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A "Thicket of Procedural Brambles:" The "Order of Battle" in Qualified Immunity and Habeas Corpus

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A "THICKET OF PROCEDURAL BRAMBLES:"[1] THE "ORDER OF BATTLE" IN QUALIFIED IMMUNITY AND HABEAS CORPUS†

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ABSTRACT

This Note is confined to qualified immunity and habeas corpus sequencing jurisprudence. Scholars have debated these "order of battle" issues, arguing for a mandatory constitutional merits analysis in every qualified immunity or habeas corpus claim, while others have written articles that support the current approaches with certain carved-out exceptions. A few scholars have discussed qualified immunity and habeas corpus together, along with other doctrines, to demonstrate alleged recent judicial activist tendencies. Others have discussed the doctrines together in the context of civil rights, arguing that the qualified immunity expansion and the introduction of the AEDPA standard has led to legal stagnation, and, as a result, diminished civil rights. This Note is the first to analyze the two doctrines together in order to argue that the Supreme Court's current approach, a case-by-case analysis, responds to inherent tensions within our dual system of government and provides the best compromise. In coming to this conclusion, this Note discusses the evolution of the two doctrines, while considering problems of federalism, separation of powers, dicta, judicial economy, and fairness. Finally, it analyzes various scholars' suggestions, reactions, and criticisms to alternative approaches the Supreme Court could impose.

INTRODUCTION

Qualified immunity and habeas corpus play important roles in the American system of government as they serve as gatekeepers for constitutional claims against state and federal officials. Both doctrines stem from a tension within government. In qualified immunity, the tension lies between the executive and the judicial branch, and, in the context of habeas corpus, between state and federal sovereigns. The doctrines require courts to compare the plaintiff's or habeas petitioner's particular set of facts to precedent and to determine whether there exists a "clearly

1. In re Troy Anthony Davis, 565 F.3d 810, 827 (11th Cir. 2009) (Barkett, J., dissenting).

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established" law or constitutional right that has been violated. Scholars have delved into each test individually, by analyzing the application of the tests,[2] effects on constitutional rights,[3] efficiencies and inefficiencies,[4] and workability.[5] This Note is confined to the parallels between the qualified immunity and habeas corpus frameworks.

The qualified immunity doctrine serves as a defense to claims against state and federal officials who are alleged to have violated constitutional rights. The doctrine balances "the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably."[6] The doctrine aims not only to protect constitutional rights, but also to provide fair notice to officials,[7] to be cost efficient,[8] and to prevent overdeterrence.[9] An adequate balance among these competing concerns should "provide government officials with the ability 'reasonably [to] anticipate when their conduct may give rise to liability for damages.'"[10] The Supreme Court has altered this balance over time by articulating

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2. *See* Daniel J. McGrady, Comment, *Whose Line Is It Anyway?: A Retrospective Study of the Supreme Court's Split Analysis of § 2254(d)(1) Since 2000*, 41 SETON HALL L. REV 1599 (2011) (arguing that many of the significant habeas decisions in the past decade have been "arbitrary" because the "conservative" and "liberal" Justices have applied the habeas standard differently, resulting in many five to four decisions).

3. *See* Lynn Adelman & Jon Deitrich, *Saying What the Law Is: How Certain Legal Doctrines Impede the Development of Constitutional Law and What Courts Can Do About It*, 2 FED. CTS. L. REV. 87, 93 (2007) (arguing that the Supreme Court's current doctrine that allows lower courts to avoid constitutional questions when deciding qualified immunity issues reduces the "content of our constitutional rights . . . to the lowest common denominator.").

4. In the qualified immunity context, Professor Chen argues that the standard created a paradoxical effect in that the qualified immunity standard was created to ease the costs of these types of litigation, but instead the doctrine has created a messy and expensive system of resolving these cases. *See* Alan K. Chen, *The Burdens of Qualified Immunity: Summary Judgment and the Role of Facts in Constitutional Tort Law*, 47 AM. U. L. REV. 1, 6–7 (1997). In the habeas context, see Thomas Healy, *The Rise of Unnecessary Constitutional Rulings*, 83 N.C. L. REV. 847 (2005) (examining the Court's broader embrace of unnecessary constitutional rulings in the context of applying the qualified immunity test) and Melissa M. Berry, *Seeking Clarity in the Federal Habeas Fog: Defining What Constitutes "Clearly Established" Law Under the Antiterrorism and Effective Death Penalty Act*, 54 CATH. U. L. REV. 747 (2005) (providing an overview of the Court's application of the AEDPA standard and what constitutes "clearly established").

5. *See* Allan Ides, *Habeas Standards of Review Under 28 U.S.C. § 2254(d)(1): A Commentary on Statutory Text and Supreme Court Precedent*, 60 WASH. & LEE L. REV 677, 680 (2003) (discussing the development of 28 U.S.C. § 2254(d)(1), finding that the cases have left us "with a mix of light and fog," and attempting to articulate a "workable way of applying [the statute] in a fashion that comports with text and precedent").

6. Pearson v. Callahan, 555 U.S. 223, 231 (2009).

7. Wood v. Strickland, 420 U.S. 308, 322 (1975) (holding that officials "must be held to a standard of conduct based . . . on knowledge of the basic, unquestioned constitutional rights of his charges. Such a standard imposes neither an unfair burden upon a person assuming a responsible public office requiring a high degree of intelligence and judgment for the proper fulfillment of its duties, nor an unwarranted burden in light of the value which civil rights have in our legal system. Any lesser standard would deny much of the promise of § 1983.").

8. Saucier v. Katz, 533 U.S. 194, 200 (2001) ("[A] ruling on [the qualified immunity issue] should be made early in the proceedings so that the costs and expenses of trial are avoided where the defense is dispositive.").

9. Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982) ("[T]here is the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.'") (citing Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949)).

10. Anderson v. Creighton, 483 U.S. 635, 646 (1987) (quoting Davis v. Scherer, 468 U.S. 183, 195

and revising the standards for the defense, but the most recent standard focuses on the clarity of the state of the relevant constitutional right at the time of the officer's actions. *Pearson v. Callahan*[11] articulated a two-part test to determine whether qualified immunity is appropriate. Lower courts must ask "whether the facts that a plaintiff has alleged or shown make out a violation of a constitutional right" and "whether the right at issue was 'clearly established' at the time of defendant's alleged misconduct."[12] If so, the official is not entitled to qualified immunity.[13] The Court, however, provided lower courts with discretion in determining the order of application of these two prongs.[14]

The habeas corpus doctrine has similarly developed from a tension between competing interests. Whether a petitioner is entitled to habeas relief—federal court review of a state court criminal conviction—is subject to the Antiterrorism and Effective Death Penalty Act[15] ("AEDPA"). AEDPA served "to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases."[16] The statute does this by preventing "retrials" and "giv[ing] effect to state convictions to the extent possible under law," while advancing "the principles of comity, finality, and federalism."[17] This habeas standard, rooted in Supreme Court decisions, evolved from strict scrutiny[18] to be more deferential to state courts, and, finally to the current standard under AEDPA, which imposes a significant hurdle for habeas petitioners to overcome. Federal courts are authorized to grant a writ of habeas corpus only if the state court decision "involved an unreasonable application[] of clearly established Federal law."[19] Under this standard, federal courts are permitted—but are not required—to determine whether the state court erred.

To balance effectively concerns that are fundamental to our judicial system, like fairness on the one hand, and efficiency and deference on the other, the qualified immunity and habeas standards must be sufficiently clear to lower courts to maintain uniformity, but must also provide flexibility in novel situations. The doctrines provide discretion to lower courts to determine their methodology: with qualified immunity, courts can determine the constitutional issue on the merits, despite the fact that immunity applies or courts can dismiss the case because the right was not clearly established enough at the time.[20] With habeas, courts can decide whether the state court erred or courts can dismiss the case because the state

(1984)); *see also Harlow*, 457 U.S. at 819 ("The public interest in deterrence of unlawful conduct and in compensation of victims remains protected by a test that focuses on the objective legal reasonableness of an official's acts.").

11. 555 U.S. 223 (2009).

12. *Id.* at 232.

13. *Id.*

14. *Id.*

15. 28 U.S.C. § 2241 (2012).

16. Woodford v. Garceau, 538 U.S. 202, 206 (2003).

17. *Id.* For a background and overview of the history of the habeas doctrine, see 2 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 32.1 (5th ed. 2005).

18. *Id.*

19. 28 U.S.C. § 2254(d)(1) (2012).

20. *See supra* notes 11–14 and accompanying text.

court's rationale did not constitute an unreasonable application of Supreme Court law.[21] This Note will consider this "order of battle" issue raised by each of the frameworks and will justify the current Supreme Court's case-by-case approaches by arguing that, while the tests permit a broad discretion in determining the order of application of the prongs, this discretionary approach is necessary within a government of separate powers and dual sovereignty. A flexible approach to these doctrines adheres to both doctrines' purposes of avoiding litigation and promoting finality, while permitting courts to rule on constitutional issues when appropriate.

