

2012

Qualified Immunity: Protecting All but the Plainly Incompetent (and Maybe Some of Them, Too), 45 J. Marshall L. Rev. 1023 (2012)

Susan Bendlin

Follow this and additional works at: <https://repository.jmls.edu/lawreview>

 Part of the [Constitutional Law Commons](#), [Courts Commons](#), [Litigation Commons](#), and the [State and Local Government Law Commons](#)

Recommended Citation

Susan Bendlin, Qualified Immunity: Protecting All but the Plainly Incompetent (and Maybe Some of Them, Too), 45 J. Marshall L. Rev. 1023 (2012)

<https://repository.jmls.edu/lawreview/vol45/iss4/2>

This Article is brought to you for free and open access by The John Marshall Institutional Repository. It has been accepted for inclusion in The John Marshall Law Review by an authorized administrator of The John Marshall Institutional Repository.

QUALIFIED IMMUNITY: PROTECTING “ALL BUT THE PLAINLY INCOMPETENT” (AND MAYBE SOME OF THEM, TOO)

SUSAN BENDLIN*

Qualified immunity ‘gives government officials breathing room to make reasonable but mistaken judgments,’ and ‘protects all but the plainly incompetent or those who knowingly violate the law.’¹

I. INTRODUCTION

Public officials can be more certain than ever before that qualified immunity will shield them from suits for money damages even if their actions violate the constitutional rights of another. In the October 2011 term, the Supreme Court of the United States granted qualified immunity to government officials in four significant cases and denied it to none.² In all four cases, the Court overturned an appellate court’s denial of qualified immunity,³ thereby signaling a broad and generous application of the protective doctrine to those “who carr[y] out the work of the government.”⁴ Additionally, the Supreme Court denied petitions for writs of certiorari in thirty-seven other cases involving qualified immunity,⁵ letting stand twenty-eight instances where

* The author, an Assistant Professor at Barry University School of Law, has served as Dean of Students at three law schools: Emory, Duke, and Barry. She wishes to thank her research assistants, Rihana Quashie (JD Candidate, 2014) and Amy German (JD Candidate, 2013).

1. *Messerschmidt v. Millender*, 132 S. Ct. 1235, 1244-45 (2012) (quoting *Asheroft v. al-Kidd*, 131 S. Ct. 2074, 2085 (2011)).

2. *Filarsky v. Delia*, 132 S. Ct. 1657, 1668 (2012); *Messerschmidt*, 132 S. Ct. at 1250-51; *Ryburn v. Huff*, 132 S. Ct. 987, 990-92 (2012) (per curiam); *Reichle v. Howards*, 132 S. Ct. 2088, 2093 (2012).

3. *Filarsky*, 132 S. Ct. at 1668; *Messerschmidt*, 132 S. Ct. at 1250-51; *Ryburn*, 132 S. Ct. at 990-92; *Reichle*, 132 S. Ct. at 2093.

4. *Filarsky*, 132 S. Ct. at 1665 (referring to the shield of qualified immunity protecting “those who carr[y] out the work of the government”).

5. *Sharp v. Johnson*, No. 11-1357, 2012 WL 1657210 (U.S. June 25, 2012) (mem.), *denying cert. to* 669 F.3d 144 (3d Cir. 2012); *Suffolk Cnty., N.Y. v. Field Day, LLC*, 132 S. Ct. 2749 (2012) (mem.), *denying cert. to* 463 F.3d 167 (2d Cir. 2006); *Morgan v. Swanson*, 132 S. Ct. 2740 (2012) (mem.), *denying cert. to* 659 F.3d 359 (5th Cir. 2011); *Swanson v. Morgan*, 132 S. Ct. 2740 (2012) (mem.), *denying cert. to* 659 F.3d 359 (5th Cir. 2011); *Estate of Henson v. Krajca*, 132 S. Ct. 2742 (2012) (mem.), *denying cert. to* 440 Fed. Appx. 341 (5th Cir. 2011); *Lebron v. Rumsfeld*, 132 S. Ct. 2751 (2012) (mem.), *denying cert. to* 670 F.3d 540 (4th Cir. 2012); *Rockwell v. Brown*, 132 S. Ct. 2433 (2012)

the appellate courts granted qualified immunity.⁶ In only ten cases did the Court leave undisturbed a denial of qualified immunity.⁷

