief.

*Id.*

<sup>54</sup> 526 U.S. 603 (1999).

<sup>55</sup> *Id.* at 607.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 608.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 608 (noting a split in the circuit courts).

<sup>60</sup> *Wilson*, 526 U.S. at 614.

<sup>61</sup> *Id.* at 617-18.

<sup>62</sup> However, for the argument that adjudicating qualified immunity is often complicated and difficult, see Chen, *supra* note 38, at 230.

[R]easonableness analyses inherently entail nuanced, fact-sensitive, case-by-case determinations involving the application of general legal principles to a particular context. The fact-intensive nature of these inquiries is exacerbated by the predominance of multifactor balancing tests in substantive constitutional law. As any experienced civil rights practitioner or

desires of lower court judges to resolve disputes expeditiously<sup>63</sup>—requires them here to decide the more difficult constitutional issue in each case in order to ensure that the law is defined and developed.<sup>64</sup>

### B. *Flexibility in Order of Decisionmaking*

In another set of cases, the Supreme Court has embraced flexibility with regard to order of decisionmaking, concluding that a court may consider the questions of right and remedy in the order that best facilitates the disposition of cases. It is this order of decisionmaking that Justice Breyer has advocated to replace *Saucier*'s merits-first rule in the qualified immunity context.<sup>65</sup>

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federal trial judge knows, the primary impediment to expedited termination of constitutional tort suits through qualified immunity-based summary judgment claims is the existence of material fact disputes.

*Id.* See also Charles R. Wilson, "Location, Location, Location": *Recent Developments in the Qualified Immunity Defense*, 57 N.Y.U. ANN. SURV. AM. L. 445, 447 (2000) ("Determining exactly when a right is 'clearly established' for qualified immunity purposes is philosophically complex. Not surprisingly, the difficulty in developing a consistent, useful definition of 'clearly established' has been the subject of some academic comment.").

<sup>63</sup> See *infra* Part I.B.

<sup>64</sup> It should be noted, however, that the Supreme Court—having mandated a merits-first order of decisionmaking on the lower federal courts—often does not follow that order of decisionmaking itself. See, e.g., *Saucier v. Katz*, 533 U.S. 194, 207-08 (2001).

Our instruction to the district courts and courts of appeal to concentrate at the outset on the definition of the constitutional right and to determine whether, on the facts alleged, a constitutional violation could be found is important. As we have said, the procedure permits courts in appropriate cases to elaborate the constitutional right with greater degrees of specificity. Because we granted certiorari only to determine whether qualified immunity was appropriate, however, and because of the limits imposed upon us by the questions on which we granted review, we will assume a constitutional violation could have occurred under the facts alleged based simply on the general rule prohibiting excessive force, then proceed to the question whether this general prohibition against excessive force was the source for clearly established law that was contravened in the circumstances this officer faced. There was no contravention under this standard. Though it is doubtful that the force used was excessive, we need not rest our conclusion on that determination. The question is what the officer reasonably understood his powers and responsibilities to be, when he acted, under clearly established standards.

*Id.* Given the importance of norm announcement in the creation of *Saucier*'s mandate, it would seem that deciding the merits first would be much more important the higher one travels up the federal courts hierarchy. District court judges bind no one when they enunciate the parameters of federal law; circuit court judges bind those within their circuit; the United States Supreme Court has the final say with regard to what the law is. And yet, at the top of this pyramid, the Supreme Court has not led by example; the court most able to clarify and announce the law has often employed the same technique it has chastised in the lower courts: skipping the constitutional question to dispose of the case on qualified immunity grounds.

<sup>65</sup> *Scott v. Harris*, 127 S. Ct. 1769, 1780 (2007); *Morse v. Frederick*, 127 S. Ct. 2618, 2641 (2007).

### 1. Ineffective Assistance of Counsel

In *Strickland v. Washington*,<sup>66</sup> the Supreme Court created a two-part test for determining whether a criminal defendant was denied the effective assistance of counsel: the defendant must demonstrate (1) that his counsel's performance fell below what could be expected of a reasonably competent practitioner, and (2) that he was prejudiced by that sub-standard performance.<sup>67</sup> In other words, the defendant must show that she was denied the right to effective counsel that the Sixth Amendment guarantees her *and* that there is a reasonable probability that this denial of counsel affected the outcome of her trial.<sup>68</sup>

In *Strickland*, the Court also embraced a flexible approach to the order in which the constituents of this two-part test are analyzed. The Court explicitly rejected *both* of Strickland's claims—that his attorney had failed to provide reasonably competent representation and that he was prejudiced thereby. The Court then stated that although it had resolved the issues in that order, it was expressing no opinion regarding the proper order of decisionmaking in such cases.<sup>69</sup>

At least two things are notable about this holding. First, the Court had no trouble resolving the “prejudice prong” of the test against Strickland even though it had already resolved the “performance prong” of the test against him.<sup>70</sup> Either one of these findings would have been sufficient to

<sup>66</sup> 466 U.S. 668 (1984).

<sup>67</sup> *Id.* at 687. As I argue elsewhere and as others have written, ineffective assistance of counsel is merely a species of harmless error analysis. See, e.g., Kamin, *supra* note 16, at 53 n.213; William S. Geimer, *A Decade of Strickland's Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 WM. & MARY BILL RTS. J. 91, 131 (1995) (“In spite of the Court's recent pronouncement that *Strickland's* application does not involve harmless error analysis, the contrary is obviously true.” (internal footnote omitted)). For this reason, it is relatively surprising that the Supreme Court has taken a different approach to order of decisionmaking in the two contexts.

<sup>68</sup> *Strickland*, 466 U.S. at 694 (“The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.”).

<sup>69</sup> *Id.* at 697.

Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one.

*Id.*

<sup>70</sup> Unlike with qualified immunity and harmless error analysis, the question of prejudice is folded into the definition of an ineffective assistance of counsel claim. A defendant has not made out an ineffectiveness claim unless he has demonstrated that he has suffered a constitutional harm *and* that he was prejudiced as a result. In this sense, the prejudice showing is a part of the substantive showing that a criminal defendant alleging a Sixth Amendment violation must make. Nonetheless, this Article refers to the “performance prong” as the merits of an ineffective assistance of counsel claim because it concerns the general question of what level of attorney performance the Constitution requires. The “prejudice

resolve *Strickland*, but the Court made both,<sup>71</sup> presumably to guide lower courts in adjudicating similar cases in the future. Thus, it seems apparent that the Court did not view the resolution of one of the two issues as a sufficient basis for refusing to reach the other.

Second, the Court also made very clear, albeit implicitly, its belief that the Constitution expresses no view with regard to the order of decisionmaking to be followed in evaluating an ineffectiveness claim. The Court explicitly stated that the determination of the proper order of decisionmaking in an individual case is a question best left to the trier of fact: “If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.”<sup>72</sup> The Supreme Court thus permitted a federal court to decide these issues in any order, or to decide both issues, even if it is not necessary to the resolution of the case to do so.

## 2. Good Faith Reliance

In *United States v. Leon*,<sup>73</sup> the Supreme Court created an exception to the exclusionary rule when officers act in good faith reliance on a facially valid search warrant.<sup>74</sup> So long as the officers reasonably rely on the apparent validity of a search warrant, the subsequent search will be upheld even if the warrant that supported it is later determined to have been improperly issued.<sup>75</sup> In other words, a defendant challenging a search will lose if either: (a) the warrant issued was supported by probable cause; or (b) if it was not, the officers executing it reasonably believed that it was.

As in *Strickland*, the Supreme Court decided both issues in *Leon*, finding that the officers had reasonably relied on the magistrate’s warrant before concluding that the warrant had issued without probable cause.<sup>76</sup> As in *Strickland*, the Court determined that the two questions presented by such a

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prong”—although it is integral to making out a constitutional violation—is merely the question of whether this particular defendant was injured by this particular misconduct. *Id.* at 687.

<sup>71</sup> *Id.* at 698-99.

<sup>72</sup> *Id.* at 697.

<sup>73</sup> 468 U.S. 897 (1984).

<sup>74</sup> *Id.* at 913.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 905, 926 (electing to accept the court of appeals’ conclusion that probable cause was lacking and reiterating that “the affidavit related the results of an extensive investigation and . . . provided evidence sufficient to create disagreement among thoughtful and competent judges as to the existence of probable cause”). Unlike in *Strickland*, however, only one of these conclusions was actually sufficient to resolve the case. The decision that the warrant was issued without probable cause could not itself resolve the case (although the decision that the warrant was issued based on a showing of probable cause *would* resolve the case). By contrast, the decision that the officer acted in good-faith reliance on the warrant, without more, was sufficient to resolve the case.

case—whether the officers reasonably relied on the magistrate’s finding that there was probable cause to support the warrant and, if not, whether there was in fact probable cause to support the warrant—could be decided in either order.<sup>77</sup> Again the Court described the importance of creating rules to guide the conduct of others—in this case both officers in the field and magistrates who review their warrant applications.<sup>78</sup>

### 3. Ordinal Flexibility Summarized

Although the Court’s jurisprudence in these areas is hardly a model of clarity, the ordinal flexibility that it advocates in these contexts seems to be driven largely by two factors: deference to the lower federal courts that bear the brunt of adjudicating these cases and the importance of announcing clear rules to govern official conduct. The Court recognizes that criminal appeals will present fact-dependent inquiries<sup>79</sup> and that the individual facts of particular cases will be the most logical determinant of the appropriate order of decisionmaking in each case. In doing so, the Court implicitly (and often explicitly) acknowledges that the lower federal court judges in these cases will be best-positioned to determine what order of decisionmaking will best facilitate the fair and efficient disposition of cases.

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<sup>77</sup> *Id.* at 924-25.

There is no need for courts to adopt the inflexible practice of always deciding whether the officers’ conduct manifested objective good faith before turning to the question whether the Fourth Amendment has been violated. Defendants seeking suppression of the fruits of allegedly unconstitutional searches or seizures undoubtedly raise live controversies which Art. III empowers federal courts to adjudicate. . . . If the resolution of a particular Fourth Amendment question is necessary to guide future action by law enforcement officers and magistrates, nothing will prevent reviewing courts from deciding that question before turning to the good-faith issue. Indeed, it frequently will be difficult to determine whether the officers acted reasonably without resolving the Fourth Amendment issue.

*Id.* However, this is not the natural order in which these questions should be considered. The question of the reasonableness of the officers’ reliance arises only once it has been determined that the warrant is invalid. The good faith reliance doctrine is an exception to the warrant requirement; it should be applied only when the warrant requirement is not satisfied.

<sup>78</sup> The Court’s decision to resolve both issues did not sit well with Justice Brennan, who was concerned about the possibility that issuing a view on the validity of a search warrant would be an advisory opinion if the court ultimately concluded that the officer had relied on the warrant in good faith. *Leon*, 468 U.S. at 956 n.15 (Brennan, J., dissenting).

After today’s decisions, there will [be] little reason for reviewing courts to conduct such a conscientious review; rather, these courts will be more likely to focus simply on the question of police good faith. Despite the Court’s confident prediction that such review will continue to be conducted, it is difficult to believe that busy courts faced with heavy dockets will take the time to render essentially advisory opinions concerning the constitutionality of the magistrate’s decision before considering the officer’s good faith.

*Id.* (citation omitted).

<sup>79</sup> *See, e.g.*, *Massachusetts v. Sheppard*, 468 U.S. 981, 988 n.5 (1984) (refusing to reach the constitutionality of the warrant on which police officers relied because such resolution “is a fact-bound issue of little importance since similar situations are unlikely to arise with any regularity”).