I. RELEVANT STATUTORY LAW

Under 42 U.S.C. § 1983, plaintiffs can sue state officials in their private capacity for monetary damages resulting from constitutional violations.[22] To prevail on a claim, a plaintiff must prove "(1) that [he or she had been] deprived of a constitutional or federal statutory right and (2) that the person who deprived [him or her] of that right was acting under the color of state law."[23] Under *Bivens*,[24] plaintiffs can also bring these types of actions against federal officials.[25] Claims against state and federal officials, such as police officers, parole officers, social workers, schoolteachers, and governors,[26] can include "illegal searches and seizures, retaliatory discharges, cruel and unusual treatment of prisoners, and deprivations of life, liberty, or property without due process of law."[27] Courts navigate and define the scope of these substantive rights through balancing tests rather than bright line rules.[28] In deciding cases on the merits, courts weigh individual rights against the corresponding governmental interest. The qualified immunity standard comes into play at the summary judgment stage, before courts decide the merits of the constitutional issue.

Under § 2254(d) of AEDPA, a federal court can grant the writ of habeas corpus only under certain circumstances.[29] The adjudication of the claim must have either:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, *clearly established* Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts

21. *See supra* note 19 and accompanying text.

22. *See* 42 U.S.C. § 1983 (2012).

23. Gomez v. Toledo, 446 US 635, 640 (1980).

24. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 389 (1971).

25. *Id.* (holding that a constitutional violation "by a federal agent acting under color of his authority gives rise to a cause of action for damages consequent upon his [] conduct").

26. Barbara E. Armacost, *Qualified Immunity: Ignorance Excused*, 51 VAND. L. REV. 583, 618 (1998).

27. *Id.* at 617–18.

28. For examples of constitutional balancing tests, see Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 619 (1989) ("Thus, the permissibility of a particular practice 'is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.'"); Mathews v. Eldridge, 424 U.S. 319, 347 (1976) (applying the balancing test in the context of procedural due process).

29. *See* 28 U.S.C. § 2254(d) (2012).

in light of the evidence presented in the State court proceeding.[30]

This Note is confined to the way in which courts have applied the clearly established inquiry.

II. BACKGROUND

A. Qualified Immunity

The Supreme Court established the qualified immunity doctrine when it interpreted § 1983[31] to incorporate all common law immunities.[32] The Court first acknowledged the doctrine as a defense to constitutional violation damages claims in *Pierson v. Ray*,[33] when the Court recognized the common law defense of good faith.[34] Since *Ray*, the Supreme Court's qualified immunity test has shifted from a subjective inquiry to an objective inquiry, but it still relies on the same key principles.

In *Scheuer v. Rhodes*,[35] the Court determined what type of immunity state officials enjoy.[36] The Court held that, unlike judges and legislators, officers enjoy immunity *only* when they are acting in good faith and informed by reasonable belief.[37] This good faith inquiry required a case-by-case analysis of the officer's actions and included both objective and subjective elements.[38] Under this precedent, if an official truly thought he was acting within the bounds of the law and he had a reasonable belief, he would be immune from suit. Likewise, in *Wood v. Strickland*,[39] the Court held that if the official "knew or reasonably should have known that the action [he] took . . . would violate [] constitutional rights . . . or if [he] took the action with the *malicious intention* to cause a deprivation of [constitutional] rights or other injury," that official could not rely on the doctrine.[40] The Court declared that officials *should* know of "clearly established constitutional rights."[41]

Harlow v. Fitzgerald[42] expanded the qualified immunity defense by eliminating the "malicious intention" introduced in *Scheuer* and *Wood*.[43] The Supreme Court

30. Ides, *supra* note 5, at 681 (citing 28 U.S.C. § 2254) (emphasis added).

31. 42 U.S.C. § 1983 (2012). This provision was enacted as part of the Ku Klux Klan Act. Pub. L. No. 42–22, 17 Stat. 13 (1871).

32. Diana Hassel, *Living a Lie: The Cost of Qualified Immunity*, 64 MO. L. REV. 123, 125–26 (1999).

33. 386 U.S. 547 (1967) (recognizing a Fourth Amendment claim brought by black ministers against police officers who arrested them for using segregated facilities).

34. *Id.* at 557.

35. 416 U.S. 232 (1974).

36. *Id.* at 240–42.

37. *Id.* at 247–48.

38. *Id.*

39. 420 U.S. 308 (1975).

40. *Id.* at 322 (emphasis added).

41. *Id.*

42. 457 U.S. 800, 807 (1982).

43. Harlow v. Fitzgerald, 457 U.S. 800, 815–17 (1982) ("The subjective element of the good-faith

eliminated the subjective component of the test and outlined qualified immunity in objective terms.[44] The Court stated that immunity is not appropriate "if an official knew or reasonably should have known" that his action "would violate the constitutional rights of the [plaintiff]."[45] This change characterized the qualified immunity analysis as a question of law. The Court emphasized the social and economic costs of the good faith prong of the defense[46] and this change would avoid raising jury questions that could often preclude summary judgment and sidestep the doctrine's primary goal of avoiding unnecessary litigation. In stark contrast to earlier cases in which the Court had focused on fairness and overdeterrence issues, the *Harlow* majority shifted to an efficiency-based approach. In his concurrence, Justice Brennan added that immunity should not be "available whenever the plaintiff cannot prove, as a threshold matter, that a violation of his constitutional rights actually occurred."[47]

In *Siegert v. Gilley*,[48] the Court further clarified *Harlow*'s objective test by holding that the defendant must have violated a constitutional right.[49] In that case, plaintiff sued his former employer alleging that his supervisor had defamed him with the supervisor's negative response to a reference request.[50] In applying *Harlow*, the Court found that even if the allegations were accepted as true, the plaintiff did not state a claim for a violation of any constitutional right,[51] therefore the claim failed at an "analytically earlier stage of the inquiry."[52] Chief Justice Rehnquist declared that whether a right was violated is often a "necessary concomitant" to the "purely legal question" of whether the right is clearly established.[53] Seven years later, in *County of Sacramento v. Lewis*,[54] Justice Souter wrote: "the *better* approach . . . 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 would ask whether the right allegedly implicated was clearly established at the time of the events in question."[55] This approach ensured that contours of official conduct remained certain, benefitting both plaintiffs and defendants. Deciding the constitutional issue "promotes clarity in the legal standards for official conduct, to the benefit of both the officers and the general public."[56] In the wake of *Lewis*,

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defense frequently has proved incompatible with our admonition in *Butz* that insubstantial claims should not proceed to trial . . . . [B]are allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery.").

44. *Id.* at 807 (citing Butz v. Economou, 438 U.S. 478, 507–08 (1978)). "In the context of Butz' attempted balancing of competing values, it now is clear that substantial costs attend the litigation of the subjective good faith of government officials." *Id.* at 816. (internal quotations omitted) (emphasis omitted).

45. *Id.* at 814.

46. *Id.* at 807.

47. *Id.* at 821 (Brennan, J., concurring).

48. 500 U.S. 226 (1991).

49. *Id.* at 228.

50. *Id.*

51. *Id.* at 227, 231.

52. *Id.* at 227.

53. *Id.* at 232.

54. 523 U.S. 833 (1998).

55. *Id.* at 841 n.5 (emphasis added).

56. Wilson v. Layne, 526 U.S. 603, 609 (1999).

lower courts were unsure of how to interpret the Supreme Court's seemingly suggestive sequencing jurisprudence, resulting in different methodologies among circuits.[57]

In 2001, the Supreme Court addressed the sequencing of the qualified immunity test by unanimously announcing a strict two-prong approach in *Saucier v. Katz*.[58] Under this precedent, the proper approach is *first* to ask whether, "[t]aken in the light most favorable to the party asserting the injury . . . the facts alleged show the officer's conduct violated a constitutional right?"[59] If not, the inquiry ends and the case should be dismissed.[60] If the facts alleged do show a violation of a constitutional right, however, the second step is to consider whether the right was clearly established at the time of the alleged violation.[61] By mandating lower courts to ask first whether the facts show that the officer's conduct violated a constitutional right, the test *required* lower courts to resolve difficult constitutional issues before even addressing the immunity question.

In 2009, the Court reexamined *Saucier*'s two-step test in *Pearson v. Callahan*.[62] There, the Court "held that federal courts are no longer required to decide the merits of constitutional claims before determining whether a defendant is entitled to qualified immunity."[63] The case involved a § 1983 complaint against police officers who were alleged to have executed a warrantless search on the plaintiff's home that led to a conviction for the sale of methamphetamine.[64] The district court found the search to be illegal, but granted summary judgment to the officers on qualified immunity grounds because the officers could have reasonably believed that the "consent-once-removed" doctrine validated the search.[65] The Court granted certiorari and, additionally, requested that the parties brief the mandatory *Saucier* procedure.[66] In articulating the test, the Court held that lower courts must determine "whether the facts that a plaintiff has alleged or shown make out a violation of a constitutional right" and "whether the right at issue was 'clearly established' at the time of defendant's alleged misconduct."[67] The Court, however, provided lower courts with discretion in determining the order of application of the two prongs because lower courts "are in the best position to determine the order of decisionmaking that will best facilitate the fair and efficient disposition of each

57. *See* Pearson v. Ramos, 237 F.3d 881, 883 (7th Cir. 2001) ("Whether [the sequencing approach] is absolute may be doubted."); Horne v. Coughlin, 191 F.3d 244, 245–56 (2d Cir. 1999) (noting that "if courts always avoided the constitutional issue by repeatedly dismissing suits on the basis of the defendants' immunity, standards of official conduct would tend to remain uncertain, to the detriment both of officials and individuals") (internal quotations omitted) (quoting Country of Sacramento v. Lewis, 523 U.S. 833, 841 n.5 (1998).