(mem.), *denying cert. to* 664 F.3d 985 (5th Cir. 2011); *Daman v. Brooks*, 132 S. Ct. 2681 (2012) (mem.), *denying cert. to* 661 F.3d 433 (9th Cir. 2011); *Agarano v. Mattos*, 132 S. Ct. 2682 (2012) (mem.), *denying cert. to* 661 F.3d 433 (9th Cir. 2011); *Brooks v. Daman*, 132 S. Ct. 2682 (2012) (mem.), *denying cert. to* 661 F.3d 433 (9th Cir. 2011); *Mattos v. Agarano*, 132 S. Ct. 2684 (2012) (mem.), *denying cert. to* 661 F.3d 433 (9th Cir. 2011); *Lafond v. Ammons*, 132 S. Ct. 2379 (2012) (mem.), *denying cert. to* 648 F.3d 1020 (9th Cir. 2011); *Cilman v. Reeves*, 132 S. Ct. 2385 (2012) (mem.), *denying cert. to* 452 Fed. Appx. 263 (4th Cir. 2011); *Rodriguez v. City of Cleveland, Ohio*, 132 S. Ct. 2380 (2012) (mem.), *denying cert. to* 439 Fed. Appx. 433 (6th Cir. 2011); *Gardner v. Chism*, 132 S. Ct. 1916 (2012) (mem.), *denying cert. to* 661 F.3d 380 (9th Cir. 2011); *Moore v. Perkins*, 132 S. Ct. 1861 (2012) (mem.), *denying cert. to* 450 Fed. Appx. 341 (5th Cir. 2011); *Loudermilk v. Danner*, 132 S. Ct. 1797 (2012) (mem.), *denying cert. to* 449 Fed. Appx. 693 (9th Cir. 2011); *Moore v. Guerrero*, 132 S. Ct. 1793 (2012) (mem.), *denying cert. to* 442 Fed. Appx. 57 (4th Cir. 2011); *Cnty. of L.A., Cal. v. Ass'n for L.A. Deputy Sheriffs*, 132 S. Ct. 1797 (2012) (mem.), *denying cert. to* 648 F.3d 986 (9th Cir. 2011); *Johnson v. Poway Unified Sch. Dist.*, 132 S. Ct. 1807 (2012) (mem.), *denying cert. to* 658 F.3d 954 (9th Cir. 2011); *N. Las Vegas Police Dept. v. Conatser*, 132 S. Ct. 1740 (2012) (mem.), *denying cert. to* 445 Fed. Appx. 932 (9th Cir. 2011); *Makas v. Miraglia*, 132 S. Ct. 1769 (2012) (mem.), *denying cert. to* 435 Fed. Appx. 51 (2d Cir. 2011); *Norris v. Cal. Coastal Comm'n*, 132 S. Ct. 1742 (2012) (mem.), *denying cert. to* 2011 WL 1793278 (Cal. Ct. App. May 11, 2011); *Signature Pharm., Inc. v. Wright*, 132 S. Ct. 1714 (2012) (mem.), *denying cert. to* 438 Fed. Appx. 741 (11th Cir. 2011); *Coscia v. Town of Pembroke, Mass.*, 132 S. Ct. 1558 (2012) (mem.), *denying cert. to* 659 F.3d 37 (1st Cir. 2011); *Diana v. Oliphant*, 132 S. Ct. 1557 (2012) (mem.), *denying cert. to* 441 Fed. Appx. 76 (3d Cir. 2011); *Sandel v. Williams*, 132 S. Ct. 1558 (2012) (mem.), *denying cert. to* 433 Fed. Appx. 353 (6th Cir. 2011); *Williams v. Sandel*, 132 S. Ct. 1622 (2012) (mem.), *denying cert. to* 433 Fed. Appx. 353 (6th Cir. 2011); *C.F. v. Corbett*, 132 S. Ct. 1566 (2012) (mem.), *denying cert. to* 654 F.3d 975 (9th Cir. 2011); *Troyanos v. Coats*, 132 S. Ct. 1560 (2012) (mem.), *denying cert. to* 372 Fed. Appx. 932 (11th Cir. 2010); *Susko v. City of Weirton, W. Va.*, 132 S. Ct. 1145 (2012) (mem.), *denying cert. to* 443 Fed. Appx. 805 (4th Cir. 2011); *Alvis v. Espinosa*, 132 S. Ct. 1089 (2012) (mem.), *denying cert. to* 598 F.3d 528 (9th Cir. 2010); *Noriega v. Torres*, 132 S. Ct. 1032 (2012) (mem.), *denying cert. to* 648 F.3d 1119 (9th Cir. 2011); *Purnell v. Henry*, 132 S. Ct. 781 (2011) (mem.), *denying cert. to* 652 F.3d 524 (4th Cir. 2011); *Hayden v. Green*, 132 S. Ct. 543 (2011) (mem.), *denying cert. to* 640 F.3d 150 (6th Cir. 2011); *Castle v. Thompson*, 132 S. Ct. 251 (2011) (mem.), *denying cert. to* 631 F.3d 1194 (11th Cir. 2011); *Lillo v. Bruhn*, 132 S. Ct. 244 (2011) (mem.), *denying cert. to* 413 Fed. Appx. 161 (11th Cir. 2011).

6. *Sharp*, 2012 WL 1657210; *Morgan*, 132 S. Ct. 2740; *Swanson*, 132 S. Ct. 2740; *Estate of Henson*, 132 S. Ct. 2742; *Lebron*, 132 S. Ct. 2751; *Rockwell*, 132 S. Ct. 2433; *Daman*, 132 S. Ct. 2681; *Agarano*, 132 S. Ct. 2682; *Brooks*, 132 S. Ct. 2682; *Mattos*, 132 S. Ct. 2684; *Lafond*, 132 S. Ct. 2379; *Cilman*, 132 S. Ct. 2385; *Rodriguez*, 132 S. Ct. 2380; *Moore*, 132 S. Ct. 1861; *Loudermilk*, 132 S. Ct. 1797; *Cnty. of L.A.*, 132 S. Ct. 1797; *Makas*, 132 S. Ct. 1769; *Norris*, 132 S. Ct. 1742; *Signature Pharm.*, 132 S. Ct. 1714; *Diana*, 132 S. Ct. 1557; *Sandel*, 132 S. Ct. 1558; *Williams*, 132 S. Ct. 1622; *Corbett*, 132 S. Ct. 1566; *Troyanos*, 132 S. Ct. 1560; *Susko*, 132 S. Ct. 1145; *Hayden*, 132 S. Ct. 543; *Castle*, 132 S. Ct. 251; *Lillo*, 132 S. Ct. 244.