At the same time, in these contexts as in the merits-first contexts described above,<sup>80</sup> the Court acknowledges the importance of creating rules to govern future behaviors. With little apparent concern for the creation of prohibited advisory opinions, the Court asserts that the merits should always be reached, or should be reached whenever “the resolution of a particular . . . question is necessary to guide future action.”<sup>81</sup>

It is to this flexible order of decisionmaking that Justice Breyer has suggested returning qualified immunity cases.<sup>82</sup> In *Scott*, Justice Breyer cites a number of justifications for overturning *Saucier*: (1) the waste of judicial resources; (2) the risk of immunizing constitutional decisions from review; and (3) the importance of avoiding constitutional adjudication where possible.<sup>83</sup> However, his principal reason for preferring ordinal flexibility appears to be efficiency. In many cases, including, he would argue, *Morse*, the remedial question is easier to resolve and allows the Court to avoid difficult questions of constitutional law.<sup>84</sup>

It should be noted that resolving the qualified immunity issue at the outset will lead to the early termination of litigation and thus avoid resolution of the constitutional questions presented only when a plaintiff has sought only money damages. Qualified immunity is a defense only to damages actions;<sup>85</sup> if the plaintiff seeks declaratory or injunctive relief, as the plaintiff did in *Morse*, or if the plaintiff has sued institutional defendants who are not entitled to qualified immunity, then the only purpose served by considering the remedial question first is the possible dismissal of the defendants sued in their individual capacities. In such an event, the Court will then have to resolve the constitutional question *regardless of its resolution of the qualified immunity* question. In other words, in these cases the Court cannot avoid constitutional adjudication by granting qualified immunity at an early stage.

While it is true that in some cases resolving the qualified immunity question in the defendant’s favor before reaching the merits will lead to the early end of the case, Justice Breyer’s willingness to allow trial judges to

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<sup>80</sup> See *supra* notes 4-8 and accompanying text.

<sup>81</sup> *Leon*, 468 U.S. at 925.

<sup>82</sup> See *supra* note 16. As Greabe points out, prior to *Siegert*, lower federal courts were free to decide the qualified immunity and merits questions in whatever order they deemed most appropriate. Greabe, *supra* note 16, at 414 (“Moreover, the regime in place prior to *Siegert*—where courts chose for themselves how to resolve pretrial motions raising qualified immunity defenses—seems preferable if expediency and the convenience of official defendants are to be the key considerations.”).

<sup>83</sup> *Scott v. Harris*, 127 S. Ct. 1769, 1780 (2007).

<sup>84</sup> *Morse v. Frederick*, 127 S. Ct. 2618, 2641 (2007) (Breyer, J., concurring in the judgment in part and dissenting in part) (“The relative ease with which we could decide this case on the qualified immunity ground, and thereby avoid deciding a far more difficult constitutional question, underscores the need to lift the rigid ‘order of battle’ decisionmaking requirement that this Court imposed upon lower courts in *Saucier v. Katz*.”).

<sup>85</sup> See, e.g., *Wood v. Strickland*, 420 U.S. 308, 314 n.6 (1975).

resolve qualified immunity before evaluating the merits wholly disregards the importance of creating precedent to guide future official conduct. This is particularly problematic in the context of constitutional tort litigation where the decision not to create clarity is a burden borne entirely by plaintiffs. When the law is unclear, defendants win and plaintiffs lose.<sup>86</sup> However, plaintiffs are not the only ones who suffer when the law is not clear. Public officials who do not have clear rules to guide them will be forced to guess what is expected of them, and are likely to err on the side of caution.<sup>87</sup> Thus, clarity of the law will aid officials—potential defendants—by allowing them to conform their conduct to the law.<sup>88</sup>

Furthermore, while it is true that Justice Breyer's formulation would *permit* the lower federal courts to decide the merits first, experience shows they are reluctant to do so unless required.<sup>89</sup> When the Supreme Court merely intimated to the lower federal courts that they *should* resolve the merits of a constitutional claim before turning to a claim of qualified immunity, those courts appeared quite reluctant to do so.<sup>90</sup> It is easy to see why judges would prefer to decide the remedial question first. It is, as Justice Breyer notes,<sup>91</sup> quite often easier to resolve the remedial question than the merits question. The downside, of course, is that such an order of decisionmaking privileges dispute resolution over norm announcement and risks denying deserving plaintiffs a remedy indefinitely.<sup>92</sup>

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<sup>86</sup> See, e.g., *Wilson v. Layne*, 526 U.S. 603, 615-16 (1999) (holding that the defendant police officers were entitled to the defense of qualified immunity because "it [was] not obvious from the general principles of the Fourth Amendment that the conduct of the officers . . . violated the Amendment").

<sup>87</sup> *Id.*; *Davis v. Scherer*, 468 U.S. 183, 196 (1984) (discussing that strict enforcement of ambiguous rules might make it likely that a public official would err on the side of caution to the public's detriment).

<sup>88</sup> See, e.g., *Wilson*, 526 U.S. at 615-16; David J. Barthel, *A Healthy Tan is Better than Sunburn: Ohio's "Sunshine Law" and Nonpublic Collective Inquiry Sessions*, 34 CAP. U. L. REV. 251, 289 (2005) (discussing various court cases involving public officials inadvertently disobeying an ambiguous law and the potential benefits of clear guidelines).

<sup>89</sup> See, e.g., Greabe, *supra* note 16, at 410 n.35 (finding that nearly two-thirds of a representative sample of qualified immunity cases involved a remedy-first order of decisionmaking). Notably, these cases were decided after *Siegert*, but before *Saucier*, when merits-first was described by the Supreme Court merely as the "better approach" and not as a requirement. *County of Sacramento v. Lewis*, 523 U.S. 833, 841 n.5 (1998); *Siegert v. Gilley*, 500 U.S. 226, 233 (1991). Given the small percentage of cases that are actually appealed to the Supreme Court, it would be interesting to see a similar study post-*Saucier*.

<sup>90</sup> See, e.g., Melissa Armstrong, *Rule Pragmatism: Theory and Application to Qualified Immunity Analysis*, 38 COLUM. J.L. & SOC. PROBS. 107 (2004) (describing a number of Second Circuit opinions demonstrating great reluctance to apply merits-first adjudication to qualified immunity cases); Greabe, *supra* note 16, at 420 ("Far too many courts faced with such questions exercise their discretion in favor of a merits bypass without any consideration of the costs entailed.").

<sup>91</sup> See, e.g., *Morse v. Frederick*, 127 S. Ct. 2618, 2641 (2007).

<sup>92</sup> As has been noted, the clarification of constitutional law does not always, in fact may not usually, favor the plaintiff in whose case the law is clarified. That is, the court may use the *Saucier* order of decisionmaking to find that no right exists. See, e.g., Healy, *supra* note 19, at 937, Appendix (showing

From the standpoint of this Article, moreover, the principal problem with ordinal flexibility is that it is no more defensible in a constitutional sense than is the merits-first order of decisionmaking that Justice Breyer would replace. If, as others argue,<sup>93</sup> it is a violation of Article III's ban on advisory opinions to decide a constitutional question in a case in which no remedy is available, that is as true whether the merits are decided first in every case or simply when it is more convenient to do so.

### C. *Determine Remedy First*

In yet other contexts the Supreme Court has announced that the ultimate availability of a remedy is always a threshold inquiry, and that a federal court should turn to the substance of a federal claim only after satisfying itself that the claimant will be entitled to a remedy if he prevails on the merits. This is the order of decisionmaking that the Supreme Court has adopted for the consideration of habeas petitions in the federal courts.<sup>94</sup>

The Supreme Court has determined that new criminal procedure rules that it creates<sup>95</sup> must be applied retroactively to those defendants whose cases are not yet final on direct appeal.<sup>96</sup> By contrast, with two very limited exceptions,<sup>97</sup> the Court has held that new rules of constitutional law may *not* be applied retroactively in adjudicating a petition from a state prisoner<sup>98</sup>

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that when courts reach the merits of civil rights claims they quite often find the right asserted not to exist). My point is not that reaching the merits of a civil rights claim will invariably benefit plaintiffs, rather it is that refusing to do so will invariably harm them.

<sup>93</sup> See, e.g., Healy, *supra* note 19, at 901-02.

<sup>94</sup> See, e.g., Teague v. Lane, 489 U.S. 288, 292 (1989).

<sup>95</sup> In the Supreme Court's most recent habeas decision, Justice Stevens takes issue with the idea that the Court creates rules. *Danforth v. Minnesota*, 128 S. Ct. 1029, 1046 (2008) ("And while there are federal interests that occasionally justify this Court's development of common-law rules of federal law, our normal role is to interpret law created by others and 'not to prescribe what it shall be.'" (quoting *Am. Trucking Ass'n., Inc. v. Smith*, 496 U.S. 167, 201 (1987) (Scalia, J., concurring in the judgment))).

<sup>96</sup> *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987) ("We therefore hold that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past.").

<sup>97</sup> See, e.g., *Danforth*, 128 S. Ct. at 1032.

New constitutional rules announced by this Court that place certain kinds of primary individual conduct beyond the power of the States to proscribe, as well as "watershed" rules of criminal procedure, must be applied in all future trials, all cases pending on direct review, and all federal habeas corpus proceedings. All other new rules of criminal procedure must be applied in future trials and in cases pending on direct review, but may not provide the basis for a federal collateral attack on a state-court conviction.

*Id.*

<sup>98</sup> It is unclear whether the same limit applies to habeas petitions brought by federal prisoners. See, e.g., *id.* at 1034 n.4 ("We note at the outset that this case does not present the questions whether

for a writ of habeas corpus. A writ of habeas corpus—a collateral attack on one’s confinement brought as a civil action against one’s jailer—is thus treated extremely differently in this regard from a prisoner’s direct appeal of his conviction.<sup>99</sup>

As the Court made clear in the *Teague v. Lane*<sup>100</sup> decision, “[u]nless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced.”<sup>101</sup> But the *Teague* Court did not stop by simply announcing this blanket rule of non-retroactive application of constitutional law on habeas petitions. In addition to announcing this rule, the Court announced a corresponding order-of-decisionmaking rule for habeas: “We . . . hold that, implicit in the retroactivity approach we adopt today, is the principle that habeas corpus cannot be used as a vehicle to create new constitutional rules of criminal procedure unless those rules would be applied retroactively to *all* defendants on collateral review through one of the two exceptions we have articulated.”<sup>102</sup> If there were any doubt about the import of that rule, the Court eliminated it in the next sentence. “Because a decision [in the petitioner’s favor on the merits] would not be applied retroactively to cases on collateral review under the approach we adopt today, *we do not address petitioner’s claim.*”<sup>103</sup>

In other words, because the petitioner (and those similarly situated) would not be able to benefit retroactively from the rule he was seeking to make, the Court simply refused to consider the merits of his claim. Thus the Court has, since *Teague*, explicitly treated the entitlement to a remedy as a threshold question in habeas petitions, one that must be resolved in the petitioner’s favor prior to an adjudication of the merits. If the petitioner cannot make an adequate showing that he would be entitled to a remedy were the court to find in his favor on the merits of his claim, then the merits are simply not reached and the petition is dismissed.<sup>104</sup>

Congress’s passage of the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) only solidified this interpretation of the proper procedures to be applied in evaluating habeas petitions. A federal court today may not grant a petition for habeas corpus unless the state court decision is “contrary to, or involve[s] an unreasonable application of, clearly established federal law *as determined by the Supreme Court of the United*

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States are required to apply ‘watershed’ rules in state post-conviction proceedings, [and] whether the *Teague* rule applies to cases brought under 28 U.S.C. § 2255 . . .”).

<sup>99</sup> For a detailed discussion of habeas corpus, see RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE (5th ed. 2005).

<sup>100</sup> 489 U.S. 288 (1989).

<sup>101</sup> *Id.* at 310.

<sup>102</sup> *Id.* at 316.

<sup>103</sup> *Id.* (emphasis added).

<sup>104</sup> *Id.*

*States*.”<sup>105</sup> AEDPA thus makes clear that new law cannot be created on petitions for habeas and defines novelty very broadly—a court cannot grant a habeas petition unless the rule the petitioner seeks to rely upon was created in a prior United States Supreme Court decision.<sup>106</sup>

While the Court has been clear and consistent in stating that this is the appropriate approach to retroactivity and order of decisionmaking in the context of evaluating habeas petitions,<sup>107</sup> it has been less clear why that is so.<sup>108</sup> Although the *Teague* Court mentioned the ban on advisory opinions in passing,<sup>109</sup> its central reasons for barring the retroactive application of new rules on habeas appear to be prudential. For example, in *Teague* the Court quotes Justice Harlan—from whom all of the Court’s current retroactivity jurisprudence derives<sup>110</sup>—as stating that it is “*sounder*, in adjudicating habeas petitions, generally to apply the law prevailing at the time a conviction became final than it is to seek to dispose of [habeas] cases on the basis of intervening changes in constitutional interpretation.”<sup>111</sup> Furthermore, subsequent cases have made clear that the state may waive the prohibition on retroactive application of new rules if it fails to raise an objection to non-retroactive application of those rules.<sup>112</sup> The Court rightly treats the non-retroactivity edict of *Teague* as prudential rather than jurisdictional. Thus, the retroactivity rule seems to derive from notions of comity and the structure of the federal system rather than from any inherent constitutional limits

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<sup>105</sup> 28 U.S.C. § 2254(d)(1) (2000) (emphasis added).