58. 533 U.S. 194, 201 (2001).

59. *Id.* (citing Siegert v. Gilley, 500 U.S. 226, 232 (1991)).

60. *Saucier*, 533 U.S. at 201.

61. *Id.*

62. 555 U.S. 223, 232 (2009).

63. Jack M. Beermann, *Qualified Immunity and Constitutional Avoidance*, 2009 SUP. CT. REV. 139, 140 (2009).

64. Pearson v. Callahan, 555 U.S. 223, 227 (2009).

65. *Id.* at 229.

66. Beermann, *supra* note 63, at 140.

67. *Pearson*, 555 U.S. at 232.

case."[68] Since *Pearson*, the Court has decided several qualified immunity cases using both the *Saucier* approach and the discretion afforded to them in the *Pearson* analysis without clarifying its selection of one approach over the other.[69]

The discretion the Supreme Court afforded lower courts in *Pearson* has led to debates among scholars. Some scholars argue that the Supreme Court has not given lower courts a sufficient framework for applying the test, nor sufficient guidance on when to rule on the merits of a constitutional issue. For example, Professor Beermann argues that *Pearson*'s new methodology is "deeply problematic" as a standardless, unreviewable discretion[70] and argues that guidelines should replace the mandatory two-step approach. He also contends that there should be a presumption in favor of deciding cases on the merits.[71]

Other scholars argue that *any* ruling on the constitutional merits in a case in which qualified immunity is appropriate constitutes dicta, is not permitted by the Constitution, and results in an unnecessary expenditure of judicial resources. This dicta issue begs the question of whether prevailing officials are permitted to appeal the district court's ruling on the constitutional issue when they have been granted qualified immunity. This scenario arose in *Camreta v. Greene*,[72] when the winning defendant petitioned for certiorari of the circuit court's finding of a constitutional violation, even though the officer had been granted qualified immunity. The Supreme Court carved out an exception when it recognized an "exempt[ion for] one special category of cases from our usual rule against considering prevailing parties' petitions."[73] In regards to the case or controversy requirement, the Court determined that the officials possessed a sufficient Article III interest in the resolution of the issue because they encountered these types of Fourth Amendment issues on a regular basis.[74] In carving out an exception, the Court stated, "We think just such a reason places qualified immunity cases in a *special category* when it comes to this Court's review of appeals brought by winners"[75] because these types of rulings would "have a significant future effect on the conduct of public officials and the policies of the government units to which they belong."[76]

Justice Kennedy's dissent opposed this carved-out exception to the Article III prohibition against petitions by prevailing parties and argued the plaintiff had had no Article III interest in obtaining this declaratory judgment.[77] He contended that the majority "overr[ode] jurisdictional rules that are basic to the functioning of the

68. *Id.* at 241–42.

69. *See* Safford Unified School District No. 1 v. Redding, 557 U.S. 364, 377–78 (2009).

70. Beermann, *supra* note 63.

71. Beermann argues that "[a]t a minimum, courts should be required to give reasons for not doing so." *Id.* at 161.

72. 131 S. Ct. 2020 (2011).

73. *Id.* at 2033.

74. *Id.*

75. *Id.* at 2030 (emphasis added).

76. *Id.* at 2031. Ultimately, however, the Court held that this particular case was moot because respondent was almost eighteen years old and had moved away from the Ninth Circuit's jurisdiction, so the exact situation could not technically arise again. *Id.* at 2033.

77. *Id.* at 2041 (Kennedy, J., dissenting).

Court and to the necessity of avoiding advisory opinions."[78]

The history of the qualified immunity test and the move from a subjective to an objective approach, illustrates the careful balance the Supreme Court has struck between judicial economy, fairness, and deterrence. The most recent standard, outlined in *Pearson*, sets forth a two-part test in which lower courts must determine whether the facts alleged show a constitutional violation and whether that right was clearly established.[79] The Court provided lower courts with discretion in determining the order of application of these two prongs[80] leading to scholarly debates regarding uniformity, judicial overreaching, and stagnation.

B. Habeas Corpus

The habeas standard is codified in 28 U.S.C. § 2254(d), but, like the qualified immunity standard, it has roots in caselaw. In an early habeas case, *Teague v. Lane*,[81] the Court held that, with two exceptions, habeas is not available to a petitioner who relied on a "new rule" of law.[82] In that case, a black petitioner appealed the judgment of a state court jury convicting him of attempted murder.[83] The prosecutor had used all of his peremptory challenges to exclude blacks from the jury and the petitioner argued that those challenges denied him a jury that was a fair cross-section of the community.[84] After considering the constitutional claim in light of past precedent, the Court defined a "new rule" as one that "breaks new ground or imposes a new obligation on the States or the Federal Government" or one that was "not *dictated* by precedent existing at the time the defendant's conviction became final."[85] Two exceptions to this general rule provide that petitioner can rely on a new rule if that rule places the "proscription of certain kinds of primary, private conduct beyond the power of the government" or if that new rule is "implicit in the concept of ordered liberty."[86] Six years after *Teague*, Congress enacted AEDPA. Section 2254(d)(1) imposes a limitation on federal court review of a state court decision, allowing review only if the adjudication of the decision at the state level "resulted in a decision that was contrary to, or involved an unreasonable application of, *clearly established* Federal law, as determined by the Supreme Court of the United States."[87]

The Court first interpreted AEDPA's language in *Williams v. Taylor*.[88] The plurality opinion described the text of the Act as the "functional equivalent" of the

78. *Id*. at 2037.
79. Pearson v. Callahan, 555 U.S. 223, 232 (2009).
80. *Id.*
81. 489 U.S. 288 (1989).
82. *Id.* at 292–93.
83. *Id.*
84. *Id.* at 293.
85. *Id.* at 301.
86. *Id.* at 307 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937).
87. Ides, *supra* note 5, at 681 (emphasis added) (citing 28 U.S.C. § 2254 (2001)).
88. 529 U.S. 362 (2000).

"new rule" principle adopted earlier in *Teague*.[89] Under *Williams*, rules articulated by lower courts are still considered "new" for habeas purposes,[90] but a rule dictated by the Supreme Court in its holdings, rather than in dicta,[91] is an "old rule" that is clearly established within the bounds of the Act. Relevant law "may be sufficiently clear for habeas purposes even when [it is] expressed in terms of a generalized standard rather than as a bright-line rule."[92] Unless the claim at issue "breaks new ground or imposes a new obligation," it will be sufficiently clearly established.[93] The Court also found "that an *unreasonable* application of federal law is different from an *incorrect* application . . . ."[94] The writ cannot be issued "simply" because the federal court finds "the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable."[95]

Lower courts interpreted *Williams* in different ways because the Court failed to offer guidance on the sequence in which federal courts are supposed to decide whether the state court erred in its application of federal law and whether the decision was contrary to or an unreasonable application of that law. In *Lockyer v. Andrade*,[96] the Court revisited the habeas standard when the petitioner claimed that California's three-strike law violated his Eighth Amendment right against cruel and unusual punishment.[97] The Ninth Circuit had required federal habeas courts to review the state court decision de novo before applying the AEDPA standard of review.[98] The Supreme Court disagreed with this approach, stating that "AEDPA does not require a federal habeas court to adopt any one methodology in deciding the *only* question that matters under § 2254(d)(1)—whether a state court decision is contrary to, or involved an unreasonable application of, clearly established federal law."[99] The Supreme Court confined its analysis to whether AEDPA foreclosed habeas relief on petitioner's Eighth Amendment claim and did not reach the question of whether the state court erred.

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89. 489 U.S. 288 (1989) (plurality opinion). *See also* Williams v. Taylor, 529 U.S. 362, 380 (2000) ("It is perfectly clear that AEDPA codifies *Teague* to the extent that *Teague* requires federal habeas courts to deny relief that is contingent upon a rule of law not clearly established at the time the state conviction became final."). This standard was affirmed in *Penry v. Johnson*, 532 U.S. 782 (2001).

90. Critics argue that because so few cases reach the Supreme Court, this will have a stagnating effect on constitutional criminal procedure. *See* Susan Bandes, *Taking Justice to Its Logical Extreme: A Comment on* Teague v. Lane, 66 S. CAL. L. REV. 2453 (1993).

91. *Williams*, 529 U.S. at 412. The holding is not constrained to bright-line rules and narrow statements, but consists of "the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision." Lockyer v. Andrade, 538 U.S. 63, 71–72 (2003) (citations omitted).

92. *Williams*, 529 U.S. at 382.