7. *Suffolk Cnty., N.Y.*, 132 S. Ct. 2749; *Lafond*, 132 S. Ct. 2379; *Gardner*,

There was a split in one case where the court of appeals granted qualified immunity to one defendant and denied it to the other.⁸ In that case, the defendants submitted a petition for certiorari, which the Supreme Court denied, letting stand the appellate court's decision to grant qualified immunity to one defendant and siding with the denial of qualified immunity to the other defendant.⁹

The doctrine of qualified immunity shields state officials from individual liability for violations of constitutional rights if the test for immunity is met.¹⁰ For many years, the test involved two inquiries: (1) whether the facts show that the actions of the public official violated a constitutional right, and (2) whether that right was clearly established at the time of the official's alleged misconduct.¹¹ In 2009, the Supreme Court held that courts may address these two questions in either order ending an eight-year period during which it was mandatory to analyze the two inquiries in sequential order.¹² As a result, many courts (including the Supreme Court) are now avoiding the first question entirely.¹³

The Supreme Court's position is that government officials should be able to count on the protection afforded by qualified immunity.¹⁴ Chief Justice John Roberts recently wrote that "[a]n uncertain immunity is little better than no immunity at all."¹⁵

There are two ways of attaining more certainty. One is for the Supreme Court to issue opinions that address and clarify the law on confusing constitutional questions.¹⁶ If the law were clearer, state officials would have better guidance about what they can legally do and they would be less likely to violate rights in the process. Another is by simply granting qualified immunity in every case except the most egregious instances of incompetent conduct

132 S. Ct. 1916; *Moore*, 132 S. Ct. 1793; *Johnson*, 132 S. Ct. 1807; *N. Las Vegas Police Dept.*, 132 S. Ct. 1740; *Coscia*, 32 S. Ct. 1558; *Alvis*, 132 S. Ct. 1089; *Noriega*, 132 S. Ct. 1032; *Purnell*, 132 S. Ct. 781.

8. *Lafond*, 132 S. Ct. 2379.

9. *Id.*

10. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (holding 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").

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

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

13. See *infra* note 45 and accompanying text.

14. See *Filarsky*, 132 S. Ct. at 1665-66 (demonstrating the importance of qualified immunity).

15. *Id.* at 1666.

16. An example would be whether the *Tinker* test allowing public schools to regulate students' on-campus speech should apply to off-campus Internet speech that disrupts the campus. See generally *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (applying interference test to determine whether in-school speech was constitutionally protected).

by state officials. The latter approach is the one currently taken by the Supreme Court.

“Qualified immunity ‘gives government officials breathing room to make reasonable but mistaken judgments,’ and ‘protects all but the plainly incompetent or those who knowingly violate the law.’”¹⁷ This Article does not contend that any specific state officials are plainly incompetent, nor is it fair to say that qualified immunity was wrongly granted in any of the cases decided by the Supreme Court during this term. On the contrary, government workers should be shielded from individual liability when they perform their jobs reasonably and competently. The real concern, however, is that the test is evolving to the point where almost every governmental actor will be shielded from individual liability by the doctrine of qualified immunity. Troublesome aspects of the Supreme Court’s current approach include (1) the failure to clarify important constitutional questions, and (2) the blurring of the distinction between absolute and qualified immunity for all practical purposes by assuring state officials that they can be certain of the shield from liability.

This Article focuses narrowly on the Supreme Court’s most recent qualified immunity decisions in which state officials are shielded from suit even without any determination as to whether their actions violated citizens’ constitutional rights. Part II of this Article discusses how the qualified immunity test has recently changed. Part III summarizes the newest Supreme Court decisions on qualified immunity. Part IV addresses some problematic aspects of the current approach.

II. THE TWO-PRONGED TEST FOR QUALIFIED IMMUNITY AND HOW THE TEST HAS EVOLVED

Most government officials—in their individual capacities—are immune from liability for money damages for their official actions.¹⁸ Some, based on the importance of their functions, are entitled to absolute immunity when they act within the scope of their authority.¹⁹ Examples include legislators, judges, “prosecutors in their role as advocates,” and “witnesses giving testimony at trial.”²⁰ Other state officials whose functions are less vital are not protected by absolute immunity, but will be granted

17. *Messerschmidt*, 132 S. Ct. at 1244-45 (quoting *Ashcroft*, 131 S. Ct. at 2085).

18. *Harlow*, 457 U.S. at 818; *see also* D.F. ex rel. Farnan v. Capistrano Unified Sch. Dist., 654 F.3d 975 (9th Cir. 2011) (finding a teacher was protected by qualified immunity).

19. *See* *Rehberg v. Paulk*, 132 S. Ct. 1497, 1503 (2012) (stating that the Court takes what has been termed a “functional approach” and citing *Forrester v. White*, 484 U.S. 219, 224 (1988)).