<sup>106</sup> See, e.g., *Williams v. Taylor*, 529 U.S. 362, 412 (2000) (O’Connor, J., concurring).

With one caveat, whatever would qualify as an old rule under . . . *Teague* jurisprudence will constitute “clearly established Federal law, as determined by the Supreme Court of the United States” under § 2254(d)(1). The one caveat . . . is that § 2254(d)(1) restricts the source of clearly established law to this Court’s jurisprudence.

*Id.*

<sup>107</sup> As others have noted, however, the Supreme Court has permitted a slightly more flexible approach to habeas order of decisionmaking in some contexts. For example, in *Lockyer v. Andrade*, 538 U.S. 63 (2003), the Supreme Court disapproved of, but did not forbid, an approach to habeas in which the Court first determined the state of the law and then decided whether the state court opinion was inconsistent with that law. *Id.* at 71. For a very thoughtful discussion of these cases, see Healy, *supra* note 19, at 853-54 nn.36-38.

<sup>108</sup> Of course, now that *Teague* is codified in § 2254, the Court could change its mind only in the event that it found its current approach unconstitutional.

<sup>109</sup> *Teague v. Lane*, 489 U.S. 288, 316 (1989) (“We think this approach is a sound one. Not only does it eliminate any problems of rendering advisory opinions, it also avoids the inequity resulting from the uneven application of new rules to similarly situated defendants.”).

<sup>110</sup> See, e.g., *Danforth v. Minnesota*, 128 S. Ct. 1029, 1038 n.12 (2008).

<sup>111</sup> *Teague*, 489 U.S. at 306 (quoting *Mackey v. United States*, 401 U.S. 667, 689 (1971) (Harlan, J., concurring in part and dissenting in part) (emphasis added)).

<sup>112</sup> See, e.g., *Schiro v. Farley*, 510 U.S. 222, 229 (1994) (finding that the state’s failure to raise the *Teague* bar below constituted a waiver of the rule); *Godinez v. Moran*, 509 U.S. 389, 397 n.8 (1993) (finding the same).

on the federal courts.<sup>113</sup> The remedy-first rule, in turn, follows logically from the Court's refusal to apply or create new rules on habeas. In order to avoid making new rules, the Court's first inquiry must be into whether the rule the petitioner seeks to benefit from is new.

The requirement that the petitioner demonstrate an entitlement to a remedy before the Court can reach the merits of her claim can lead to frustrating results for petitioners. For example, on January 7, 2008 the Supreme Court granted certiorari and summarily reversed in *Wright v. Van Patten*,<sup>114</sup> a habeas petition from the Seventh Circuit.<sup>115</sup> The circuit court had granted Van Patten's request for a writ on the ground that his counsel had not appeared in person at a plea hearing, participating instead by telephone and thereby depriving him of his right to counsel.<sup>116</sup> Applying the remedy-first order of decisionmaking mandated in habeas cases, the Supreme Court concluded that because there was no Supreme Court precedent announcing that an attorney's decision to participate in a sentencing hearing telephonically rather than in person is ineffective assistance, Van Patten had not demonstrated that the state court "unreasonabl[y] appli[ed] clearly established Federal law."<sup>117</sup>

After *Teague*, this is the proper order of decisionmaking in a habeas petition. What is unusual about this case is that, in arguing that Van Patten's conviction should be upheld, the state did not even make the argument that counsel's conduct met constitutional standards. Rather it merely argued that no Supreme Court opinion had yet made that ineffectiveness clear:

Petitioner tells us that "[i]n urging review, [the State] does not condone, recommend, or encourage the practice of defense counsel assisting clients by telephone rather than in person at court proceedings, even in nonadversarial hearings such as the plea hearing in this case," and he acknowledges that "[p]erhaps, under similar facts in a direct federal appeal, the Seventh Circuit could have properly reached the same result it reached here." Our own consideration of the merits of telephone practice, however, is for another day, and this case turns on the

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<sup>113</sup> See, e.g., *Teague*, 489 U.S. at 304.

In *Griffith v. Kentucky*, . . . we rejected as unprincipled and inequitable the *Linkletter* standard for cases pending on direct review at the time a new rule is announced, and adopted the first part of the retroactivity approach advocated by Justice Harlan. We agreed with Justice Harlan that "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication." *Id.* (quoting *Griffith v. Kentucky*, 479 U.S. 314, 322 (1987)). See also *Collins v. Youngblood*, 497 U.S. 37, 41 (1990) ("Although the *Teague* rule is grounded in important considerations of federal-state relations, we think it is not 'jurisdictional' in the sense that this Court, despite a limited grant of certiorari, must raise and decide the issue *sua sponte*.").

<sup>114</sup> 128 S. Ct. 743 (2008).

<sup>115</sup> *Id.* at 747.

<sup>116</sup> *Id.* at 744.

<sup>117</sup> *Id.* at 747 (quoting *Carey v. Musladin*, 127 S. Ct. 649, 651 (2006) (citing 28 U.S.C. § 2254)).

recognition that no clearly established law contrary to the state court's conclusion justifies collateral relief.<sup>118</sup>

The irony here is that, despite the apparent ineffective assistance of counsel in this case, even after *Van Patten* there is *still* no Supreme Court precedent prohibiting an attorney from appearing at a plea hearing telephonically. Given that the Supreme Court issued written opinions in only seventy-three cases during the October 2007 term,<sup>119</sup> there is unlikely to be such a precedent in the near future. The next habeas petitioner will be exactly no better-off than Van Patten, thus underscoring the capacity of remedy-first adjudication to effectively prevent the announcement of legal norms and to deny recovery to deserving petitioners.<sup>120</sup>

*Van Patten* is thus a cautionary tale for the future of constitutional litigation if *Saucier v. Katz* is overturned by the Supreme Court. Petitions for habeas corpus have been eliminated as a means for the creation of new rules of constitutional law, thus greatly reducing the opportunities for the creation of new law.<sup>121</sup> If lower court judges are permitted to resolve the qualified immunity question before the substantive law question in constitutional tort litigation, there is plenty of evidence that they will do so. If this avenue for the explication of law is also cut off, the opportunities for the law's expansion and explanation will be greatly curtailed.<sup>122</sup>

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<sup>118</sup> *Id.* at 747 (citations omitted).

<sup>119</sup> See 2007 Term Opinions of the Court, <http://supremecourtus.gov/opinions/07slipopin.html> (last visited Aug. 16, 2008).

<sup>120</sup> For a discussion of the impact of the shrinking opportunities for the Supreme Court to create constitutional precedents, see Justin F. Marceau, *Un-Incorporating the Bill of Rights: The Endeavor to Release States from Their Constitutional Obligations to Criminal Defendants*, 99 J. CRIM. L. & CRIMINOLOGY (forthcoming 2008), available at [http://works.bepress.com/justin\\_marceau/3/](http://works.bepress.com/justin_marceau/3/).

<sup>121</sup> For an argument that *Teague's* order of decisionmaking is itself a violation of Article III, see Fallon & Meltzer, *supra* note 16, at 1804.

[D]octrines that withhold remedies when a claimant relies on new law curtail the incentive for litigants to raise novel arguments and, correspondingly, the opportunities for courts to recognize new rights. Building on this foundation, a critic might assert that the law-freezing tendency of doctrines withholding remedies in new law cases so diminishes the judicial role as to violate article III.

*Id.*

<sup>122</sup> See Fallon & Meltzer, *supra* note 16, at 1820.

The Court appears too single-minded in its effort to make new law not simply relevant, but dominant, in shaping the scope of habeas corpus jurisdiction, and too eager to use new law as a tool for sharply restricting habeas courts from either developing or enforcing the constitutional law of criminal procedure.

*Id.*

D. *The Supreme Court's Inconsistent Approach to Order of Decisionmaking*

In all of the contexts in which the order-of-decisionmaking question arise—harmless error, good faith reliance, non-retroactivity, ineffective assistance, qualified immunity—a plaintiff must demonstrate both that she was injured and that she is therefore entitled to a remedy.<sup>123</sup> If she prevails on both claims she receives her remedy. If she fails on either, she does not receive anything. What should be equally clear from the preceding discussion is that the Supreme Court has dealt with the order-of-decisionmaking question in these different contexts in dramatically different ways. In one context (habeas corpus), the Court has held that a petitioner's entitlement to a remedy must be resolved prior to turning to the merits of her claim.<sup>124</sup> In others (qualified immunity, harmless error), the Court has held exactly the opposite, namely that the merits must always be evaluated first, and that the entitlement to a remedy should be resolved only after it is clear that the plaintiff has adequately stated a cause of action.<sup>125</sup> Finally, and just to complicate matters entirely, the Supreme Court has endorsed ordinal flexibility in other contexts (good faith reliance, ineffective assistance of counsel), encouraging courts to resolve the issues in the most "convenient" order.<sup>126</sup>

Furthermore, even if there were a principled ground for distinguishing the order-of-decisionmaking opinions in these different contexts from one another, the Court has not made that case. It might be argued, for example, that the merits should be resolved as infrequently as possible in the context of habeas corpus litigation because habeas adjudication necessarily involves the risk of contradicting a state court interpretation of federal law. A habeas litigant under § 2254 has necessarily had his claims evaluated by a competent state court with jurisdiction over his case.<sup>127</sup> Comity requires respect for this decision, the argument goes, and that decision should not be disturbed if there are other ways of resolving the case.

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<sup>123</sup> In a previous article I agreed with Professor Jeffries that doctrines that separate rights from remedies are laudable to the extent that they encourage courts to innovate. *See, e.g.*, Jeffries, *supra* note 51, at 90 ("Put simply, limiting money damages for constitutional violations fosters the development of constitutional law. Most obviously, the right-remedy gap in constitutional torts facilitates constitutional change by reducing the costs of innovation."); Kamin, *supra* note 16, at 5-6 (arguing that Jeffries' argument relies on a merits-first order of decisionmaking). *But see* Kamin, *supra* note 16, at 3 n.8 (cataloguing articles critical of the rights-remedies split).

<sup>124</sup> *See supra* Part I.C.

<sup>125</sup> *See supra* Part I.A.

<sup>126</sup> *See supra* Part I.B; *see also* Joan Steinman, *After Steel Co.: "Hypothetical Jurisdiction" in the Federal Appellate Courts*, 58 WASH. & LEE L. REV. 855, 871 (2001) (arguing that the Supreme Court has "recognized that judicial economy in general, and ease of resolution of issues in particular, have a rightful place in the courts' decisions as to the sequence in which they should address issues").

<sup>127</sup> 28 U.S.C. § 2254 (2000).

However, this federalism argument does not adequately explain the way the Court has treated order of decisionmaking across different contexts. So, for example, the Supreme Court has mandated merits-first adjudication in qualified immunity cases regardless of whether a state or federal officer's conduct is at issue.<sup>128</sup> Similarly, it has mandated merits-first in harmless error cases whether the underlying conviction was had in state or federal court.<sup>129</sup> If comity were the reason for merits-first decisionmaking in habeas, it would seem to argue in favor of the same order of decisionmaking in direct appeals from state court criminal cases.

Instead of attempting to reconcile these disparate approaches, the Supreme Court has viewed these contexts in isolation, neither acknowledging the structural similarities among these contexts nor explaining the apparent inconsistencies among the various ordinal rules it has created. Rather, the Supreme Court has tended to address the ordering question in a vacuum, arriving at an order of decisionmaking in each context as if it were considering the issue for the first time.<sup>130</sup>

One consequence of the Supreme Court's failure to create an order-of-decisionmaking jurisprudence is that the Court has rarely written critically about the Article III implications of the order-of-decisionmaking question. As I discuss more fully in the next section, Article III of the Constitution sets forth the extent of the federal judicial power and limits the exercise of that power to cases and controversies.<sup>131</sup> One limit traditionally read into Article III is a prohibition against advisory opinions in the federal courts.<sup>132</sup>

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<sup>128</sup> See *Saucier v. Katz*, 533 U.S. 194, 199 (2001) (holding that qualified immunity doctrine is identical under § 1983 and *Bivens* actions).