93. *Id.* at 381 (citations omitted) (quoting *Teague*, 489 U.S. at 301).

94. *Id.* at 410 (emphasis in original).

95. *Id.* at 411. Under AEDPA, federal courts are authorized to grant a writ of habeas corpus only if the state court decision "involved an unreasonable application of clearly established Federal law." 28 U.S.C. § 2254(d)(1) (2012). Even if the federal court believes the state court applied the relevant federal law incorrectly, the federal courts must deny the petition so long as the decision was objectively reasonable. *See* Lockyer v. Andrade, 538 U.S. 63, 68 (2003).

96. 538 U.S. 63 (2003).

97. *Id.* at 68.

98. *Id.* at 71.

99. *Id.* (citing Weeks v. Angelone, 528 U.S. 225 (2000)) (emphasis added).

Lockyer makes clear that courts have discretion to decide whether the state court erred, but must *always* decide whether the decision constituted an unreasonable application of Supreme Court law. In *Carey v. Musladin*,[100] the circuit court had granted habeas relief because it found that the criminal defendant had been denied a fair trial after the victim's family arrived at court wearing buttons with the victim's picture.[101] The Supreme Court reversed, noting that although the Court had ruled on certain courtroom practices in the past pertaining to state actors, it had not ruled on the conduct of private persons in the courtroom.[102] Lower courts had split on the constitutionality of this type of conduct,[103] so the state court's determination could not constitute an unreasonable application of federal law.[104] Notably, although the Court reversed, it did not rule on the merits of the constitutional issue of private persons in the courtroom.[105]

As this sample of cases suggests, issues such as judicial economy, fairness concerns, and the potential for advisory opinions arise when courts must decide the order in which they will address the inquiries within the habeas corpus test. Judges have disagreed not only on the application of the AEDPA standard and what constitutes an unreasonable application of federal law, but also on the federal courts role in habeas review.

III. "ORDER OF BATTLE"[106]

The sequencing issues that the habeas corpus and qualified immunity analyses raise create an enormous tension within the structure of the government. The "order of battle" has been extensively debated with respect to both doctrines, but the structural principles that the two doctrines evoke have not yet been compared to one another. As discussed in Part II.A, in the qualified immunity context, the Supreme Court in *Pearson* gave lower courts discretion to determine whether it is appropriate to analyze constitutional issues, rather than requiring the constitutional inquiry as a first step as in *Saucier*.[107] Likewise, in the habeas context, in *Lockyer*, the Court recognized that lower courts are permitted to approach the analysis in the

100. 549 U.S. 70 (2006).

101. *Id.* at 72.

102. *Id.* at 70.

103. *Id.* at 71.

104. *Id.*

105. For another recent example in which a court declined to address whether the petitioner's constitutional rights were violated, see Jackson v. Litscher, 194 F. Supp. 2d 849, 865 (2002). In this case, the Seventh Circuit declined to address whether an officer's misleading statements in an attempt to induce a *Miranda* waiver violated the Fifth Amendment, and considered only whether the state court decision was "contrary to, or involved an unreasonable application of, clearly established Federal law." *Id.* (citation omitted).

106. In the qualified immunity context, scholars have termed this issue the "order of battle" dilemma. *See* James E. Pfander, Essay, *Resolving the Qualified Immunity Dilemma: Constitutional Tort Claims for Nominal Damages*, 111 COLUM. L REV. 1602, 1607 (2011). *See also* Nancy Leong, *The Saucier Qualified Immunity Experiment: An Empirical Analysis*, 36 PEPP. L. REV. 667, 668 (2009) ("*Pearson*'s holding has, if anything, intensified the debate over the proper procedural framework for addressing qualified immunity claims.").

107. Pearson v. Callahan, 555 U.S. 223, 241–42 (2009).

best way they see fit.[108] In both *Pearson* and *Lockyer*, the Court *discouraged* lower courts from unnecessarily exercising their power either to reanalyze the state court issue in habeas or to rule on the constitutional issue in qualified immunity. In other ways, however, the Court expanded lower courts' discretionary power to dismiss cases without having to address the constitutional issue. The application of the tests, specifically the ordering, can change the outcome of not only the case at hand, but can also have significant future implications on future cases and on the development of constitutional law as a whole.

In the qualified immunity context, while there may be some overlap in deciding whether a right exists and whether the right was clearly established at the time of the action, the two issues are articulated as distinct questions. And their analyses are different. In deciding whether the officer violated a plaintiff's constitutional right, courts must look to caselaw and to modes of constitutional interpretation, whereas in analyzing the "clearly established" prong, a "purely legal analysis," courts are confined to caselaw.[109] In the habeas analysis, federal courts consider whether Supreme Court precedent has created clearly established law and whether the state court decision was contrary to, or an unreasonable application of that precedent.

The sequencing decision in both cases is a judgment call, which allows courts to tailor the approach to the case at hand. Like many other areas of constitutional law, these decisions involve balancing one competing interest against the other.[110] Relevant policy concerns include the need to develop constitutional law versus efficiency and fairness issues. In deciding which approach to take in qualified immunity, many factors come into play. Courts should be hesitant to dismiss an issue on the clearly established prong without deciding the merits before considering the potential impact on future plaintiffs of a ruling on the constitutional issue, petitioners' incentives to litigate the constitutional issue, and how the set of facts fits on the spectrum of clearly established rights. With habeas, by contrast, courts have in front of them a fully developed record, one that has been reviewed several times, and should hesitate before deciding whether a lower court erred. This Part considers scholarly and judge-made arguments against the current approach and argues that the discretionary methodology in the qualified immunity and habeas corpus doctrines is optimal. This case-by-case discretion is necessary to a government of dual sovereignty and of separate powers because it provides federal courts with the option to stay their hand and dismiss a case or petition or to analyze the issue on the merits if the circumstances are appropriate.

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108. Lockyer v. Andrade, 538 U.S. 63, 71 (2003).

109. *See* Siegert v. Gilley, 500 U.S. 226, 232 (1991).

110. *See* Camreta v. Greene, 131 S. Ct. 2020, 2032 (2011) (stating that it is "sometimes beneficial to clarify the legal standards governing public officials"). The Court provided lower courts with discretion in determining the order of application of the two prongs because lower courts "are in the best position to determine the order of decisionmaking [that] will best facilitate the fair and efficient disposition of each case." *Pearson*, 555 U.S. at 241–42. Justice Kagan warned, however, that "[i]n general, courts should think hard, and then think hard again, before turning small cases into large ones" by ruling on the merits when a case could be quickly dismissed on qualified immunity grounds. *Camreta*, 131 S. Ct. at 2032.

A. Courts' Role in Qualified Immunity

When deciding qualified immunity cases, courts play a particularly significant role because the Supreme Court's guidance provides some flexibility for courts to decide constitutional issues when the facts allow or to decline to rule on the merits when there is not enough information. Courts can take one of four approaches when confronted with a qualified immunity issue. These four approaches include:

> (1) cases where the courts find the violation of a clearly established right and thus, deny qualified immunity, (2) cases where the courts find no constitutional violation and grant qualified immunity, (3) cases where the courts invoke their newly found discretion under *Pearson* to avoid reaching the "merits" prong of qualified immunity and grant qualified immunity based on the "clearly established law" prong, and (4) cases where the courts find a constitutional violation but grant qualified immunity because the law was not clearly established at the time.[111]

While *Pearson* alluded to a standard for choosing which approach to take,[112] courts still have a great amount of freedom in this arena.[113] While discretionary balancing tests are common, this type of methodological discretion is not common, especially in a system of government that is based on separation of powers.

The *Pearson* Court offered some guidance on the methodology in its articulation of the test. The Court noted that the *Saucier* sequence—first determining whether a constitutional right was violated and then asking whether that right was clearly established at the time—would be valuable when ruling with respect to "questions that do not frequently arise in cases in which a qualified immunity defense is unavailable."[114] For example, in *Pearson* the Court declined to decide the constitutional issue on the merits even though it appears that there were good reasons to do so.[115] A few months post-*Pearson*, in *Safford Unified School District No. 1 v. Redding*,[116] a plaintiff brought a Fourth Amendment claim against school officials who searched her undergarments under the reasonable belief that she had brought forbidden prescription drugs into school.[117] The Court followed the two-step *Saucier* procedure, articulating the boundaries of officials'

111. Karen M. Blum, *Selected Excerpts: Practicing Law Institute's Twenty-Seventh Annual Section 1983 Civil Rights Litigation Program: Qualified Immunity: Further Developments in the Post*-Pearson *Era*, 27 TOURO L. REV 243, 244 (2011) (providing an overview of which approach circuits have taken since *Pearson*).

112. *See supra* note 68 and accompanying text; *infra* notes 114–24 and accompanying text.

113. Beermann argues against allowing "judges to have complete discretion over whether to decide unsettled constitutional issues, with no standard governing when the judges should reach the issue, and in circumstances in which the decision will not affect the outcome of the case before the court." Beermann, *supra* note 63, at 171.