20. *Id.* (internal citations omitted).

qualified immunity to shield them from individual liability in certain situations.²¹ These include “the chief executive officer of a State,” “the senior and subordinate officers of a State’s National Guard,” “the president of a state university,” police officers, and public school officials.²²

A. *The Two-Pronged Test for Qualified Immunity*

The test for qualified immunity as announced in *Saucier v. Katz*²³ was (1) whether the state official’s actions violated a constitutional right, and (2) whether that right was clearly established at the time of the official’s alleged misconduct.²⁴ In *Saucier*, the Supreme Court held that the first inquiry had to be addressed first.²⁵ However, in 2009, the Court in *Pearson v. Callahan*²⁶ abolished mandatory sequencing and held that courts may address the two prongs of the test in either order.²⁷

While acknowledging that a positive aspect of the *Saucier* protocol was that “the two-step procedure promotes the development of constitutional precedent,”²⁸ the Supreme Court also stated that, on the negative side, it “sometimes results in a substantial expenditure of scarce judicial resources on difficult questions that have no effect on the outcome of the case.”²⁹ The *Pearson* Court concluded that federal courts “should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand.”³⁰

To support its abandonment of the sequencing requirement, the Supreme Court in *Pearson* described several situations where skipping the first step of the qualified immunity analysis might be desirable.³¹ These situations include: (1) “cases in which it is plain that a constitutional right is not clearly established but far from obvious whether in fact there is such a right;”³² (2) cases where parties must endure “the costs of litigating constitutional

21. *See id.* (listing examples of officials who will only be protected by qualified immunity in certain situations).

22. *Id.* (internal citations omitted).

23. *Saucier*, 533 U.S. 194.

24. *Id.* at 200.

25. *Id.* at 201. The “threshold” is, “[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the officer’s conduct violated a constitutional right?” *Id.* If not, the inquiry ends. *Id.* If so, then “the next, sequential step is to ask whether the right was clearly established.” *Id.*

26. *Pearson*, 555 U.S. 223.

27. *Id.* at 236.

28. *Id.*

29. *Id.* at 236-37.

30. *Id.* at 236.

31. *Id.* at 237-39.

32. *Id.* at 237.

questions and delays attributable to resolving them—when the suit otherwise could be disposed of more readily;³³ (3) “cases in which the constitutional question is so factbound that the decision provides little guidance for future cases;”³⁴ (4) cases where “it appears that the question will soon be decided by a higher court;”³⁵ (5) “cases in which resolution of the constitutional question requires clarification of an ambiguous state statute . . . or “depends on a federal court’s uncertain assumptions about state law;”³⁶ (6) cases where “qualified immunity is asserted at the pleading stage” and “the precise factual basis for the plaintiff’s claim or claims may be hard to identify;”³⁷ and (7) cases where “the first step of the *Saucier* procedure may create a risk of bad decisionmaking,” such as when “the briefing of constitutional questions is woefully inadequate.”³⁸

An important concern was that “[a]dherence to *Saucier*’s two-step protocol departs from the general rule of constitutional avoidance and runs counter to the ‘older, wiser judicial counsel not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.’”³⁹ One commentator criticized the “unnecessary [c]onstitutional rulings” resulting from *Saucier*’s sequencing requirement, but acknowledged that “[t]he most prominent justification for the Court’s approach is that it ensures the continued evolution of constitutional rights.”⁴⁰ He added, “[a]lthough this is a powerful justification for unnecessary constitutional rulings, it overlooks an important consideration. When a court reaches out to decide the constitutional issue, it will not necessarily rule that the right exists.”⁴¹

Even if the Supreme Court were to determine that no constitutional right existed in a given situation, that decision clarifies the law. Such clarity is beneficial, as was observed

33. *Id.*

34. *Id.*

35. *Id.* at 238.

36. *Id.* at 238 (quoting *Egolf v. Witmer*, 526 F.3d 104, 110 (3d Cir. 2008)).

37. *Id.* at 238-39.

38. *Id.* at 239.

39. *Id.* at 241 (quoting *Scott v. Harris*, 550 U.S. 372, 388 (2007) (Breyer, J., concurring)).

40. Thomas Healy, *The Rise of Unnecessary Constitutional Rulings*, 83 N.C. L. REV. 847, 857 (2005) (stating that “[b]y reaching constitutional issues even in cases where a non-constitutional issue is dispositive, courts are able to articulate new constitutional rights that will benefit later litigants. This is especially important in areas such as qualified immunity and habeas corpus, where relief can be granted only if the right has been clearly established”). *Id.* The author’s view, however, was that unnecessary constitutional decisions are unwarranted and do not demonstrably advance individual rights because the Supreme Court often rules against plaintiffs and finds that there was no constitutional right at issue. *Id.*

41. *Id.*

eloquently in earlier Supreme Court opinions. For example, a decade earlier in *Siegert v. Gilley*,⁴² the Supreme Court made the seemingly inherently logical statement that “[a] necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is ‘clearly established’ at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all.”⁴³ This same point was reemphasized in 2001 when the Court stated that “[t]he 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.”⁴⁴

After *Pearson*, many courts reserved the ability to jump straight into an analysis of the second inquiry,⁴⁵ that is, whether the constitutional right in question was clearly established at the time of the official’s action. Although *Pearson* did not rule that courts could entirely disregard the first prong, that is what has occurred even at the Supreme Court level.⁴⁶

Because the qualified immunity test has been applied differently post-*Pearson*, the old two-pronged definition seems no longer relevant even though it has not been officially abandoned. The current test focuses on the second prong. There appear to be two aspects of the analysis as to whether the right was clearly established: (1) at the time of the action, was the law clearly established based on precedent from the Supreme Court or other binding authority? And (2) under the circumstances, would a reasonable, competent official have known that his actions were illegal?⁴⁷

B. A Previous Empirical Study of Qualified Immunity Decisions

The above-mentioned emphasis on the second prong—whether the right was clearly established—is not surprising when one examines the history of qualified immunity analysis. In an extensive empirical study of qualified immunity, Greg Sobolski and Matt Steinberg analyzed 741 appellate qualified immunity

42. *Siegert v. Gilley*, 500 U.S. 226 (1991).