<sup>129</sup> See Kamin, *supra* note 16, at 12-13.

<sup>130</sup> Of course, not all of the Justices have taken such a myopic view of the order-of-decisionmaking decisions. For example, Justice Stevens would apply the same order of decisionmaking to habeas cases that is applied in harmless error cases. *Teague v. Lane*, 489 U.S. 288, 318-19 (1989) (Stevens, J., concurring in part and concurring in judgment).

When a criminal defendant claims that a procedural error tainted his conviction, an appellate court often decides whether error occurred before deciding whether that error requires reversal or should be classified as harmless. I would follow a parallel approach in cases raising novel questions of constitutional law on collateral review, first determining whether the trial process violated any of the petitioner's constitutional rights and then deciding whether the petitioner is entitled to relief.

*Id.* However, Justice Stevens's holistic approach to the order-of-decisionmaking question is unique among the justices of the last 30 years.

<sup>131</sup> U.S. CONST. art. III, § 2, cl. 1.

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws, of the United States, and Treaties made, or which shall be made, under their authority; – to all Cases affecting Ambassadors, other public Ministers and Consuls; – to all Cases of admiralty and maritime Jurisdiction; – to Controversies to which the United States shall be a Party; – to Controversies between two or more States; – between a State and Citizens of another State; – between Citizens of different States; – between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens, or Subjects.

*Id.*

<sup>132</sup> See *infra* Part II.A.

The Supreme Court has occasionally been mindful of this ban in discussing order of decisionmaking, while at other times it has seemed largely unconcerned with the risk of advisory opinions. So, while the Court held in *Teague* that inquiring into the availability of a remedy as a threshold question is a “sound” approach to avoiding the problem of advisory opinions,<sup>133</sup> in other contexts it has either dismissed the Article III concerns out of hand<sup>134</sup> or else seemed entirely unconcerned with the risk of advisory opinions.<sup>135</sup> In these latter contexts, the Court has focused on the importance of announcing a substantive rule to govern a large class of conduct or of allowing over-taxed trial courts to resolve legal questions in the most convenient order.

The inconsistency that the Supreme Court has shown with regard to order of decisionmaking cannot itself resolve the constitutional question, of course. We cannot conclude from the fact that the Supreme Court has permitted or mandated merits-first adjudication in some cases and prohibited it in other cases that Article III necessarily permits any particular order of decisionmaking. Because the Supreme Court has taken such an *ad hoc* approach to these issues, the sanctioning or even mandating of merits-first adjudication in some contexts can hardly be seen as a thoughtful refutation of the constitutional argument to the contrary. Nonetheless, requiring a remedy-first order of decisionmaking in all of these contexts would require reversal of nearly all of the Court’s rights/remedies jurisprudence; essentially, everything would have to go but *Teague* and its progeny.

The next Part moves from the Supreme Court’s uncritical analysis of this issue to look more closely at the question of what Article III in fact prohibits and whether merits-first order of decisionmaking runs afoul of the Constitution.

## II. THE CONSTITUTIONALITY OF MERITS-FIRST DECISIONMAKING— MAKING SENSE OF ARTICLE III’S BAN ON ADVISORY OPINIONS

As the Supreme Court reexamines *Saucier* during the October 2008 term in *Pearson*, it is clear that proponents of the current rule must prevail on both the constitutional and prudential points in order to carry the day: Merits-first adjudication must be both consistent with the Constitution and a good idea as well. As I discussed in the Introduction, the prudential case for

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<sup>133</sup> *Teague*, 489 U.S. at 316.

<sup>134</sup> *See, e.g.*, *United States v. Leon*, 468 U.S. 897, 924 (1984) (“Defendants seeking suppression of the fruits of allegedly unconstitutional searches or seizures undoubtedly raise live controversies which Art. III empowers federal courts to adjudicate.”).

<sup>135</sup> *See, e.g., id.* at 925 (holding the merits should be reached whenever “the resolution of a particular . . . question is necessary to guide future action . . .”).

merits-first adjudication has been made elsewhere.<sup>136</sup> This Part takes on the critique that deciding the merits of a case in which a remedy is not made available is an impermissible advisory opinion and thus an *ultra vires* exercise of the judicial power under Article III.

#### A. *The Ban on Advisory Opinions*

The term “advisory opinion” has been used in various, not necessarily consistent, ways by the United States Supreme Court over the years, leading to needless confusion of the term.<sup>137</sup> The concept of the advisory opinion in fact contains a core with firm grounding in Article III and penumbras with a far more tenuous connection to the Constitution’s text.<sup>138</sup>

##### 1. The Core of the Ban on Advisory Opinions

Article III of the Constitution limits the judicial power to cases and controversies.<sup>139</sup> The terms “case” and “controversy” are not self-defining. There has been a great deal of disagreement in both the courts and the academy regarding the precise meaning of the terms.<sup>140</sup> However, one of the few

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<sup>136</sup> See *supra* note 16 and accompanying text.

<sup>137</sup> See, e.g., Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 HARV. L. REV. 603, 644 (1992) (“Over the years, the Court has been extremely sloppy in its use of the phrase ‘advisory opinions.’ Perhaps no other term of art has acquired so many different meanings.”); see also 13 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3529.1 (2d ed. 1984) (“The vital principle of federalism that the Supreme Court will not review the judgment of a state court that rests on independent and adequate state grounds occasionally is explained on the ground that decision of the federal questions presented would be merely advisory. This use of advisory opinion terminology is essentially useless.”).

<sup>138</sup> There are, of course, other competing ways to conceptualize the advisory opinion. See Lee, *supra* note 137, at 644-45.

The Supreme Court has characterized advisory opinions to include: (1) any judgment subject to review by a co-equal branch of government; (2) advice to a co-equal branch of government prior to the other branch’s contemplated action (that is, pre-enactment review); (3) Supreme Court review of any state judgment for which there is or may be adequate and independent state ground of decision; (4) any opinion, or portion thereof, not truly necessary to the disposition of the case at bar (that is, dicta); and (5) any decision on the merits of a case that is moot or unripe or in which one of the parties lacks standing.

*Id.* (citations omitted). This Article’s taxonomy includes each of these examples, grouping them based on their centrality to the constitutional ban on advisory opinions.

<sup>139</sup> See, e.g., *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 121-22 (1998) (citing *Muskrat v. United States*, 219 U.S. 346, 362 (1911)).

<sup>140</sup> Not all scholars believe that the terms case and controversy are interchangeable. See, e.g., Pushaw, *supra* note 25, at 448-50 (arguing that “case” refers to “a cause of action requesting a remedy for the claimed violation of a legal right” while “controversy” means “a bilateral dispute wherein a judge served principally as a neutral umpire whose decision bound only the immediate parties”); Akhil R. Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65

points of clarity in this area is that a party not actively involved in litigation before the court who seeks a legal opinion from that court does *not* present a case or controversy.<sup>141</sup> For example, it is abundantly clear that a Senator cannot walk a proposed piece of legislation across the street and ask a Supreme Court Justice to give her an opinion as to its likely constitutionality. While there might be good policy reasons for permitting a legislator or a member of the executive to obtain this sort of legal advice from the highest court in the land<sup>142</sup>—why should she have to invest time, energy and political capital in a bill that a Supreme Court Justice can assure her in advance will be deemed unconstitutional if implemented?—the Supreme Court has refused, almost since the dawn of the Republic, to offer this sort of legal advice, usually citing either Article III or the structure of divided government as the basis for the refusal.<sup>143</sup>

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B.U. L. REV. 205, 238-44 (1985) (arguing that the six, party-based bases of jurisdiction and the three subject-matter based bases of jurisdiction were intended to be treated differently). However, I will follow the general understanding of the courts and most commentators and treat them as identical in meaning.

<sup>141</sup> See Pushaw, *supra* note 25, at 512-17.

<sup>142</sup> For a dated but intriguing argument that courts ought to be more proactive in seeking to resolve disputes, see Manley O. Hudson, *Advisory Opinions of National and International Courts*, 37 HARV. L. REV. 970, 971-72 (1924) (arguing that while the medical profession has embraced notions of prevention as well as cure, and although “most lawyers devote much of their time to precautions against future controversy . . . we have made slow progress toward developing what might be called preventive adjudication, and the notion widely prevails that the judicial branch of the legal profession must necessarily confine itself to ripened conflicts”). A more contemporary defense of a kind of advisory opinion can be found in George D. Brown, *Binding Advisory Opinions: A Federal Courts Perspective on the State School Finance Decisions*, 35 B.C. L. REV. 543, 546 (1994).

[S]tate courts, unconstrained by Article III of the United States Constitution, are developing their own approaches to a particularly complex form of institutional litigation. . . . The state courts engage in a dialogue about the question with the political branches almost to the point where they become partners in crafting a solution. . . . The court does declare a duty, but its order is essentially advice on how to . . . perform that duty. These binding advisory opinions are quite different from the manner in which Article III courts handle reform litigation. This does not mean that the state approach is inferior.

*Id.* See also Jonathan D. Persky, “Ghosts That Slay”: *A Contemporary Look at State Advisory Opinions*, 37 CONN. L. REV. 1155, 1161 (2005) (“[A] tightly controlled, shrewdly implemented advisory opinion system promotes efficiency and accountability in state government without violating the due process rights of individuals or corrupting the independence of the judicial branch.”). *But see* Mel A. Topf, *State Supreme Court Advisory Opinions as Illegitimate Judicial Review*, 2001 L. REV. MICH. ST. U. DET. C.L. 101, 102-03.

In spite of the frequency with which advisory justices invoke and rely upon the doctrine, it is insufficient to its purposes. Advisory opinions are in effect and in fact a binding constitutional intervention and they are perceived and responded to as such. Without the jurisprudential figleaf of the nonbinding doctrine, advisory opinions are naked to the challenges against them. Advisory opinions, typically involving constitutional construction leading to pronouncements on the constitutionality of statutes, rules or actions, are *de facto* and illegitimate judicial review.

*Id.*

<sup>143</sup> For example, see *Correspondence of the Justices* (1793), in which Chief Justice John Jay refused to answer a series of questions posed to the Court by then Secretary of State Thomas Jefferson,

Similarly, the Supreme Court has steadfastly refused to enter a decision that would be subject to amendment by a co-equal branch of government. So, for example in its 1792 decision in *Hayburn's Case*, the Justices of the Supreme Court<sup>144</sup> refused to issue an opinion in a case in which both Congress and a federal executive official would have the power to reverse the Court's judgment if they disagreed with it.<sup>145</sup> Even though there were adverse parties before the Court contesting a ripe legal question, the Court described issuing an opinion subject to reversal by a co-equal branch of government as an inappropriate exercise of the judicial power set forth in Article III:

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stating that separation of powers precludes such an opinion and the president should convene his cabinet if he desired such an opinion. RICHARD H. FALLON, JR. ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 92-93 (4th ed. 1996). *See also* *Muskrat v. United States*, 219 U.S. 346, 361 (1911).

It is therefore evident that there is neither more nor less in this procedure than an attempt to provide for a judicial determination, final in this court, of the constitutional validity of an act of Congress. Is such a determination within the judicial power conferred by the Constitution, as the same has been interpreted and defined in the authoritative decisions to which we have referred? We think it is not. That judicial power, as we have seen, is the right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction. The right to declare a law unconstitutional arises because an act of Congress relied upon by one or the other of such parties in determining their rights is in conflict with the fundamental law. The exercise of this, the most important and delicate duty of this court, is not given to it as a body with revisory power over the action of Congress, but because the rights of the litigants in justiciable controversies require the court to choose between the fundamental law and a law purporting to be enacted within constitutional authority, but in fact beyond the power delegated to the legislative branch of the government. This attempt to obtain a judicial declaration of the validity of the act of Congress is not presented in a "case" or "controversy," to which, under the Constitution of the United States, the judicial power alone extends.

*Id.* For a good historical treatment of the question of advisory opinions during the founding period, see STEWART JAY, *MOST HUMBLE SERVANTS: THE ADVISORY ROLE OF EARLY JUDGES* (1997). Others see less of a prohibition on advisory opinions in the Court's jurisprudence than an unwillingness to give an advisory opinion when one is demanded. *See, e.g.*, Pushaw, *supra* note 25, at 517.