114. Pearson v. Callahan, 555 U.S. 223, 236 (2009).

115. The parties had briefed the constitutional issue, the consent-once removed doctrine did not have a clear Supreme Court decision at that point, and the issue was relatively "uncomplicated." *See* Beermann, *supra* note 63, at 168.

116. 557 U.S. 364 (2009).

117. *Id.* at 368.

duties in this context and finding a constitutional violation, and then determining that the right was not clearly established at the time.[118] The Court did not, however, explain why it reached the constitutional merits rather than simply deciding whether the right was clearly established.[119] *Camreta v. Greene*[120] provided some clarification, warning that "[i]n general, courts should think hard, and then think hard again, before turning small cases into large ones" by ruling on the merits when a case could be quickly dismissed on qualified immunity grounds.[121]

B. Federal Courts' Role in Habeas Petitions

The Supreme Court has interpreted AEDPA such that even if a state-court decision is clearly erroneous, habeas relief may not be available because the decision may still be not objectively unreasonable.[122] This standard forces federal courts to stay their hand when a state court incorrectly, but reasonably incorrectly, applies Supreme Court precedent. Federal courts, however, have sharply split on the fundamental application of the habeas test, creating uniformity issues and raising separation of powers concerns.[123]

For example, in 2007, Judge Reinhardt, sitting on the Ninth Circuit, dissented from a denial to rehear a habeas petition en banc.[124] He argued that § 2254(d) was unconstitutional *on its face* in that it violates the separation of powers doctrine.[125] He stated:

> AEDPA's demand that federal courts disregard the full corpus of constitutional jurisprudence—including both the precedents normally binding on them through *stare decisis* and the Constitution itself when the state courts got it wrong but their error was not unreasonable—and give effect to state court adjudications that, in the federal court's independent determination, violate the Constitution, makes a mockery of

118. *See id.* at 377–78.

119. Most circuits have interpreted *Pearson* to be "neutral," in that the caselaw suggests the constitutional merits prong to be optional and discretionary, and imparting discretion on lower courts to determine the correct methodology on a case-by-case basis. For an overview of the circuits' recent jurisprudence in this area, see Ted Sampsell-Jones & Jenna Yauch, *Official and Municipal Liability for Constitutional and International Torts Today: Does the Roberts Court Have an Agenda?: The Repudiation of* Saucier v. Katz *and Its Consequences in the Courts: Measuring Pearson in the Circuits*, 80 FORDHAM L. REV. 623, 625–27 (2011) (tracking which methodology courts have used) and Blum, *supra* note 111, at 243 (2011) (examining the legal landscape post-*Pearson*).

120. 131 S. Ct. 2020 (2011).

121. *Id.* at 2032.

122. *See* Williams v. Taylor, 529 U.S. 362, 376 (2000).

123. For example, Daniel McGrady analyzed the Supreme Court's decisions from 2000–2011 and found that the Court has been divided on the correct standard to apply. McGrady, *supra* note 2, at 1602. He labels the conservative Justices the "blind deference camp" and the more liberal Justices the "de novo camp" with Justices Kennedy and O'Connor to be something in between. *Id.* at 1602, 1618 ("[T]he two groups are blatantly using entirely different standards of review."). Some judges find AEDPA to be unconstitutional on its face. *See infra* note 125 and accompanying text.

124. Crater v. Galaza, 508 F.3d 1261, 1262 (9th Cir. 2007) (Reinhardt, J., dissenting).

125. *Id.*

> the careful boundaries between Congress and the courts that our Constitution's Framers believed so essential to the prevention of tyranny.[126]

Judge Barkett, sitting on the Eleventh Circuit, argued in her dissent in *In re Troy Anthony Davis*[127] that AEDPA was unconstitutional *as applied*.[128] In that case, the death row petitioner had admitted to being present during a beating of a homeless man, but insisted that one of his companions shot the man.[129] Judge Barkett argued, "AEDPA cannot possibly be applied when to do so would offend the Constitution and the fundamental concept of justice that an innocent man should not be executed."[130] In sum, her dissent argued that "[t]his case highlights the difficulties in navigating AEDPA's thicket of procedural brambles,"[131] and that because the Constitution prohibits executing individuals who are actually innocent, habeas relief must be granted to those seeking that relief in this circumstance.[132] She relied in part on *Harris v. Nelson*,[133] a case that recognized that "[t]he very nature of the [habeas] writ demands that it be administered with the *initiative and flexibility* essential to insure that miscarriages of justice within its reach are surfaced and corrected."[134]

When the case reached the Supreme Court, the divided Court granted the writ in seven lines, instructing readers to, "imagine a petitioner in [petitioner's] situation who possesses new evidence conclusively and definitively proving, beyond any scintilla of doubt, that he is an innocent man. The dissent's reasoning would allow such a petitioner to be put to death nonetheless. The Court correctly refuses to endorse such reasoning."[135] In his concurring opinion to that case, Justice Stevens stated that "[e]ven if the court finds that § 2254(d) applies in full, it is arguably unconstitutional to the extent it bars relief for a death row inmate who has established his innocence."[136] In dissent, Justice Scalia adhered strictly to the language of AEDPA when he stated that the majority was sending the Southern District of Georgia on a "fool's errand" after petitioner's evidence has been "reviewed and rejected at least three times."[137] He stated further that "[e]ven if the District Court were to be persuaded by Davis's affidavits, it would have no power to grant relief. Federal courts may order the release of convicted state prisoners only in accordance with the restrictions imposed by the Antiterrorism and Effective

126. *Id.* at 1270.

127. 565 F.3d 810 (11th Cir. 2009).

128. In re Troy Anthony Davis, 565 F.3d 810, 827 (11th Cir. 2009) (Barkett, J., dissenting).

129. *Id.* at 824 (majority opinion).

130. *Id.* at 827 (Barkett, J., dissenting).

131. *Id.*

132. *Id.*

133. 394 U.S. 286 (1969).

134. *In re* Troy Anthony Davis, 565 F.3d at 828 (Barkett, J., dissenting) (emphasis added) (citing Harris v. Nelson, 394 U.S. 286, 291 (1969)).

135. *In re* Troy Anthony Davis, 557 U.S. 952, 954 (2009).

136. *Id*. at 954 (Stevens, J., concurring).

137. *Id*. at 954, 957–58 (Scalia, J., dissenting).

Death Penalty Act of 1996."[138]

The sharply divided court in *In re Troy Anthony Davis* illustrates a fundamental disagreement about the application of the "reasonable application" prong. Justice Scalia inquired into Supreme Court precedent, which has never provided relief to a person who has had a full trial, but later persuades a habeas court that circumstances had he is "'actually' innocent."[139] Because there was no precedent on point, the state court could not have unreasonably applied clearly established law.[140] Justice Stevens responded to this dissent by lamenting that Justice Scalia would treat convincing evidence of innocence the same as a "minor procedural error."[141]

Recently, in *Lafler v. Cooper*,[142] the Court was faced with the issue of how to apply *Strickland*'s prejudice test where ineffective assistance of counsel resulted in a rejection of a plea offer and a conviction at a later trial.[143] In this case, the petitioner received a sentence three and one-half times more severe than he would have received had he taken the plea.[144] The Supreme Court granted the writ rejecting the state's argument that a fair trial should "wipe clean" a claim regarding the plea bargain process.[145] The Court took a functional approach in finding that this argument "ignores the reality that criminal justice today is for the most part a system of pleas, not a system of trials."[146] Four Justices in dissent, led by Justice Scalia, found that the Sixth Circuit violated AEDPA when it granted habeas relief and the Supreme Court did the same when it recognized "a whole new field of constitutionalized criminal procedure: plea-bargaining law."[147] Justice Scalia mentioned the economic effects of the majority's opinion, stating, "The ordinary criminal process has become too long, too expensive, and unpredictable, in no small part as a consequence of an intricate Federal Code of Criminal Procedure imposed on the States by this Court in pursuit of perfect justice."[148]

Justice Scalia's approach in *Lafler* that emphasizes "federalism, finality, and efficiency"[149] stands in stark contrast to Judges Reinhardt and Barkett's more flexible and functional approach.[150] Congress, with the aid of recent Supreme Court jurisprudence, struck a careful balance between the federal courts' duty to say what the law is and the courts' duty to refrain from interfering with a state court's

138. *Id*. at 956.

139. *Id*. at 955.

140. *Id*.

141. *Id*. at 954 (Stevens, J., concurring).

142. 132 S. Ct. 1376 (2012).

143. *Id.* at 1384.

144. *Id*. at 1386.

145. *Id*. at 1381.

146. *Id*.

147. *Id*. at 1391 (Scalia, J., dissenting).

148. *Id*.

149. *See, e.g.*, Brecht v. Abrahamson, 507 U.S. 619, 650–51 (1993) (O'Connor, J., dissenting) ("Because I am not convinced that the principles governing the exercise of our habeas powers—federalism, finality, and fairness— counsel against applying Chapman's harmless-error standard on collateral review, I would adhere to our former practice of applying it to cases on habeas and direct review alike.").