43. *Id.* at 232.

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

45. *See, e.g.*, *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2080 (2011) (stating that “courts have discretion to decide which of the two prongs of qualified-immunity analysis to tackle first”); *Millender v. Cnty. of L.A.*, 620 F.3d 1016, 1024 (9th Cir. 2010) (en banc), *rev’d on other grounds by Messerschmidt*, 132 S. Ct. 1235.

46. *See, e.g.*, *Reichle*, 132 S. Ct. at 2093.

47. *Messerschmidt*, 132 S. Ct. at 1245; *see also Pearson*, 555 U.S. at 239 (emphasizing that “qualified immunity protects government officials ‘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’” (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982))).

cases from 1976 to 2008.⁴⁸ Only a few other empirical studies have been done, and those involved much smaller samples.⁴⁹ One unsurprising consensus in the studies is that when courts address the two prongs in sequential order, there are fewer cases where the constitutional question is skipped.⁵⁰

The Sobolski-Steinberg study divided the qualified immunity jurisprudence into four time periods.⁵¹ Those time periods are marked by a shift in the Supreme Court's approach to the two-pronged test and whether it was mandatory to address the first prong (whether a constitutional violation occurred) before turning to the second prong (whether the constitutional right was clearly established at the time the action was taken).⁵² Sobolski and Steinberg referred to this approach as "sequencing."⁵³

The four time frames are: (1) from *Pierson v. Ray*⁵⁴ in 1967 to *Siegert* in 1991 (described as a period where courts were free to address the questions in either order without guidance from the Supreme Court);⁵⁵ (2) from *Siegert* to *Saucier* in 2001 (described as a period of confusion among courts and scholars as to whether it was mandatory to address the constitutional right before

48. Greg Sobolski & Matt Steinberg, Note, *An Empirical Analysis of Section 1983 Qualified Immunity Actions and Implications of Pearson v. Callahan*, 62 STAN. L. REV. 523, 525 (2010).

49. See, e.g., Healy, *supra* note 40, at 857 (analyzing two years of case law); Nancy Leong, *The Saucier Qualified Immunity Experiment: An Empirical Analysis*, 36 PEPP. L. REV. 667, 670 (2009) (analyzing six years of case law); Paul W. Hughes, *Not a Failed Experiment: Wilson-Saucier Sequencing and the Articulation of Constitutional Rights*, 80 U. COLO. L. REV. 401, 404 (2009) (analyzing case law from three general time periods).

50. Sobolski & Steinberg, *supra* note 48, at 526 (citing Hughes, *supra* note 49 and Leong, *supra* note 49). The empirical study also revealed that even though courts that followed the *Saucier* sequencing found more claims of constitutional violations, the percentage of plaintiffs who ultimately recovered damages decreased after *Saucier*. *Id.* at 527. Courts more frequently answered "yes" to the question of whether a constitutional violation occurred but more often said "no" as to whether that right was clearly established at the time of the action. *Id.* at 549 (stating that "[p]re-Saucier, 83% (114 of 136) of rights-affirming holding were followed by denials of qualified immunity . . . [but] [p]ost-Saucier, 72% of (123 of 170) of rights-affirming holdings were attached to denials of qualified immunity"). There was, however, an increase from 17% to 28% in grants of qualified immunity in the same time periods, showing a statistically significant increase in granting protection from suit to government officials. *Id.*

51. *Id.* at 528; see also Hughes, *supra* note 49, at 404 (dividing the cases into only three time periods: "(1) the period prior to the Supreme Court's development of the sequencing doctrine, (2) the period when sequencing was advisable but not considered mandatory, and (3) the [then-]present, post-Wilson-Saucier period where sequencing is mandatory").

52. Sobolski & Steinberg, *supra* note 48, at 528.

53. *Id.*

54. *Pierson v. Ray*, 386 U.S. 547 (1967).

55. Sobolski & Steinberg, *supra* note 48, at 530.

analyzing whether it was clearly established at the time);⁵⁶ (3) from *Saucier* to *Pearson* in 2009 (described as a period of explicitly mandated sequencing);⁵⁷ and (4) Post-*Pearson* (described as a period where sequencing is discretionary but encouraged).⁵⁸ This Article does not re-address the shift that occurred in each time period. The purpose of mentioning the four periods is to acknowledge the significant swings in the Supreme Court's past qualified immunity analysis.

Referring to the first prong of the test as “the constitutional question,” Sobolski and Steinberg observed that more courts declined to analyze the first prong during time periods when the Supreme Court had not clearly mandated that the two questions be addressed in sequence.⁵⁹ Although one study indicated that pre-*Saucier*, courts were free to exercise discretion,⁶⁰ the Sobolski-Steinberg empirical study determined that some appellate courts already regarded sequencing as mandatory even before the *Saucier* Court's pronouncement.⁶¹ *Pearson* ended all speculation by unequivocally allowing courts to exercise discretion in sequencing.⁶²

One of the study's observations about past cases is equally true now in light of the Supreme Court's most recent decisions: that there is less clarification of constitutional rights when courts are free to skip the first prong in the qualified immunity test.⁶³ The study's authors indicated that the post-*Pearson* era would be an ideal time to study the result of the abandonment of strict sequencing,⁶⁴ and this Article takes a look at the newest cases.