[N]either *Hayburn's Case* nor the "Letter from the Justices" established a ban on advisory opinions. The limitations on federal judicial power identified in the early advisory opinion and political question decisions rested explicitly on separation of powers grounds, not on any notion that Article III's "Cases" and "Controversies" language imposed a jurisdictional barrier.

*Id.*

<sup>144</sup> While six of the Court's Justices considered the statute in question, they reviewed it in their capacity as circuit court judges. *See, e.g.*, ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* 51-52 (4th ed. 2003).

<sup>145</sup> *Hayburn's Case*, 2 U.S. 408, 409-10 (1792). Of course, many decisions that the Supreme Court regularly issues can be reviewed by another branch of government. For example, if the Court is forced to determine a question of congressional intent, Congress is free to disagree with the Court's view as to that intent and to enact a new piece of legislation that renders the Supreme Court's opinion a nullity. It is not generally suggested that such opinions are advisory opinions, however. Perhaps the reason is that the Court is often forced to determine congressional intent in order to resolve a dispute between litigants properly before it. By contrast in *Hayburn's Case*, the Justices of the Supreme Court were relegated to the status of an intermediate court, whose legal conclusions and factual findings could be easily cast aside.

1st. Because the business directed by this act is not of a judicial nature. It forms no part of the power vested by the constitution in the courts of the United States; the circuit court must, consequently, have proceeded *without* constitutional authority. 2d. Because, if, upon that business, the court had proceeded, its *judgments* (for its *opinions* are its judgments) might, under the same act, have been revised and controlled by the legislature, and by an officer in the executive department. Such revision and control we deemed radically inconsistent with the independence of that judicial power which is vested in the courts; and consequently, with that important principle which is so strictly observed by the constitution of the United States.<sup>146</sup>

I refer to these refusals to give legal advice—either actual or constructive—as the core of the advisory opinion ban: If an issue is presented to a court outside of a live case or controversy or if there is a risk that the federal court’s opinion will be rendered moot by another branch of government, the federal courts will refuse to issue an opinion. While there is some scholarly disagreement regarding even this strongest form of the ban on advisory opinions,<sup>147</sup> there is little disagreement that, as a practical matter, federal courts almost never give this kind of legal advice.<sup>148</sup> Furthermore, when federal courts refuse to give this advice they generally state that they do so not for prudential reasons but because they believe that Article III does not permit them to do so.<sup>149</sup>

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<sup>146</sup> *Id.* at 410 (emphasis added). There is disagreement among scholars on how to view the adequate and independent state grounds doctrine. While the doctrine is often justified on the basis of avoiding advisory opinions, many commentators believe that the doctrine is unnecessary in this context. Compare Richard W. Westling, Comment, *Advisory Opinions and the “Constitutionally Required” Adequate and Independent State Grounds Doctrine*, 63 TUL. L. REV. 379, 382 (1988) (arguing that the advisory opinion rationale underlying the adequate and independent state grounds doctrine is required by the constitution) with Richard A. Matasar & Gregory S. Bruch, *Procedural Common Law, Federal Jurisdictional Policy, and Abandonment of the Adequate and Independent State Grounds Doctrine*, 86 COLUM. L. REV. 1291, 1294 (1986) (“The main thesis of this Article is that the presence of state grounds, adequate or not, should never preclude the Supreme Court from reaching federal issues in an appeal from a state court.”).

<sup>147</sup> See, e.g., Phillip M. Kannan, *Advisory Opinions by Federal Courts*, 32 U. RICH. L. REV. 769, 770 (1998) (“The basic hypothesis of this article is that federal courts cannot be compelled, either by Congress or parties, to render advisory opinions, but under circumstances they themselves define, these courts *may elect to give advice*.” (emphasis added)).

<sup>148</sup> *Magaziner v. Montemuro*, 468 F.2d 782, 784 (3d Cir. 1972).

<sup>149</sup> The closest most federal courts come to giving this kind of advice is the exercise of jurisdiction conferred on the federal courts under the Declaratory Judgment Act of 1934, 28 U.S.C. § 2201 (2000). Pursuant to that Act, a federal court is permitted to grant a declaratory judgment in a “case of actual controversy within its jurisdiction.” Although the constitutionality of the Declaratory Judgment Act was in doubt for some time, the Supreme Court upheld the Act in 1950. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950) (holding that the Act created a cause of action in the federal courts but did not expand the jurisdiction of those courts to any case not previously cognizable there).

## 2. The Penumbras of the Ban on Advisory Opinions

The term “advisory opinion” is also commonly used as a catchall phrase for any judicial opinion that is issued in a case that is not justiciable.<sup>150</sup> So, for example, if a federal court is presented with a legal question in a case outside the core of the ban on advisory opinions, but it becomes apparent that the court lacks subject matter jurisdiction over the parties,<sup>151</sup> that the plaintiff lacks standing to sue,<sup>152</sup> that the case is not yet ripe,<sup>153</sup> or that the case has become moot,<sup>154</sup> the matter is not justiciable and the ban on advisory opinions dictates that the court must dismiss the case without reaching the merits.

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<sup>150</sup> See, e.g., Kannan, *supra* note 147, at 771-72.

[The] definition of case and controversy includes the requirements that the court have subject-matter jurisdiction, that the issue be justiciable, that the plaintiff have standing to raise the issue, that the issue not be moot, and that the court have authority to enter an enforceable remedy. If any of these is absent, the pronouncement by a federal court would be non-binding and hence advisory.

*Id.* See also Healy, *supra* note 19, at 896 (“Despite its centrality to Article III, the ban on advisory opinions is rarely enforced as a separate doctrine. Instead, it is usually implemented through other justiciability doctrines, such as standing, ripeness, and mootness.”). Commentators are not unanimous, however, in their approval of this reading of Article III. See, e.g., Pushaw, *supra* note 25, at 451.

During the past half century, the Supreme Court has developed the idea that “case” and “controversy” are equivalent terms that constitutionally restrict federal jurisdiction to live disputes involving an injured party. This modern concept of justiciability has little linguistic or historical basis: From the founding of the republic to the New Deal, the Court never mentioned that Article III’s reference to “Cases” and “Controversies” imposed any threshold jurisdictional requirement.

*Id.* See also Lee, *supra* note 137, at 666-67 (arguing that what the Court refers to as jurisdictional has more to do with the credibility of federal court opinions than with a prohibition on their issuing an opinion).

<sup>151</sup> When it becomes apparent that a federal court does not have subject matter over a dispute, it must dismiss the case; a court may raise the question of subject matter even if it is not argued by the parties; an appellate court must dismiss a case for want of subject matter jurisdiction and vacate the opinions below. See, e.g., *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149, 152 (1908).

<sup>152</sup> See, e.g., *Warth v. Seldin*, 422 U.S. 490, 499 (1975) (“In its constitutional dimension, standing imports justiciability: whether the plaintiff has made out a ‘case or controversy’ between himself and the defendant within the meaning of Art. III. This is the threshold question in every federal case, determining the power of the court to entertain the suit.”). The concept of standing to sue is one of the most contested in the field of justiciability. As Justice Rehnquist has artfully understated, “‘Art. III standing’ has not been defined with complete consistency in all of the various cases decided by this Court . . .” *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State*, 454 U.S. 464, 475 (1982).

<sup>153</sup> See, e.g., *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227 (1937) (holding that in order to satisfy Article III, a suit must call “not for an advisory opinion upon a hypothetical basis, but for an adjudication of present right upon established facts”).

<sup>154</sup> See, e.g., Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1384 (1973) (describing mootness as “the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)”).

This Article refers to the refusal to announce a decision in a non-justiciable case as lying within the penumbra of the ban on advisory opinions because it is more difficult to ground this ban in the language or history of Article III, than the refusal to give legal advice that lies at the ban's core. Unlike the core of the advisory opinion ban which quite plausibly derives directly from the case and controversy requirement of Article III, the penumbral ban derives from the Court's justiciability doctrines and is thus only as required by the Constitution as those doctrines themselves.<sup>155</sup> On this point the Supreme Court has been far from clear. It has announced that some of the justiciability doctrines derive from the Constitution, while others are much more clearly based on prudential considerations.<sup>156</sup> All are entirely judge-created.<sup>157</sup> Even where the Court has asserted that one of the justiciability doctrines is mandated by the Constitution, there is a great deal of scholarly debate regarding the validity of such a reading of Article III.<sup>158</sup>

Perhaps the best known (and most controversial) of the justiciability doctrines is the standing requirement. The Supreme Court has held that a plaintiff must demonstrate that the injury of which she complains was caused by the defendant's actions and can be remedied by a favorable decision from the court.<sup>159</sup> If a favorable decision by a court cannot alleviate the harm claimed by the plaintiff, the argument goes, then the court's evaluation of the merits of the case is nothing more than an advisory opinion.<sup>160</sup>

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<sup>155</sup> Criticism of the justiciability doctrines has been so broad and deep that it is difficult to catalog in a single footnote. *See, e.g.*, Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—and their Connections to Substantive Rights*, 92 VA. L. REV. 633, 634-35 (2006) (“Indeed, the idea that rulings on standing often represent concealed judgments on the merits has acquired the status of folk wisdom.”); Gene R. Nichol, Jr., *Abusing Standing: A Comment on Allen v. Wright*, 133 U. PA. L. REV. 635, 650 (1985); Mark V. Tushnet, *The New Law of Standing: A Plea For Abandonment*, 62 CORNELL L. REV. 663, 663-64 (1977). Healy phrases the acceptance of this version of the advisory opinion ban slightly differently. *See* Healy, *supra* note 19, at 895 (“The ban on advisory opinions is as old and well established as any of the justiciability doctrines.”).

<sup>156</sup> *See, e.g.*, CHEMERINSKY, *supra* note 144, at 45 (“A clear separation of the constitutional and prudential aspects of the justiciability doctrines is often difficult because both reflect the same basic policy considerations.”).

<sup>157</sup> *See, e.g., id.* at 44 (“Each of these justiciability doctrines was created and articulated by the United States Supreme Court. Neither the text of the Constitution, nor the Framers in drafting the document, expressly mentioned any of these limitations on the judicial power.”).

<sup>158</sup> *See, e.g., id.* at 45 (“Some justiciability doctrines, such as standing, have both constitutional and prudential components. In other instances—for example, the political question doctrine—the Court has not announced whether it views the limitation as constitutional or prudential.”).

<sup>159</sup> *See, e.g.*, *Warth v. Seldin*, 422 U.S. 490, 521-22 (1975) (finding that plaintiffs lacked standing to challenge city zoning practices because they could not show that the housing that they sought would be built even if the city were forced to change its practices).

<sup>160</sup> *See, e.g.*, *City of Los Angeles v. Lyons*, 461 U.S. 95, 128-29 (1983).

Under established principles, the only additional question in determining standing under Article III is whether the injuries he has alleged can be remedied or prevented by some form of judicial relief. Satisfaction of this requirement ensures that the lawsuit does not entail the issuance of an advisory opinion without the possibility of any judicial relief, and that the exercise of a court's remedial powers will actually redress the alleged injury.

For example, in *Lujan v. Defenders of Wildlife*<sup>161</sup> the Supreme Court held that the plaintiffs did not have standing to sue under the Endangered Species Act because they could not demonstrate that they had tangible plans to visit the species' habitat at issue.<sup>162</sup> However strong their desire to protect the endangered species might be, the Court reasoned, there was no evidence from which it could conclude that a positive outcome on the merits would produce any tangible benefit to the plaintiffs and thus the Court found their case to be non-justiciable.<sup>163</sup>

The penumbral ban on advisory opinions is sometimes stated slightly differently. Commentators and some courts have stated that, even if a court has before it a justiciable case or controversy, a federal court should not decide a constitutional issue that cannot affect the rights of the litigants before the court.<sup>164</sup> The case most often cited for this proposition is *North Carolina v. Rice*.<sup>165</sup> In *Rice*, the defendant had successfully appealed his drunk driving conviction, was retried de novo in the district court, and received a more severe sentence than that originally imposed.<sup>166</sup> He objected that the imposition of a higher sentence on appeal impermissibly burdened his right to appeal, citing the Court's decision in *North Carolina v. Pearce*<sup>167</sup> for the proposition that the imposition of a higher sentence after remand violates due process.<sup>168</sup> By the time *Rice*'s case reached the federal courts, however, he had served the entirety of the more severe sentence.<sup>169</sup> The Supreme Court decided that the petition for writ of habeas corpus should not have issued from the Fourth Circuit.<sup>170</sup> Because *Rice* had served

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*Id.*

<sup>161</sup> 504 U.S. 555 (1992).