150. *See supra* notes 124–34 and accompanying text.

final decision. Despite Congress's strict articulation of this test, these cases illustrate the disagreement that judges hold regarding the congressional purpose and application of the AEDPA inquiry.[151]

C. Stagnation of the Law

With qualified immunity, the current standard provides federal courts with the option to define constitutional rights by articulating the law.[152] Many scholars have argued for a return to the *Saucier* mandatory two-step approach that asks whether the facts alleged show a constitutional violation and whether that constitutional right was clearly established at the time of the alleged violation. By demanding a decision on the merits, this two-step approach would facilitate the constant development of constitutional law in light of changing circumstances and novel factual situations.[153] Through the statute's requirement of a decision on the merits, federal judges promulgate important constitutional standards that "will become the basis for a holding that a right is clearly established"[154] in later cases. Professor Beermann argues, "[i]n some circumstances, repeated immunity findings can cause the law to stagnate."[155] Without deciding the constitutional issue on the merits, individual rights are sacrificed because "officials might repeatedly engage in the same conduct and successfully defend damages suits with qualified immunity, leaving the scope of constitutional rights undetermined."[156] When the scope is unclear, a vicious cycle occurs—officials may continually violate individual rights without repercussions. Despite these potential stagnation issues, the mandatory *Saucier* two-step test creates problems of its own. This approach was met with resistance by lower courts and was criticized by scholars as an unnecessary judicial

151. For a detailed history of congressional attempts pre-AEDPA, see Larry W. Yackle, *Explaining Habeas Corpus*, 60 N.Y.U. L. Rev. 911 (1985). For an overview of the legislative history of the Act, see McGrady, *supra* note 2, at 1605–09.

152. *See supra* note 68 and accompanying text.

153. Pfander, *supra* note 106, at 1607; John C. Jeffries, Jr., *Reversing the Order of Battle in Constitutional Torts*, 2009 SUP. CT. REV. 115, 120 (2009) (referring to the system the "degradation of constitutional rights"); Adelman & Deitrich, *supra* note 3, at 87, 96 (discussing the Supreme Court's duty to say what the law is and how a number of doctrines make it more difficult for courts to develop constitutional law). Professor Michael Wells asks "'will it make it easier for court to decide that the law is unsettled, grant qualified immunity and not get to the merits of important constitutional questions . . . . Now there is always an argument against facing them." David L. Hudson, Jr., *Fourth Amendment Ruling Could Influence First Amendment Law*, FIRST AMENDMENT CENTER ONLINE (Jan. 27, 2009), *available at* http://www.firstamendmentcenter.org/4th-amendment-ruling-could-influence-first-amendment-law. *See also* Gary S. Gildin, Iqbal *and Constitutional Torts: The Supreme Court's Legislative Agenda to Free Government from Accountability for Constitutional Deprivations*, 114 PENN ST. L. REV 1333 (2010) (arguing that the evolution of the Supreme Court's qualified immunity test and the *Twombly* and *Iqbal* standard aligns with the Court's "legislative agenda" to expand the qualified immunity doctrine and discussing how this has negatively affected civil rights).

154. Saucier v. Katz, 533 U.S. 194, 201 (2001).

155. Beermann, *supra* note 63, at 143.

156. *See id.* at 141. *But see* Leong, *supra* note 106, at 709 (arguing based on empirical studies that mandatory sequencing of *Saucier* does not better serve civil rights plaintiff as a whole because "mandatory sequencing does not correspond to any increase in the rate at which courts find for plaintiffs in the qualified immunity context").

expenditure.[157] In changing the required methodology, the Court afforded lower courts much discretion in deciding the constitutional issue as well as the clearly established issue. Discretion, however, may result in other issues, including, potentially straining judicial resources, a result the doctrine is supposed to prevent. Decisions on the merits may also be labeled "advisory opinions" if unnecessary to decide the case at hand.[158] Despite these potential issues with the afforded discretion, the discretionary approach provides an optimal compromise between the competing concerns.

Switching to the habeas context, federal courts are only required to analyze the "clearly established" barrier imposed by § 2254(d)(1). This inquiry "does not require federal courts to determine whether state court decisions are correct or incorrect."[159] Some scholars argue that as a result, constitutional issues are not addressed and the law stagnates. This issue is especially prevalent when there is a constitutional or federal law issue that has been split amongst the states or circuits. In novel circumstances, habeas petitioners may have no recourse to challenge unfair jurisdictional procedures because the clearly established inquiry confines relevant precedent to the Supreme Court. In addition, so few habeas petitions actually reach the Supreme Court for decisions on the merits that the law is not given the chance to develop.

These limitations have spurred arguments from scholars suggesting a mandatory review of lower courts' analyses. Taking this approach, courts would first ask whether the state court erred in that the conviction involved a violation of the petitioner's constitutional rights, rather than immediately considering whether the state court's ruling was contrary to "clearly established" Supreme Court precedent under § 2254(d)(1).[160] For example, in *Lockyer*, the case in which petitioner claimed that California's three-strike law violated his Eighth Amendment right, the Court, in its "clearly established" analysis, described the state of Supreme Court law in an abstract, vague manner.[161] The Court stated that only one relevant clearly established law—the gross disproportionality principle—applied to the case and the Court admitted that, despite being clearly established, it was "not a model of clarity."[162] The gross disproportionality doctrine, a discretionary inquiry, only allows reversal in "exceedingly rare" and "extreme case[s]."[163] Because the test is vague on its face, it serves as a particularly difficult constitutional issue to overcome under § 2254(d)(1)'s unreasonable application of federal law inquiry.[164]

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157. *See* Healy, *supra* note 4, at 902–03; Sam Kamin, *An Article III Defense of Merits-First Decisionmaking in Civil Rights Litigation: The Continued Viability of* Saucier v. Katz, 16 GEO. MASON L. REV 53, 59–68 (2008).

158. *See infra* Part III.D; *see also* Beermann, *supra* note 63, at 142.

159. Adelman & Deitrich, *supra* note 3.

160. Adelman & Deitrich, *supra* note 3.

161. Lockyer v. Andrade, 538 U.S. 63, 68 (2003). *See supra* notes 96–99 and accompanying text.

162. *Lockyer*, 538 U.S. at 62, 73 (citing Harmelin v. Michigan, 501 U.S. 957, 965 (1991)) ("Thus, in this case, the only relevant clearly established law amenable to [the] framework is the gross disproportionality principle, the precise contours of which are unclear, applicable only in the 'exceedingly rare' and 'extreme' case.").

163. *Id.* at 70.

164. Professor Ides argues that, in this case, in defining the contours of this right, the court relied on dicta.

Much like the cycle discussed with qualified immunity,[165] when the Court describes the law in broad terms, rather than clarifying the bounds of the law, the ambiguity is intensified and it becomes increasingly difficult for later courts to grant habeas relief in that area of the law. For example, Professor Ides argues that when the Court defined the gross disproportionality principle in this manner, "the Court [may have] eschew[ed] its duty to describe the clearly established principles that will guide its application of the federal review standards," resulting in an "abdication," rather than a mere respectful deference to the state court.[166]

Likewise, in *Wright v. Van Patten*,[167] an ineffective assistance of counsel claim, the Supreme Court vaguely described the broad Sixth Amendment right and determined that it was unclear what standard applied in the matter.[168] In this case, the petitioner produced evidence that his lawyer participated in his plea colloquy over speaker-phone.[169] The district court and the Seventh Circuit disagreed about which constitutional test, *Strickland v. Washington*[170] or *United States v. Cronic*,[171] applied to the case.[172] In its opinion, the Court took no position on which test was appropriate.[173] Because the area of law was ambiguous, the Court found that the district court could not have unreasonably applied clearly established federal law.[174] The district court's decision, therefore, was upheld not because there was no precedent, but because it was unclear which precedent applied. In scenarios like these, when the Court does not rule on the merits, the Court, in its discretion, determines that the particular case at hand did not afford an appropriate set of facts on which to decide the constitutional question. Much like the qualified immunity sequencing issue, this discretion has resulted in a dichotomy among judges. Some judges favor promoting the development of constitutional law and some judges follow the principles of constitutional avoidance.[175]

D. Unnecessary Constitutional Rulings

Since *Marbury v. Madison*,[176] federal courts have understood that it is their

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See Ides, *supra* note 5, at 734, 737 ("It will be rare indeed that a state-court decision will be either contrary to or involve an unreasonable application of amorphously described federal law.").

165. *See supra* note 158 and accompanying text.

166. Ides, *supra* note 5, at 747.

167. 552 U.S. 120 (2008).

168. *Id.* at 121.

169. *Id.*

170. 466 U.S. 688 (1984).

171. 466 U.S. 648 (1984).

172. *Wright*, 552 U.S. at 122.

173. *Id.*

174. *Id.*

175. For some examples of this dichotomy, see Beermann, *supra* note 63, at 178–79. *See also* David L. Hudson, Pearson v. Callahan *and Qualified Immunity: Impact on First Amendment Law*, 10 FIRST AMEND. L. REV. 125, 129 (2011) ("Judges have seized upon enhanced flexibility to grant qualified immunity provided by *Pearson* and impacted numerous areas [constitutional] law."). *But see* Pierre N. Leval, *Madison Lecture: Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. Rev. 1249, 1253 n.17 (2006) (arguing that judges should be hesitant to resolve complicated constitutional questions).