III. RECENT SUPREME COURT DECISIONS ALL GRANTED QUALIFIED IMMUNITY

The Supreme Court issued decisions in four qualified immunity cases in the October 2011 term. Those cases are summarized here.

A. *Ryburn v. Huff* (Decided Jan. 23, 2012)

The Supreme Court reversed the Ninth Circuit's denial of qualified immunity to two police officers in *Ryburn v. Huff*,⁶⁵

56. *Id.* at 530-31.

57. *Id.* at 531-32.

58. *Id.* at 528-29.

59. *Id.* at 525.

60. Hughes, *supra* note 49, at 412-13; *see also* Sobolski & Steinberg, *supra* note 48, at 530 (stating that “prior to *Saucier* sequencing was not mandatory”).

61. Sobolski & Steinberg, *supra* note 48, at 556.

62. *Pearson*, 555 U.S. 223; Sobolski & Steinberg, *supra* note 48, at 556.

63. Sobolski & Steinberg, *supra* note 48, at 556.

64. *Id.* at 527.

65. *Ryburn*, 132 S. Ct. 987.

declaring that the officers' actions were reasonable.⁶⁶ The case involved Sergeant Ryburn, Officer Zepeda and two other Burbank police officers who went to the home of Vincent Huff, a high school student who had reportedly threatened to "shoot up" the school after being bullied.⁶⁷ Based on their training on school violence, the officers intended to interview young Huff, so they knocked several times on the front door of his family's house.⁶⁸ When no one answered, Ryburn called the home telephone, but the call went unanswered.⁶⁹ He next called Mrs. Huff's cell phone, and when she answered, he asked where Vincent was, to which she replied that he was in the house with her.⁷⁰ When told that he and other officers wanted to speak with her outside, Mrs. Huff hung up.⁷¹ Shortly thereafter, the mother and son appeared on the front steps but, without asking why they were there, Mrs. Huff refused to allow the officers to go inside and interview Vincent.⁷² When Ryburn asked if there were any guns in the house, Mrs. Huff immediately turned and ran back into the house.⁷³ Suspicious about her behavior and claiming that he was scared because he had seen too many officers killed, Ryburn followed her into the house.⁷⁴ Zepeda immediately followed because of "officer safety" concerns.⁷⁵ The officers stood in the living room and when Mr. Huff appeared they interviewed him and his son for five or ten minutes, but conducted no search.⁷⁶ Concluding that the rumors of threatened violence were unfounded, the officers reported their determination to the school.⁷⁷

The Huffs sued the police officers under 42 U.S.C. § 1983 for violation of their Fourth Amendment rights.⁷⁸ After a two-day bench trial, the district court concluded that the officers were entitled to qualified immunity and entered judgment in their favor.⁷⁹ The Ninth Circuit reversed as to Ryburn and Zepeda (the two who knew there was no consent to enter), concluding that although police officers are allowed to enter a home if they reasonably believe that it is necessary to protect themselves or

66. *Id.* at 992.

67. *Id.* at 988.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 988-89.

73. *Id.* at 989.

74. *Id.*

75. *Id.* (noting also that two other officers entered, but they had not heard the verbal exchange and assumed that consent to enter was granted).

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

others from harm, these two acted unreasonably and should not be shielded by qualified immunity.⁸⁰ Dissenting, Judge Rawlinson of the Ninth Circuit wrote that the majority had relied on a sanitized version of the facts, and that an officer in that situation “could have reasonably believed that he was justified in making a warrantless entry.”⁸¹

The Supreme Court held:

[R]easonable officers in petitioners’ position could have come to the conclusion that the Fourth Amendment permitted them to enter the Huff residence if there was an objectively reasonable basis for fearing that violence was imminent. And a reasonable officer could have come to such a conclusion based on the facts as found by the District Court.⁸²

Rather than looking at the situation from the viewpoint of the Huffs (the aggrieved parties), the Court reviewed the scenario in light of the officers’ perceptions.⁸³ Emphasizing that “judges should be cautious about second-guessing a police officer’s assessment, made on the scene,” the Court sided with the officers and granted them qualified immunity.⁸⁴

B. Messerschmidt v. Millender (Decided Feb. 22, 2012)

The Supreme Court of the United States held in *Messerschmidt v. Millender*⁸⁵ that Detective Messerschmidt and his fellow officer Lawrence were entitled to qualified immunity when they were sued after searching a house pursuant to a warrant. Messerschmidt prepared the search warrant and showed to his two supervising officers and the Deputy District Attorney before submitting it to a magistrate who approved it.⁸⁶ The Supreme Court indicated that the validity of the warrant itself was not at issue, and that the sole question was whether the officers were entitled to qualified immunity “even assuming that the warrant should not have been issued.”⁸⁷

The case involved a search of a home occupied by the Millender family.⁸⁸ A weapon confiscated during the search belonged to the grandmother who later sued for violation of her

80. *Id.* at 989-90 (stating that “any belief that the officers or other family members were in serious, imminent harm would have been objectively unreasonable’ given that [Mrs. Huff] merely asserted her right to end her conversation with the officers and returned to her home”).

81. *Id.* at 990.

82. *Id.* at 992.

83. *Id.* at 991-92.

84. *Id.*

85. *Messerschmidt*, 132 S. Ct. 1235.

86. *Id.* at 1243.

87. *Id.* at 1244.

88. *Id.* at 1240.