<sup>162</sup> *Id.* at 563-64 ("When [plaintiff] was asked at a subsequent deposition if and when she had any plans to return to Sri Lanka, she reiterated that 'I intend to go back to Sri Lanka,' but confessed that she had no current plans . . .").

<sup>163</sup> *See id.* at 564 ("We shall assume for the sake of argument that these affidavits contain facts showing that certain agency-funded projects threaten listed species—though that is questionable. They plainly contain no facts, however, showing how damage to the species will produce 'imminent' injury to [plaintiffs]. That the women 'had visited' the areas of the projects before the projects commenced proves nothing.").

<sup>164</sup> Healy, *supra* note 19, at 896 ("The ban on advisory opinions also prevents courts from deciding questions that will not have any effect on the litigants before them.").

<sup>165</sup> 404 U.S. 244 (1971).

<sup>166</sup> *Id.* at 245.

<sup>167</sup> 395 U.S. 711 (1969).

<sup>168</sup> *Rice*, 404 U.S. at 245.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 245-46.

The State claims that *Pearce* does not apply to a situation where the more severe sentence is imposed after a trial de novo in its Superior Court. *We do not reach that question, however, since the threshold issue of mootness was improperly disposed of by the Court of Appeals.* Although neither party has urged that this case is moot, resolution of the question is essential if federal courts are to function within their constitutional sphere of authority. Early in its history, this Court held that it had no power to issue advisory opinions, and it has frequently repeated that federal courts are without power to decide questions that cannot affect the rights

his entire increased sentence by the time his petition came before the Fourth Circuit, there appeared to be no relief that a federal court could afford him, and any resolution of his constitutional claims would have been purely advisory.<sup>171</sup> *Rice* likely represents one of the relatively rare instances of a petitioner who cannot make a good-faith claim to a remedy.<sup>172</sup> *Rice* was a free man at the time he filed his habeas petition in the district court.<sup>173</sup> Given that the purpose of habeas is to provide the remedy of release to those wrongfully imprisoned,<sup>174</sup> the outcome of his petition was never in doubt, regardless of whether his rights had been denied in the state court.

What both *Rice* and *Lujan* demonstrate is that the first question a court asks about a case—is it justiciable?—is inherently influenced by the last question it generally asks—is the plaintiff entitled to a remedy?<sup>175</sup> *Rice*'s case was non-justiciable because it was plain from the outset that even if he was correct that *Pearce* applied to his case, there was no remedy that a habeas court would be able to afford him.<sup>176</sup> The *Lujan* plaintiffs lacked standing because they had not alleged a concrete, imminent harm that a federal court would be able to remedy with an appropriate order.<sup>177</sup>

As Professor Richard Fallon has noted, courts often use the justiciability doctrines, the merits of a case, and remedial principles together to craft the desired outcome in each case.<sup>178</sup> The prohibition on adjudication of non-

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of litigants in the case before them. To be cognizable in a federal court, a suit “must be definite and concrete, touching the legal relations of parties having adverse legal interests. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.”

*Id.* (citations omitted) (emphasis added).

<sup>171</sup> The Court actually remanded the case to the Fourth Circuit to inquire whether there were collateral consequences of the longer sentence that would survive the end of that sentence and hence be remediable by a federal court. *Id.* at 248.

<sup>172</sup> See *infra* Part II.D.

<sup>173</sup> See *Rice*, 404 U.S. at 245 (“[Rice] was completely discharged by North Carolina on January 24, 1970 . . . .”); *Wood v. Ross*, 434 F.2d 297 (4th Cir. 1970) (showing that Rice filed his habeas petition before the Fourth Circuit on May 8, 1970).

<sup>174</sup> See, e.g., *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973) (“[T]he essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and . . . the traditional function of the writ is to secure release from illegal custody.”).

<sup>175</sup> See, e.g., Fallon, *supra* note 155, at 634 (“We customarily think about lawsuits as having three stages. First, at the threshold, the court determines justiciability. Second, if the suit is justiciable, the court rules on the merits. Finally, if the plaintiff prevails, the court determines the remedy.”).

<sup>176</sup> *Rice*, 404 U.S. at 247–48.

<sup>177</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573–75 (1992).

<sup>178</sup> Fallon, *supra* note 155, at 637.

[C]ourts, and especially the Supreme Court, decide cases by seeking what they regard as an acceptable overall alignment of doctrines involving justiciability, substantive rights, and available remedies. When facing an outcome or pattern of outcomes that it regards as practically intolerable or disturbingly sub-optimal, the Court will adjust or manipulate the applicable law. . . . In other words, when the Court dislikes an outcome or pattern of outcomes, it will often be equally possible for the Justices to reformulate applicable justiciability doctrine, substantive doctrine, or remedial doctrine.

justiciable cases and of cases in which the plaintiff cannot receive a remedy are merely two examples of this phenomenon.

### B. *Understanding the Ban on Advisory Opinions*

Ultimately, why is it that the Constitution prohibits advisory opinions? The cases and commentary regarding advisory opinions suggest the following answer: It is the concreteness of issues that are sharpened by adversarial litigation by interested parties that makes the issuance of advisory opinions such a poor idea.<sup>179</sup> The risk of getting a case wrong, of not seeing the issues clearly, of failing to identify an issue that an interested party would not miss, are all magnified when courts decide issues that are not presented by interested parties.<sup>180</sup> Similarly, when courts are not restrained by the limitations of the case and controversy requirement—when they need not wait for interested parties to bring them cases but instead reach out to decide issues not properly before them—they risk squandering judicial resources and reaching questions properly left to the political branches of government.

In this sense, the reasons for the ban on advisory opinions are essentially identical to the traditional justifications of the adversary legal system itself. For the same reason that we believe that bimodal, contested cases are the best means of arriving at thoughtful judicial results, we generally believe that courts should not pronounce judgment in the absence of such contests. It is for this reason that many authors have described the advisory opinion ban as being at the very core of Article III's case and controversy requirement.<sup>181</sup>

*Id.*

<sup>179</sup> See, e.g., *United States v. Fruehauf*, 365 U.S. 146, 157 (1961).

Such opinions, such advance expressions of legal judgment upon issues which remain unfocused because they are not pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multifaceted situation embracing conflicting and demanding interests, we have consistently refused to give.

*Id.*

<sup>180</sup> See, e.g., *Flast v. Cohen*, 392 U.S. 83, 96-97 (1968).

[T]he implicit policies embodied in Article III . . . impose the rule against advisory opinions . . . . [That rule] . . . recognizes that such suits often "are not pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multifaceted situation embracing conflicting and demanding interests."

*Id.* (quoting *Fruehauf*, 365 U.S. at 157).

<sup>181</sup> See, e.g., CHEMERINSKY, *supra* note 144, at 56.

Although the Supreme Court expressly refers to the ban on advisory opinions less frequently than the other justiciability doctrines, this should not be taken as an indication that it is less important. Quite the contrary, it is because the prohibition of advisory opinions is at the core of Article III that the other justiciability doctrines exist largely to ensure that federal courts will not issue advisory opinions. That is, it is because standing, ripeness, and mootness implement the policies and requirements contained in the advisory opinion doctrine that it is usually unnecessary for the Court to separately address the ban on advisory opinions.

As argued more fully below, these concerns are not implicated when a federal court decides a case in which a plaintiff ultimately does not receive a remedy for her alleged injury. Rather, concerns about concreteness, adversariness, judicial restraint, and the proper framing of issues<sup>182</sup> arise only when it is apparent *from the outset* that no remedy will be forthcoming to the petitioning party. The cases usually cited for the proposition that a court should decide the merits in a case only when there is a demonstrated entitlement to a remedy should not be taken to mean that the *ultimate* award of a remedy is a prerequisite to any adjudication of the merits.

Rather I argue that these cases stand for the proposition that courts ought not to reach the constitutional question in a case where it is apparent *ex ante* that relief will be unavailable to the plaintiff. As I demonstrate below, I believe that these cases—which do raise valid Article III concerns—in fact make up a very small proportion of all constitutional adjudication.

### C. *The Doctrine as Applied to Merits-First Order of Decisionmaking*

The Article III argument against merits-first adjudication is enunciated most clearly by Thomas Healy in the *NORTH CAROLINA LAW REVIEW*.<sup>183</sup> Healy argues that merits-first adjudication violates Article III's ban on advisory opinions because it permits adjudication of constitutional rights in cases where that adjudication cannot affect the outcome:

The principles discussed above raise serious questions about the practice of deciding the constitutional issue in qualified immunity, habeas corpus, harmless error, and Fourth Amendment good faith cases. In these cases, a ruling on the constitutional issue often has no effect because the court's determination that the governmental actor has immunity or that an error

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*Id.* See also WRIGHT ET AL., *supra* note 137, at 293 (“The oldest and most consistent thread in the federal law of justiciability is that federal courts will not give advisory opinions.”).

<sup>182</sup> This desire to have issues properly framed and appropriately developed also justifies the prudential aspects of the Supreme Court's justiciability doctrines. The doctrines are used to avoid cases that would require the court to decide the “wrong” cases. See, e.g., ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH—THE SUPREME COURT AT THE BAR OF POLITICS* 69 (2d ed., Yale Univ. Press 1986) (1962) (arguing that the Court considering a piece of legislation may uphold it, overturn it, or do neither—“It may do neither, and therein lies the secret of its ability to maintain itself in the tension between principle and expediency.”); Jeffery O. Cooper & Douglas A. Berman, *Passive Virtues and Casual Vices in the Federal Courts of Appeal*, 66 *BROOK. L. REV.* 685, 726 (2000) (arguing that the justiciability doctrines allow the federal courts to pick and choose among cases to shape substantive law). *But see* Gerald Gunther, *The Subtle Vices of the “Passive Virtues”—A Comment on Principle and Expediency in Judicial Review*, 64 *COLUM. L. REV.* 1, 25 (1964) (“[T]here is an obligation to decide in some cases; there is a limit beyond which avoidance devices cannot be pressed and constitutional dicta cannot be urged without enervating principle to an impermissible degree.”); HERBERT M. WECHSLER, *Toward Neutral Principles in Constitutional Law*, in *PRINCIPLE, POLITICS AND FUNDAMENTAL LAW* 1, 9 (1961) (“For me, as for anyone who finds the judicial power anchored in the Constitution, there is no such escape from the judicial obligation; the duty cannot be attenuated in this way.”).

<sup>183</sup> Healy, *supra* note 19.

was harmless is adequate to resolve the dispute. *In qualified immunity cases, for instance, a decision that the plaintiff has alleged the violation of a constitutional right is immaterial if the court finds that the right was not clearly established at the time of the events giving rise to the lawsuit.* Because government officials can be held liable only for violating rights that are clearly established, the court will dismiss the lawsuit in spite of its conclusion that the constitutional right exists.<sup>184</sup>

Literally read, Healy's argument does not seem limited to the merits-first order of decisionmaking. He seems to argue that a federal court should *never* decide the constitutional question in this broad class of cases, as the remedial question is always sufficient to resolve a lawsuit while the substantive question never is.<sup>185</sup> Thus, for Healy, the question of whether a right is clearly established is always the dispositive question in qualified immunity cases.<sup>186</sup>

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<sup>184</sup> *Id.* at 901-02 (emphasis added) (footnote omitted).

<sup>185</sup> *Id.* at 902.

One might respond that a court cannot know whether its decision on the constitutional issue will have some effect until after it determines whether the governmental actor has immunity or the error was harmless. Therefore, as long as a court decides the constitutional issue first, it will not knowingly issue an ineffectual ruling. But at least with respect to qualified immunity and habeas cases, this argument is unpersuasive. *In these two contexts, a decision on the constitutional issue can never have any independent effect and can never change the outcome of the case.*

*Id.* (emphasis added).