176. 5 U.S. 137 (1803).

duty to resolve ambiguities that arise from *cases*.[177] The Court has stated: "We ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable."[178] In a law review article in 2006, Judge Leval of the Second Circuit outlined the difference between dicta and holding. He wrote that in crafting a holding, courts will state: "A plus B plus C make out a claim (the holding)," however courts will often add that "if D were present . . . there would be no claim."[179] This "dictum" can be viewed as "narrowing the holding."[180] When a similar issue arises in a future case, and D is actually present in that case, the prior holding directs one result, when in reality, D might have a more significant effect on the case than what the prior court had even "envisioned at the time of the earlier opinion."[181] Judge Leval argues that not only is this type of overreaching prohibited by the Constitution's cases and controversies requirement, but it also likely produces bad law and increases the judicial branch's workload.[182] According to Judge Leval, courts must rule on the merits only when the issue at hand has been sufficiently argued on both sides and is ripe for review.

The adversarial process and incentives to litigate serve as policy justifications for the usual practice of avoiding constitutional questions that are unnecessary to the resolution of the particular case. Under the current framework, in qualified immunity, a civil rights plaintiff must vigorously argue that the defendant violated his or her constitutional rights and those rights were clearly established at the time of the alleged violation. Habeas petitioners, likewise, must prove a constitutional violation and show that that violation was clearly established by Supreme Court precedent at the time. Defendants are not required to argue both because they can prevail by arguing that the alleged right was not clearly established. In many cases, therefore, only petitioners and plaintiffs have a strong incentive to argue vigorously the constitutional issue.[183] Even if defendants do argue both, courts still may not be properly informed in making their decisions because of limited judicial resources and because of a potential bias in knowing the outcome of the case without having to resolve the constitutional issue.

In qualified immunity, the broad discretion afforded to district courts to define constitutional rights has the potential to raise dicta issues, because constitutional questions should only be decided if their resolution is necessary to resolving the particular case before the court. Judge Leval addressed the *Saucier* holding directly (pre-*Pearson*), criticizing *Saucier* as "mischievous," because before dismissing a

177. *Id.* at 163.

178. Doc v. United States House of Representatives, 525 U.S. 316, 343 (1999) (holding that courts must construe statutes to avoid such constitutional questions that are difficult unless construction is plainly contrary to the intention of congress); Solid Waste Agency v. United States Army Corps of Eng'rs, 531 U.S. 159, 173 (2001). For an argument that the Court has more generally embraced unnecessary constitutional rulings, see Healy, *supra* note 4, at 884 (arguing that because of docket discretion, the decline of the political question doctrine, the weakening of the mootness doctrine, and an overall less deferential approach taken to Congressional acts, that the Court has developed a different view of itself).

179. Leval, *supra* note 175, at 1253 n.17.

180. *Id.*

181. *Id.*

182. *Id.* at 1255.

183. *See* Healy, *supra* note 4, at 913.

case on qualified immunity grounds, "the court must first either gratuitously declare a new constitutional right in dictum or decide that the claimed right does not exist."[184] Likewise, Justice Breyer referred to the period in which *Saucier* controlled as the "failed *Saucier* experiment"[185] and Justice Alito has called it a "puzzling misadventure in constitutional dictum."[186] Many scholars agreed. Professor Beermann took issue with *Saucier*'s procedure as "fl[ying] in the face of the general norm against dicta and the related, even stronger norm against the unnecessary decision of constitutional issues."[187] While many of these concerns have been alleviated by the *Pearson* standard which was articulated in 2009, the standard still provides lower courts the discretion to exercise this controversial power. Recently, the Supreme Court declined to address the constitutional question in *Reichle v. Howards*,[188] a qualified immunity case. In this case, the plaintiff claimed he had been arrested because of his political speech when he made negative remarks about then-Vice President Cheney.[189] The Court held that the officials were entitled to qualified immunity because, at the time, it was not clearly established that a probable cause arrest could create a First Amendment violation.[190] Justice Thomas authored the opinion, rehashing *Pearson*'s discretional standard and stating that "[t]his approach comports with our usual reluctance to decide constitutional questions unnecessarily."[191]

The *Pearson* discretionary standard runs the risk of judicial activism, but there are sufficient safeguards in place. In qualified immunity claims and with habeas petitions, a court will always know in advance whether its decision on the constitutional issue will or will not affect the outcome of that case, and thus, can tailor the opinion accordingly. The court can proceed straight to the clearly established analysis to fulfill its duty of resolving the case[192] or the court can decide that a constitutional ruling is appropriate as well. In the habeas context, a federal court can find that the state court incorrectly interpreted the Constitution, but if the decision was not contrary to, or an unreasonable application of, clearly established

184. Leval, *supra* note 175, at 1276 & n.82. Judge Leval comically discusses a hypothetical conversation between a judge and a defendant-official's attorney under *Saucier*'s mandatory two-step framework. *Id.* If the court recognizes the right to be not sufficiently clearly established, the judge is still required to rule on the constitutional issue and he or she must ask the attorneys to brief the issue. *Id.* Defendant-official's attorney might respond, "my client couldn't care less what you decide on that point. He has no interest in it. I can't charge for writing a brief the client has no interest in. He is entitled to the dismissal no matter what you conclude about the theoretical existence of the right." *Id*. at 1278. Justice Scalia suggested curing this potential problem by allowing defendant to petition to the Supreme Court for review of the declaration of a right in dictum. *See* Bunting v. Mellon, 541 U.S. 1019, 1023, 1025 (2004) (Scalia, J., dissenting). Judge Leval, however, found it hard to believe that a defendant would appeal after he or she has won. Leval, *supra* note 175, at 1278. This precise situation occurred when the Supreme Court granted certiorari in *Camreta v. Greene*, 131 S. Ct. 2020, 2032 (2011). *See infra* notes 194–208.

185. Morse v. Frederick, 551 U.S. 393, 432 (2007) (Breyer, J. concurring in the judgment and dissenting in part).

186. Pearson v. Callahan, 555 U.S. 223, 234–35 (2009).

187. Beermann, *supra* note 63, at 151.

188. 132 S. Ct. 2088 (2012).

189. *Id.* at 2092.

190. *Id.* at 2097.

191. *Id.* at 2093.

192. Healy, *supra* note 4, at 903.

federal law, a ruling that the decision was merely incorrect is *immaterial*. The discretionary standards sufficiently account for the dicta issue so long as courts takes into account a number of factors, such as how the set of facts conform to precedent, how well the parties have briefed the issue, and whether the issue is likely to arise again in the future. Courts are prone to be sensitive to the potential for dicta not only because it is a central concept to the judiciary, but because of limited judicial resources. For example, if a defendant has qualified immunity and if the right is not clearly established, then deciding whether the right exists will add to the court's workload, especially if the circumstances of the case are not appropriate to decide the issue on the merits. In the event a court incorrectly decides an issue or proclaims an overly broad holding on the merits, future courts may distinguish the case.[193]

E. Petitions by Prevailing Parties

Camreta v. Greene, briefly mentioned above, raises another advisory opinion question in its consideration of whether a court of appeals is permitted to rule on an official's petition who has prevailed on qualified immunity grounds, but who disagrees with the constitutional determination.[194] In this case, a state child protective service worker interviewed a nine year-old child about allegations that her father sexually abused her.[195] The mother sued under § 1983 alleging that the interview constituted an unreasonable seizure.[196] The district court granted summary judgment in favor of the officials because the right to be free from an unreasonable search and seizure in this type of circumstance was not clearly established at the time.[197] Although defendant social worker was granted summary judgment, he petitioned for review on the ruling that this conduct violated the Constitution. The Ninth Circuit affirmed the district court's qualified immunity ruling, but also ruled on the merits of the constitutional claim, finding a Fourth Amendment violation.[198] The court stated that its decision to rule on the merits "provide[d] guidance to those charged with the difficult task of protecting child welfare within the confines of the [Constitution]."[199] On certiorari, the question for the Supreme Court was whether his petition violated the rule against petitions by prevailing parties.[200]

In its holding, the Supreme Court articulated an exception to the prevailing party rule, in part, as an attempt to solve the stagnation issues created by the discretionary qualified immunity standard.[201] The Court declared that the critical question under Article III in cases in which petitioner prevailed in the court below

193. Courts can use their judgment under the "clearly established" prong to distinguish prior cases.
194. Camreta v. Greene, 131 S. Ct. 2020, 2028 (2011).
195. *Id.* at 2026.
196. *Id.* at 2027.
197. *Id.*
198. *Id.* at 2031 (quoting Pearson v. Callahan, 555 U.S. 223, 242 (2009)).
199. *Id.* at 2027.
200. *Id.*
201. *Id.* at 2041 (Kennedy, J., dissenting).