Fourth Amendment rights.⁸⁹ The officers were searching for evidence of a crime in which the suspect, Jerry Ray Bowen, shot at his girlfriend as she attempted to break up with him.⁹⁰ The victim told police that her boyfriend fired at her with a sawed-off shotgun and told her that he would kill her if she tried to leave.⁹¹ She also told police that Bowen was affiliated with a local street gang, the Mona Park Crips.⁹² The crime, however, did not appear to be related to gang activity.⁹³ Bowen fired the gun at Kelly as she was attempting to drive away after moving out of an apartment to which Bowen had the key.⁹⁴

Drafted by Detective Messerschmidt, the search warrant authorized two broad searches, one for “[a]ll handguns, rifles, or shotguns of any caliber, or any firearms capable of firing ammunition,” and the other for “[a]rticles of evidence showing street gang membership.”⁹⁵ The Ninth Circuit held that this search warrant was unconstitutionally overbroad in two ways.⁹⁶ First, the warrant failed to establish probable cause to search for “all firearms” instead of only the black sawed-off shotgun reportedly used in the crime.⁹⁷ Second, the warrant was defective because it failed to establish any link between the domestic violence incident and the request to search for gang-related materials.⁹⁸ The Ninth Circuit denied qualified immunity on the grounds that “a reasonable officer in the deputies’ position would have been well aware of this [constitutional] deficiency,” and therefore, the test for immunity could not be met.⁹⁹

In holding that Messerschmidt and Lawrence should be shielded from suit,¹⁰⁰ the Supreme Court overruled the Ninth Circuit’s en banc denial¹⁰¹ of qualified immunity.¹⁰² The Supreme Court focused on the second prong of the test for qualified immunity, skipping the first aspect entirely.¹⁰³ The Court stated that “[t]he doctrine of qualified immunity protects government officials ‘from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional

89. *Id.* at 1258 n.10.

90. *Id.* at 1241.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 1242.

96. *Id.* at 1244.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* at 1241.

101. *Millender*, 620 F.3d at 1034-35.

102. *Messerschmidt*, 132 S. Ct. at 1250-51.

103. *Id.* at 1244.

rights of which a reasonable person would have known.”¹⁰⁴ The Court did, however, acknowledge that the shield of immunity could be lost if a warrant was “based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.”¹⁰⁵ The Court determined that the warrant in question was not so plainly defective and the officers’ belief in its validity was reasonable.¹⁰⁶

With regard to the search for “all firearms,” the Supreme Court came up with possible scenarios in which a search for weapons other than the sawed-off shotgun that Bowen used might have been permissible.¹⁰⁷ The majority concluded that “it would not have been entirely unreasonable” for Messerschmidt and Lawrence to have believed they had probable cause to search for all the evidence they sought.¹⁰⁸ For example, the officers could have believed that Bowen owned additional firearms, and it was reasonable for them to assume that some of those guns might be illegal and that “seizure of the firearms was necessary to prevent further assaults on Kelly.”¹⁰⁹

As to the search for gang-related evidence, the Court found a way to characterize the attack as one that was possibly linked to Bowen’s gang membership.¹¹⁰ Indicating that the attack was not simply a domestic dispute, but that it was described in the affidavit as “spousal assault *and* an assault with a deadly weapon,”¹¹¹ the majority concluded that “[a] reasonable officer could certainly view Bowen’s attack as motivated not by the souring of his romantic relationship with Kelly but instead by a desire to prevent her from disclosing details of his gang activity to the police.”¹¹² Viewing the scenario in that light, a search for gang-related material was deemed relevant.¹¹³ The Supreme Court then sidestepped whether these interpretations of the facts would have amounted to probable cause, and merely concluded that “[t]he officers’ judgment that the scope of the warrant was supported by probable cause may have been mistaken, but it was not ‘plainly incompetent.’”¹¹⁴

The Supreme Court further stated that “[w]here the alleged

104. *Id.* (citing *Pearson*, 555 U.S. at 231, which quoted *Harlow*, 457 U.S. at 818, the case in which the good faith requirement was purged from the qualified immunity test).

105. *Id.* at 1245 (quoting *United States v. Leon*, 468 U.S. 897, 923 (1984)).

106. *Id.* at 1246.

107. *Id.*

108. *Id.* at 1246-47.

109. *Id.* at 1246.

110. *Id.* at 1247.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.* at 1249 (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

Fourth Amendment violation involves a search or seizure pursuant to a warrant, the fact that a neutral magistrate has issued a warrant is the clearest indication that the officers acted in an objectively reasonable manner.”¹¹⁵ Moreover, the majority wrote that the appropriate inquiry is not whether the magistrate erred, but “whether the magistrate so obviously erred that any reasonable officer would have recognized the error.”¹¹⁶ Only on rare occasions would such an obvious error be made, stated Chief Justice John Roberts, and he indicated that, likewise, only in rare circumstances should “personal liability [be imposed] on a lay officer in the face of judicial approval of his actions.”¹¹⁷

The dissent took issue with the majority view, writing that “[t]he Court’s analysis bears little relationship to the record in this case, our precedents, or the purposes underlying qualified immunity analysis.”¹¹⁸ Justice Sotomayor continued in her dissent that the correct inquiry is “not whether different conclusions might conceivably be drawn from the crime scene,” but instead, it is “whether a ‘reasonably well-trained officer in petitioner’s position would have known that his affidavit failed to establish probable cause.’”¹¹⁹ Concluding that a reasonable officer could not have believed that he had probable cause to search for gang-related evidence, Justice Sotomayor characterized the search by Messerschmidt as the “kind of fishing expedition for evidence of unidentified criminal activity committed by unspecified persons [that] was the very evil the Fourth Amendment was intended to prevent.”¹²⁰