<sup>186</sup> This is true, of course, but it also proves too much. Deciding whether a right is clearly established inevitably requires determining what the underlying substantive rights are. *See, e.g.,* Wells, *supra* note 14, at 1544 (“*Saucier’s* harshest critics acknowledge that ‘it often may be difficult to decide whether a right is clearly established without deciding precisely what the exiting [sic] constitutional right happens to be.’” (quoting Brief for the States of Illinois et al. as Amici Curiae Supporting Petitioner at 18, *Scott v. Harris*, 127 S. Ct. 1769 (2007) (No. 05-1631))). For this reason, as Professor Patchel has written in the habeas context, determining a plaintiff’s entitlement to a remedy before turning to the merits creates at least as many Article III problems as it solves. Kathleen Patchel, *The New Habeas*, 42 HASTINGS L.J. 939, 1005 (1991).

[A]s a practical matter, the *Teague* plurality’s solution not only does not avoid advisory opinions, but makes it much more likely that such opinions will occur. In order to decide whether the petitioner’s claim would be a new rule at all, and if it is a new rule, whether it should apply retroactively on habeas, the Court necessarily must establish the content of the proposed rule and the extent to which the rule was dictated by prior precedent.

*Id.* *See also* James S. Liebman, *More Than “Slightly Retro:” The Rehnquist Court’s Rout of Habeas Corpus Jurisdiction in Teague v. Lane*, 18 N.Y.U. REV. L. & SOC. CHANGE 537, 570 (1991) (“If retroactivity is treated as a “threshold” matter, everything the court necessarily will have to say on the constitutional merits of the proposed rule in the process of resolving the retroactivity question will be hypothetical—in direct violation of the injunction that the plurality itself endorsed against ‘rendering advisory opinions.’”). *See also* *Teague v. Lane*, 489 U.S. 288, 319 n.2 (1989) (Stevens, J., concurring) (“[T]he plurality inverts the proper order of adjudication. Among other things, until a rule is set forth, it would be extremely difficult to evaluate whether the rule is ‘new’ at all. If it is not, of course, no retroactivity question arises.”). The same principle holds true in determining whether a defendant is entitled to qualified immunity in the Section 1983 context. The only way to determine whether past decisions provide sufficient notice to permit the imposition of liability on public officials is to determine what the law is and when the law became defined. *See Lyons v. City of Xenia*, 417 F.3d 565, 581 (6th Cir. 2005) (Sutton, J., concurring).

Healy's primary critique of merits-first adjudication is that it requires the consideration of the merits in a case that cannot affect the parties before the court.<sup>187</sup> Taken to its logical extreme, a prohibition on constitutional adjudication that does not ultimately benefit the plaintiff would completely eviscerate the argument for merits-first adjudication. If Article III mandates that the *ultimate* unavailability of a remedy precludes a federal court from reaching the merits of the case, then obviously the entitlement to a remedy must always be the first thing considered by a federal court. Were this interpretation of Article III correct, then all of constitutional adjudication would have to follow the *Teague* model.<sup>188</sup> From the point of view of norm-announcement, this approach could lead to disastrous results.<sup>189</sup>

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*Saucier* and [*County of Sacramento v. Lewis*] convincingly explain why the constitutional-avoidance doctrine does not naturally apply in the qualified-immunity setting. The constitutional and non-constitutional questions in a qualified immunity case overlap, and it often may be difficult to decide whether a right is clearly established without deciding precisely what the existing constitutional right happens to be.

*Id.* See also Wells, *supra* note 14, at 1554.

In resolving the immunity issue, the court must concentrate on the substantive law at the time of the challenged action. Under *Saucier*, the immunity issue is resolved only after the court has concluded that the plaintiff's allegations state a constitutional violation today. In this way, the *Saucier* order-of-battle separates the substantive issue from the immunity issue and thereby promotes analytical clarity. Absent *Saucier*, a court that undertakes to resolve the immunity issue first may have difficulty distinguishing between the two.

*Id.* (footnotes omitted).

<sup>187</sup> See, e.g., Healy, *supra* note 19, at 855 ("One of the underlying principles of the ban on advisory opinions is that federal courts may issue only rulings that have some effect on the resolution of a dispute between adverse parties.").

<sup>188</sup> See *supra* Part I.C.

<sup>189</sup> For a sense of just how disastrous, see Paul Hughes, *Not a Failed Experiment: Wilson-Saucier Sequencing and the Articulation of Constitutional Rights*, 80 U. COLO. L. REV. (forthcoming Feb. 2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1156421](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1156421) (demonstrating that as the *Saucier* order of decisionmaking has become more firmly imposed by the Supreme Court, the percentage of lower court cases in which the constitutional merits are reached has gone up dramatically). Of course, the impact of a retreat from *Saucier* would vary with the type of claim being brought. Some claims can obviously be litigated outside the context of Section 1983. Others, principally the excessive force claims that were the basis of *Saucier* and *Scott v. Harris*, 127 S. Ct. 1769 (2007), can essentially be resolved only through a money damages claim against individual officers. These claims rarely arise in the context of a motion to suppress, as the purported constitutional violation does not lead to the seizure of evidence. Standing requirements generally make injunctive suits difficult. See, e.g., *City of Los Angeles v. Lyons*, 461 U.S. 95, 105-06 (1983) (holding that federal court did not have jurisdiction to adjudicate a choking victim's request for an injunction against future police use of chokeholds). Fourth Amendment claims are not cognizable on habeas. See, e.g., *Stone v. Powell*, 428 U.S. 465, 494 (1976) ("[W]here the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." (citations omitted)). For this reason, petitioner in *Pearson v. Callahan* has suggested to the Court an alternative to *Saucier's* retention:

In Fourth Amendment cases, the *Saucier* order should be limited to claims that do not involve alleged fruits of the poisonous tree, and therefore will not arise in the context of motions to suppress. This approach recognizes that all Fourth Amendment claims are not created equal: some claims arise often in motions to suppress but others do not. The most im-

I believe that Healy's critique of merits-first adjudication has merit, but only in those cases where it is clear a priori that a litigant will not be entitled to a remedy even in the event that the court agrees with her on the merits of her constitutional claim. In such a case, a federal court ought not to adjudicate the constitutional issues she raises.<sup>190</sup> As set out in Part II.A, the ban on advisory opinions extends farther than the provision of legal advice—it extends to those cases where a court knows that its opinion cannot affect the parties before it.<sup>191</sup> Thus, if a federal court sets out an opinion in a case in which it *knows* before it considers the merits that the plaintiff will not be entitled to any remedy, then Article III is likely violated by the adjudication of the claim.

In such cases the court risks making law in a case in which it is apparent that the parties are not sufficiently “interested” in the outcome. However concerned the parties might be in the resolution of the legal issues raised by the case, both they and the court know from the start of the litigation that the outcome will not affect them personally. Such cases thus carry the risk that they will not be litigated either as forcefully or as carefully as Article III's case and controversy requirement mandates.<sup>192</sup> To put the matter only slightly differently, in such a case it will be clear from the outset that the plaintiff lacks standing because she does not have an injury that a federal court can remedy.<sup>193</sup>

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portant example of important claims that rarely arise in suppression cases involves excessive force claims.

Brief of Petitioner at 58, *Pearson v. Callahan*, No. 07-751 (Mar. 24, 2008) (citations omitted).

<sup>190</sup> In this regard I look more favorably on the Article III critique of merits-first than do other commentators. *See, e.g.*, Wells, *supra* note 14, at 1541 n.22.

The threshold problem with Professor Healy's reasoning—and no doubt the reason for his isolation on this issue—is that the advisory opinion doctrine ordinarily functions more as a standard than as a rule. It is, as he recognizes elsewhere in his article, “usually implemented through other justiciability doctrines, such as standing, ripeness, and mootness.” Each of these doctrines incorporates the “advisory opinions” theme into a larger matrix of factors bearing on whether a given litigant or a given dispute should be granted access to federal court. Only a naked request for advice, as in the early episode of the Correspondence of the Justices would trigger what he calls the “ban on advisory opinions.”

*Id.* (citations omitted). I would not go so far as Professor Wells. As set out in Part II.A., *supra*, I believe that the ban on advisory opinions extends farther than the provision of legal advice. If a court sets out an opinion in a case in which it knows the parties cannot be affected by its ruling then Article III is violated, whether we call the violation an advisory opinion or not.

<sup>191</sup> *See supra* Part II.A.

<sup>192</sup> Of course the same point could be made about a suit seeking only declaratory relief. However, the Supreme Court has permitted such suits when the plaintiff demonstrates that she would be entitled to coercive relief if she were to prevail. *See, e.g.*, *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227 (1937).

<sup>193</sup> *See, e.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 557 (1992).

### III. THE SOLUTION: A PEEK AT THE ENTITLEMENT TO A REMEDY

Following the Article III analysis of Part II, this Part argues that a federal court considering a § 1983 or *Bivens* actions should proceed to the merits of that claim unless it is apparent from the pleadings that the plaintiff will not be entitled to a remedy were he to prevail on the merits. Rather than beginning its analysis with a full evaluation of the plaintiff's entitlement to a remedy—as the court does in habeas cases after *Teague*—a federal court need only satisfy itself as an initial matter that there is a possibility that the plaintiff will receive a remedy if he prevails on the merits. Once it has satisfied itself that the plaintiff has made such a minimal showing, the court should proceed to a full evaluation of the merits and then, if necessary, consider the defense of qualified immunity.

#### A. *Determine If There Is a Colorable Claim for a Remedy*

This approach—ensuring that there is at least a colorable claim to a remedy before proceeding to the merits—is one that the Supreme Court has adopted in a number of different justiciability contexts. One example is the amount in controversy requirement of federal diversity jurisdiction.<sup>194</sup> The Court has consistently held that the amount in controversy requirement, like the ability of a court to afford the prevailing party a remedy, is jurisdictional, in that it cannot be waived by the parties, may be raised by the court on its own motion, and will serve to terminate litigation if at any point it becomes clear that the element fails.<sup>195</sup> Nonetheless, the Court has held that a case should be dismissed on the basis of the amount in controversy only if it is a “legal certainty” that the amount actually in controversy will fall below the statutory minimum.<sup>196</sup>

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<sup>194</sup> See, e.g., *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 552 (2005) (“To ensure that diversity jurisdiction does not flood the federal courts with minor disputes, [28 U.S.C.] § 1332(a) requires that the matter in controversy in a diversity case exceed a specified amount, currently \$75,000.”).

<sup>195</sup> See, e.g., FED. R. CIV. P. 12(h)(3).

<sup>196</sup> *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 282, 289-90 (1938).

It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal. The inability of plaintiff to recover an amount adequate to give the court jurisdiction does not show his bad faith or oust the jurisdiction. Nor does the fact that the complaint discloses the existence of a valid defense to the claim. But if, from the face of the pleadings, it is apparent, to a legal certainty, that the plaintiff cannot recover the amount claimed, or if, from the proofs, the court is satisfied to a like certainty that the plaintiff never was entitled to recover that amount, and that his claim was therefore colorable for the purpose of conferring jurisdiction, the suit will be dismissed. Events occurring subsequent to the institution of suit which reduce the amount recoverable below the statutory limit do not oust jurisdiction.

*Id.* See also *Rosado v. Wyman*, 397 U.S. 397, 405 n.6 (1970) (citing “the well-settled rule that a federal court does not lose jurisdiction over a diversity action which was well founded at the outset even though

Were the Court to strictly apply the principle that its jurisdiction to hear a case is a threshold question to be resolved before turning to the merits, then it ought to require that the first inquiry in all diversity cases be into the *actual* amount in controversy. This would require making findings of fact and conclusions of law to determine whether the plaintiff would in fact meet the amount in controversy requirements before turning to the merits of her case. That courts do not in fact do so—but instead merely inquire whether there is a colorable claim to a jurisdictional amount—is a recognition of the principle that what makes a case justiciable is a colorable claim of jurisdiction and not the ultimate capacity of a court to afford a remedy to a plaintiff.

Furthermore, such an order of decisionmaking—beginning a diversity case by determining whether the amount actually in controversy exceeds the current threshold of \$75,000—would be a great waste of federal judicial resources. Federal courts, limited in their time and energies, would expend much of their precious resources on narrow, unique, case-specific factual findings rather than resolving questions of broader application. It would be similar, in other words, to determining whether complained of conduct was prejudicial before determining whether or not it was constitutional error.<sup>197</sup> This is not to say that a federal court sitting in diversity should entertain a suit simply because doing so would resolve an important question of federal law rather than a narrow, fact-specific one. Rather, as the Supreme Court has now mandated, a diversity court should proceed to the merits if there is a colorable claim that the amount in controversy will meet the statutory minimum.<sup>198</sup>

The parallel test that I suggest for constitutional tort litigation is whether the plaintiff has made a colorable claim that she will be entitled to a remedy if she prevails on the merits. This is the test of standing that the Supreme Court already applies in many other contexts.<sup>199</sup> As the Court reiterated recently in *Steel Co. v. Citizens for a Better Environment*,<sup>200</sup> a federal court is not prohibited from deciding the merits of a case simply because

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one of the parties may later change domicile or the amount recovered falls short of [the statutory minimum].” (citations omitted).