is "whether the litigant retains the necessary personal stake in the appeal."[202] The Court noted that an interest in a ruling can constitute a sufficient personal stake if it has a prospective effect on that party.[203] In general, because of lacking judicial resources, the Court has "declined to consider cases at the request of a prevailing party, even when the Constitution allow[s],"[204] but in qualified immunity cases, the Court held that the nature of the doctrine "supports bending [the] usual rule to permit consideration of immunized officials' petitions."[205]

Some Justices in *Camreta*, however, characterized the majority's decision as an unconstitutional extension of the Supreme Court's jurisdiction.[206] The dissent in this case was unwilling to compromise jurisdictional requirements and conventional dictum rules to further the development of constitutional law in qualified immunity cases.[207] Justice Scalia, although agreeing with the judgment of the majority, noted in his concurrence that he might later consider "end[ing] the extraordinary practice of ruling upon constitutional questions unnecessarily when the defendant possesses qualified immunity."[208]

Shifting to the habeas context, in a pre-AEDPA case, *Teague v. Lane*,[209] Justice O'Connor directly addressed the dictum issues the habeas doctrine raises. In her plurality opinion, the threshold issue was whether the claim relied on a "new rule" of criminal procedure.[210] If so, the Court should dismiss without considering the merits of the asserted rule "because a habeas petition may not be granted on the basis of a new rule, any opinion expressed by the court on the merits of the rule would be merely advisory."[211] According to *Teague*, therefore, when a petitioner seeks habeas relief on a new principle of criminal law, lower courts are instructed to dismiss that petition without hearing the claim on the merits.

F. Alternatives to the Current Approach

While this Note has argued thus far that the current frameworks for the qualified immunity and habeas corpus doctrines serve to promote effectively judicial economy, federalism, and separation of powers principles, others find the scope of doctrines to be too narrow to protect constitutional rights.[212] For habeas petitioners and for civil rights plaintiffs, the qualified immunity and habeas standards act as a barrier to relief, shielding government officials from the

202. *Id.* at 2028 (majority opinion) (citing Deposit Guaranty Nat'l Bank v. Roper, 445 U.S. 326, 332–336 (1980)).

203. *Id.* at 2029.

204. *Id.* at 2030 (citations omitted).

205. *Id.*

206. *Id.* at 2042 (Kennedy, J., dissenting).

207. *Id.*

208. *Id.* at 2036 (Scalia, J., concurring). *See also* Country of Sacramento v. Lewis, 523 U.S. 833, 859 (1998) (Stevens, J. concurring) (stating that when a "question is both difficult and unresolved, I believe it wiser to adhere to the policy of avoiding the unnecessary adjudication of constitutional questions").

209. Teague v. Lane, 489 U.S. 288 (1989) (plurality opinion).

210. *Id.* at 299–301.

211. *Id.*; Healy, *supra* note 4, at 884.

212. *See* John H. Blume, *AEDPA: The "Hype" and the "Bite"*, 91 CORNELL L. REV. 259, 297 (2006).

consequences of their unconstitutional acts or decisions. A recent *New York Times* article notes that judges, "some of whom have ruled in favor of the death penalty many times, have complained that Congress and the Supreme Court have raised daunting barriers for petitioners to appeal their convictions."[213] Eric Freedman notes that there is increasing frustration amongst judges and that they have become less likely to adhere to "legalistic mumbo-jumbo . . . which prevents them from reaching fair results."[214]

Scholars have attempted to articulate reasonable alternative standards.[215] For death row inmates, Daniel McGrady argues for congressional revision of AEDPA such that a different habeas standard applies.[216] In capital cases, courts would review federal law claims de novo.[217] Professor Beermann argues that *Pearson*'s new methodology is "deeply problematic" because it provides lower courts with an unreviewable discretion.[218] He proposes a set of guidelines to replace the two-step approach.[219] He also contends that there should be a presumption in favor of deciding cases on the merits.[220]

Professor Pfander proposes a new doctrine, to be judicially-developed, that would encourage civil rights plaintiffs who cannot satisfy the qualified immunity standard to sue for nominal damages.[221] In order to state a claim, plaintiffs would need to disclose in the complaint the fact that he or she is only seeking nominal damages, rather than compensatory and punitive damages and litigation costs and attorney's fees.[222] Pfander compares this type of litigation to declaratory and injunctive types of relief and argues that this doctrine would encourage the initiation of more suits against low-level officials, but would not increase the level of frivolous suits.[223] He cites the Court's recent decision in *Ashcroft v. Iqbal*[224] which requires a more developed factual record at the pleading stage, as a barrier

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213. John Schwartz, *Judges' Dissents For Death Row Inmates Are Rising*, N.Y. TIMES, (August 13, 2009), *available at* http://www.nytimes.com/2009/08/14/us/14dissent. html?_r=2&; (citing Judge Reinhardt's dissent that found the act to have made "a mockery of the careful boundaries between Congress and the courts that our Constitution's framers believed so essential to the prevention of tyranny").

214. *Id.*

215. *See* Ides, *supra* note 5, at 680 (discussing the development of § 2254(d)(1) that has left us "with a mix of light and fog," and attempting to find a "workable way of applying [the statute] in a fashion that comports with text and precedent"); *see also* Leong, *supra* note 106, at 709 ("[T]he decision to decide the constitutional question should result from the thoughtful assessment of two relevant factors: whether the constitutional issue is likely to be repeated without ever becoming more susceptible to review and whether the issue is adequately presented in the particular case, taking account of the procedural posture of the case, the corresponding thoroughness of the parties' briefing of the constitutional issue, and the level of factual development.").

216. *See* McGrady, *supra* note 2.

217. *Id.*

218. Beermann, *supra* note 63.

219. *Id.*

220. Beermann argues that "[a]t a minimum, courts should be required to give reasons for not [reaching the merits of the constitutional issue]." *Id.* at 161.

221. Pfander, *supra* note 106, at 1607, 1639 (suggesting nominal damages suits as a way for plaintiffs "to secure an adjudication of constitutional claims in a world of legal novelty or uncertainty").

222. *Id.* at 1619.

223. *Id.* at 1636.

224. 556 U.S. 262 (2009).

for those meritless claims.[225] With this approach, the court could reach a decision on the merits and giv[e] content to constitutional law"[226] in murkier cases where the law is not clearly established enough to satisfy the qualified immunity threshold.[227] The difficulty with his proposal, however, is the judicial resources issue addressed above.[228] Courts may be unwilling to reach the merits on a complex issue when the plaintiff is only requesting one dollar. In addition, seeking constitutional "clarification" is not cheap, and there are not a lot of incentives to bring these claims, especially for *pro se* plaintiffs.

IV. CONCLUSION

Since *Marbury v. Madison*, the judiciary has been understood as the branch responsible for interpreting the Constitution. Through their adjudication in the qualified immunity and habeas corpus contexts, courts play a crucial role in the development of constitutional rights. Both doctrines serve as barriers for plaintiffs and state prisoners to vindicating their constitutional rights, as well as shields for government officials who violate those constitutional rights. The Court's decision in *Pearson* provided courts with discretion to decide whether to define constitutional rights, and likewise, AEDPA has limited federal courts' review of state court judgments to those that have violated clearly established Supreme Court law. While these doctrines, in a sense, impede the development of constitutional law, they serve judicial economy purposes and help to preserve federalism and separation of powers principles. The discretion results in a necessary ongoing tension between state and federal courts and between the executive branch and the judicial branch. In some cases, deciding constitutional questions is necessary to fulfilling the court's duty to resolve cases presented to it, but, deciding constitutional questions in dicta can result in serious consequences.

The discretion that both doctrines afford courts allows them to tailor their methodology to the case at hand. While this approach runs the risk of judicial activism and resulting dicta, there are sufficient safeguards in place. Courts are unlikely to pronounce overly broad rulings because of the lack of judicial resources. In addition, when courts choose to unnecessarily decide the issue on the merits, the holding can usually be distinguished in later cases.[229] If not, admittedly, overreaching can result in severe side effects on future cases.[230] These effects, however, are inherent to the judicial system and are the unavoidable results of a dual system of government.[231]

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225. *Id.*

226. Pfander, *supra* note 106, at 1608.

227. *Id.* at 1607.

228. *See supra* notes 193–194 and accompanying text.

229. In qualified immunity, in later cases, courts can distinguish precedent using the clearly established prong. In habeas, federal courts are confined to Supreme Court analysis, which serves as one uniform body of law to consider.

230. *See* Healy, *supra* note 4, at 935.

231. *Id.* at 903, 917 ("[T]o a certain extent, the announcement of legal principles broader than necessary to decide a case is an inherent aspect of our legal system."). Usually courts do not merely repeat facts of the

The current Supreme Court standards in the qualified immunity and habeas corpus doctrines best resolve the aforementioned issues of dicta and stagnation by maintaining an ongoing tension. When deciding which prong of either doctrine to decide first, courts must consider on a case-by-case basis the particular facts of the case at hand, potential stagnation and dicta issues, and judicial resources. The qualified immunity and habeas frameworks respect courts' duties to interpret the law, while conforming to the doctrines' goals of fairness, finality, federalism, and the prevention of frivolous claims.

case and announce a simple, straightforward judgment; their decisions will almost always resolve another case that is not before the court.