<sup>197</sup> See *supra* Part I.A.2.

<sup>198</sup> See, e.g., *St. Paul Mercury*, 303 U.S. at 288-89.

The rule governing dismissal for want of jurisdiction in cases brought in the federal court is that, unless the law gives a different rule, the sum claimed by the plaintiff controls if the claim is apparently made in good faith. It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal.

*Id.* (citations omitted).

<sup>199</sup> The use of tests of this sort is not limited to the standing context. See, e.g., *Schriro v. Landrigan*, 127 S. Ct. 1933, 1935 (2007) (“In deciding whether to grant an evidentiary hearing [in a habeas case], a federal court must consider whether the hearing could enable an applicant to prove the petition’s factual allegations, which, if true, would entitle the applicant to federal habeas relief.”).

<sup>200</sup> 523 U.S. 83 (1998).

the party asserting jurisdiction might ultimately not prevail.<sup>201</sup> Rather, the Court stated:

[T]he district court has jurisdiction if “the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another,” unless the claim “*clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous.*”<sup>202</sup>

The Court applies a similar approach to other questions of justiciability. In *United States v. SCRAP*,<sup>203</sup> the Supreme Court allowed a claim to go forward because the plaintiffs had asserted enough evidence of an injury in fact to survive a motion to dismiss on the pleadings.<sup>204</sup>

[P]leadings must be something more than an ingenious academic exercise in the conceivable. A plaintiff must allege that he has been or will in fact be perceptibly harmed by the challenged agency action, not that he can imagine circumstances in which he could be affected by the agency’s action. And it is equally clear that the allegations must be true and capable of proof at trial. But we deal here simply with the pleadings in which the appellees alleged a

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<sup>201</sup> *Id.* *Steel Co.* is best known for its rejection of the concept of the hypothetical jurisdiction—the principle that a court may presume the existence of jurisdiction in order to decide the merits of a case when the merits of the case are easier to resolve than the jurisdictional question. *See, e.g., In re Grand Jury Subpoena Issued to Bailin*, 51 F.3d 203, 206 (9th Cir. 1995) (stating that the criteria for application of the doctrine include: “(1) the jurisdictional question must be difficult; (2) the merits of the appeal must be insubstantial; (3) the appeal must be resolved against the party asserting jurisdiction; and (4) undertaking a resolution on the merits as opposed to dismissing for lack of jurisdiction must not affect the outcome”). Justice Scalia, writing for the Court in *Steel Co.*, determined that however convenient this order of decisionmaking might be for the courts, it ran afoul of Article III’s limitation to cases and controversies:

We decline to endorse such an approach because it carries the courts beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers. This conclusion should come as no surprise, since it is reflected in a long and venerable line of our cases. . . . The requirement that jurisdiction be established as a threshold matter “spring[s] from the nature and limits of the judicial power of the United States” and is “inflexible and without exception.”

*Steel Co.*, 523 U.S. at 94-95 (quoting *Mansfield, C. & L.M. R.R. Co. v. Swan*, 111 U.S. 379, 382 (1884)). Obviously, the *Steel Co.* case on its face presents a challenge to the argument I make herein that the merits of a claim should always be resolved prior to the determination of a remedy. However, I believe that *Steel Co.* is no bar to the order of decisionmaking that I advocate in this Article. *Steel Co.* stands for the proposition that a case should not be dismissed as non-justiciable simply because the plaintiff may ultimately fail to prevail; rather, the Court states that if a colorable—as opposed to theoretical—jurisdictional claim can be made, the court should exercise its jurisdiction even though that jurisdictional question is ultimately resolved against the party seeking to invoke it.

<sup>202</sup> *Steel Co.*, 523 U.S. at 89 (quoting *Bell v. Hood*, 327 U.S. 678, 682-83, 685 (1946)) (emphasis added) (citations omitted).

<sup>203</sup> 412 U.S. 669 (1973).

<sup>204</sup> *Id.* at 688-89.

specific and perceptible harm that distinguished them from other citizens who had not used the natural resources that were claimed to be affected.<sup>205</sup>

Thus, a federal court, in determining whether it has jurisdiction to hear a case, begins by evaluating the plaintiff's entitlement to a remedy with something approaching a laugh test. If the plaintiff has made a credible claim that the court will have jurisdiction to hear her case, it exercises jurisdiction over that case.

A similar approach to the question of remedies in civil rights litigation would satisfy *Saucier's* Article III critics while at the same time preventing the ossification of constitutional law. Rather than fully evaluating a plaintiff's remedial claim before turning to her merits claim, as a court currently does in the habeas context,<sup>206</sup> a federal court ought simply to determine at the outset whether the plaintiff is making the sort of claim for which a federal court *might* be able to grant relief. If so, the court ought to proceed to the merits of that claim. If those merits are resolved in the plaintiff's favor, the court should then proceed to an in-depth examination of the entitlement to a remedy. If the court is ultimately unable to provide a remedy, that fact alone is insufficient to transform the decision on the merits into an advisory opinion.

### B. *The Doctrine Applied*

This is a relatively minor change in *Saucier's* mandate because the number of cases in which the unavailability of a remedy will be clear a priori is relatively small. For example, if a habeas petitioner explicitly seeks to develop a new rule through a habeas petition<sup>207</sup> or demonstrably seeks to benefit from a rule that did not exist at the time her conviction became final on appeal,<sup>208</sup> then a federal court should stop at that point and not reach the merits of her claim.<sup>209</sup> Similarly, if a criminal appellant makes a claim of

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<sup>205</sup> *Id.*

<sup>206</sup> *See, e.g.,* *Teague v. Lane*, 489 U.S. 288, 289 (1989).

<sup>207</sup> *See, e.g., id.*

<sup>208</sup> It is unclear whether the two exceptions set forth in *Teague*—the watershed rule of criminal procedure or the rule that puts certain primary behavior beyond the power of the state to regulate—survived the codification of *Teague* under the Antiterrorism and Effective Death Penalty Act (“AEDPA”). *See, e.g.,* *Gosier v. Welborn*, 175 F.3d 504, 510 (7th Cir. 1999) (“[Section] 2254(d)(1) means that only rules articulated by the Supreme Court of the United States *before* the state court rendered its decision may be applied on collateral review. Section 2254(d)(1) differs from *Teague* because the new statute closes the escape hatches in *Teague*.”).

<sup>209</sup> This Article does not endorse the Supreme Court's decision in *Teague* that new rules should be announced on habeas only under extraordinary circumstances. Rather, it presumes the correctness of the Court's remedial jurisprudence and takes issue only with the order-of-decisionmaking question. Others

error so trifling that no reasonable fact-finder could find that it had an effect on the outcome of any trial, then a federal court should not move on to the merits of the claimed constitutional violation.<sup>210</sup> Finally, if a Section 1983 plaintiff is demonstrably seeking to have a federal court overturn existing law in order to award her money damages, in which case the official defendant will be entitled to qualified immunity as a matter of law,<sup>211</sup> then the court ought not to hear the merits of her claim.<sup>212</sup>

In these cases, the court knows when it sits down to consider the merits of the case that it will not afford a remedy to the plaintiffs before it, and in these circumstances there is reason to be concerned about the framing of the issues by the parties and the quality of the constitutional ruling that results. Whether the adjudication of such a claim is considered as a violation of the ban on advisory opinions, or a failure of the plaintiff to demonstrate that she has standing to sue, Article III is likely violated when a federal court reaches the merits of the claim.

Thus, in most cases, federal courts will proceed directly to the merits of the claim, even if a remedy is not ultimately found to be available. Such instances would include: (1) a habeas petitioner who makes a colorable argument that a new rule should be applied retroactively to him under one of the exceptions to *Teague*;<sup>213</sup> (2) a criminal appellant who claims a constitutional error that might, under some conceivable circumstances, have prevented a more positive result in his case;<sup>214</sup> or (3) a civil rights plaintiff who argues that a prior decision of a relevant court should have made apparent to a public official defendant that her conduct violated a constitutional right of the plaintiff.<sup>215</sup> In each such case, it is not clear at the time the court sits down to consider the case how the remedial question will be resolved, and Article III's ban on advisory opinions is not violated by an analysis of the merits.

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have launched a vigorous attack on the remedial jurisprudence. *See generally* Liebman, *supra* note 186, at 569-74; Patchel, *supra* note 186, at 1005.

<sup>210</sup> In a previous article I discussed the California case of *People v. St. Clair*, 56 Cal. 406 (1880), in which the defendant claimed that a typo in the indictment, which produced a charge of "larceny" entitled him to a judgment of acquittal on appeal. Kamin, *supra* note 16, at 20 n.79.

<sup>211</sup> *E.g.*, *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

<sup>212</sup> *See supra* note 70. Under the Court's mootness jurisprudence, however, it is often difficult for a plaintiff to show that she is likely to be injured again. *See, e.g.*, *City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983); Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U. L. REV. 1, 5 (1984) (arguing that *Lyons* demonstrates the Court's hostility to public law litigation and is an example of manipulation of remedial doctrines in an outcome-driven manner).

<sup>213</sup> *Teague v. Lane*, 489 U.S. 288, 290 (1989) (citing *Mackey v. United States*, 401 U.S. 667, 692 (1989) (Harlan, J., concurring)). Alternatively, the petitioner may claim that the rule she seeks to benefit from is not new but was the law at the time her conviction became final. Again, it is not clear that these exceptions survive the passage of the AEDPA. *See supra* note 208.

<sup>214</sup> *See, e.g.*, *Chapman v. California*, 386 U.S. 18, 24 (1967).

<sup>215</sup> *Harlow*, 457 U.S. at 818-19.

In these matters the court may ultimately decide that the plaintiff is correct on the merits and entitled to a remedy, or that she is not correct on the merits (and hence not entitled to a remedy). But the fact that the plaintiff does not ultimately prevail on both of her arguments certainly does not render the result an advisory opinion. When the Supreme Court states, in a case such as *North Carolina v. Rice*, that “it has frequently repeated that federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them”<sup>216</sup> the word “cannot” must be taken to mean that the court knows a priori that it cannot afford a remedy to the plaintiff. It is not the fact that the status quo is ultimately unchanged, but the fact that it *cannot be changed*, that makes a case non-justiciable.

If a federal court follows this order of decisionmaking, then it will either assure itself, prior to considering the merits of the constitutional claim, that the plaintiff has at least a colorable claim to a remedy, or else it will dismiss the claim as non-justiciable. If a colorable claim to a remedy has been established, the court has every reason to consider the plaintiff’s arguments in their natural order<sup>217</sup>—the claim of harm followed by a request for a remedy. If the plaintiff prevails on the first of these but not the second, the court has no more issued an advisory opinion than it does any time a prevailing party is not entitled to the damages she seeks.

## CONCLUSION

In this Article, I have proposed a slight alteration to *Saucier*’s mandated order of decisionmaking in constitutional tort litigation—I argue that federal courts should examine the merits of a plaintiff’s case unless she has made no colorable claim to a remedy. Although crafted to address the constitutional attack on merits-first adjudication, I believe that this modification will also address many of the prudential concerns with *Saucier*’s mandate. The judges and Justices who have objected to *Saucier*’s strict order of decisionmaking invariably refer to the ease with which the remedial question can generally be resolved and the difficulty of deciding complex constitutional issues. In crafting a solution that steers merits-first adjudication well clear of Article III concerns, the solution this Article proposes should satisfy those critics. In those cases where there is not a chance that the plaintiff will be entitled to a remedy, a federal court should not evaluate the merits of her case. However, if the plaintiff has made a colorable showing of entitlement to a remedy, the court should reach the merits, providing other courts and public officials with legal interpretations to guide their future conduct.

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<sup>216</sup> *North Carolina v. Rice*, 404 U.S. 244, 246 (1971).

<sup>217</sup> *See supra* note 32 (discussing the natural order of deciding constitutional litigation issues).