The dissent also criticized the majority’s erosion of *Malley v. Briggs*’s holding that an officer “cannot excuse his own default by pointing to the greater incompetence of the magistrate.”¹²¹ Justice Sotomayor described the effect of the majority’s decision as one “hold[ing] blameless the ‘plainly incompetent’ action of the police officer seeking a warrant because of the ‘plainly incompetent’ approval of his superiors and the district attorney.”¹²²

One of her stated concerns was that the majority’s holding will encourage “sloppy police work” and “exacerbate[e] the risk” of Fourth Amendment violations.¹²³ Just as eloquently as Chief Justice Roberts described the purposes underlying the qualified

115. *Id.* at 1245 (citing *Leon*, 468 U.S. at 922-23).

116. *Id.* at 1250.

117. *Id.*

118. *Id.* at 1253 (Sotomayor, J., dissenting).

119. *Id.* at 1256 (Sotomayor, J., dissenting).

120. *Id.* (Sotomayor, J., dissenting).

121. *Id.* at 1260 (Sotomayor, J., dissenting) (quoting *Malley*, 475 U.S. at 346 n.9).

122. *Id.* (Sotomayor, J., dissenting).

123. *Id.* (Sotomayor, J., dissenting).

immunity doctrine in *Filarsky v. Delia*¹²⁴ by pointing to history and tradition,¹²⁵ Justice Sotomayor heralded the purpose of the Fourth Amendment stating that “efforts ‘to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land.’”¹²⁶

C. *Filarsky v. Delia* (Decided Apr. 17, 2012)

The issue in *Filarsky*¹²⁷ was whether qualified immunity would extend to a private attorney who was hired by the city to conduct an internal affairs investigation of possible wrongdoing by a city firefighter.¹²⁸ The question as framed by the Supreme Court was “whether an individual hired by the government to do its work is prohibited from seeking such immunity, solely because he works for the government on something other than a permanent or full-time basis.”¹²⁹

The Ninth Circuit concluded that *Filarsky* was not entitled to qualified immunity “because he was a private attorney and not a City employee,”¹³⁰ but the Supreme Court held otherwise. Stating that the common law “did not draw a distinction between public servants and private individuals engaged in public service in according protection to those carrying out government responsibilities,”¹³¹ the Court traced the history and the purposes of qualified immunity and concluded that *Filarsky* was entitled to protection.¹³²

The Court emphasized that its holding was consistent with the important reasons that justify the doctrine of qualified immunity. The reasons are: (1) the shield of qualified immunity helps to “avoid ‘unwarranted timidity’ in performance of public duties” and ensures that “those who serve the government do so ‘with the decisiveness and the judgment required by the public good,’”¹³³ (2) qualified immunity ensures that “talented candidates are not deterred from public service,”¹³⁴ and (3) the grant of

124. *Filarsky*, 132 S. Ct. 1657.

125. *Id.* at 1667-68.

126. *Messerschmidt*, 132 S. Ct. at 1261 (Sotomayor, J., dissenting) (quoting *Weeks v. United States*, 232 U.S. 383, 393 (1914)).

127. *Filarsky*, 132 S. Ct. 1657.

128. *Id.* at 1660.

129. *Id.*

130. *Id.* at 1661.

131. *Id.* at 1663.

132. *Id.* at 1667-68.

133. *Id.* at 1665 (quoting *Wyatt v. Cole*, 504 U.S. 158, 167 (1992)).

134. *Id.* at 1665. The Court added:

To the extent such private individuals do not depend on the government for their livelihood, they have freedom to select other work—work that

qualified immunity “prevent[s] the harmful distractions from carrying out the work of government that can often accompany damages suits.”¹³⁵

The majority did not address whether the test for qualified immunity would be met in this factual scenario, and Justice Ginsburg in her concurrence suggested that there should still be an inquiry into whether Filarsky “knew or should have known that his conduct violated a right ‘clearly established’ at the time.”¹³⁶ The important point in this case is that the Supreme Court extended the reach of the protective shield so that even a private employee can be covered in certain instances.

D. Reichle v. Howards (Decided June 4, 2012)

In *Reichle v. Howards*,¹³⁷ the Supreme Court reversed the Tenth Circuit’s denial of qualified immunity to Secret Service agents Gus Reichle and Dan Doyle, who were part of a protective detail guarding then-Vice President Dick Cheney during a public appearance at a shopping mall in Colorado.¹³⁸ The agents were sued for allegedly violating the Fourth and First Amendment rights of a man who aroused suspicion, touched Vice President Cheney on the shoulder, and then lied about it.¹³⁹ That man, Steven Howards, was overheard by Agent Doyle saying, “I’m going to ask [the Vice President] how many kids he’s killed today.”¹⁴⁰ Howards then got in line to greet the Vice President.¹⁴¹ In a brief encounter, Howards told Cheney that his “policies in Iraq are disgusting,” and when the Vice President simply thanked Howards and moved on, Howards touched Cheney on the shoulder and walked away.¹⁴² Secret Service Agent Reichle approached Howards, who refused to speak with him.¹⁴³ Howards tried to

will not expose them to liability for government actions. This makes it more likely that the most talented candidates will decline public engagements if they do not receive the same immunity enjoyed by their public employee counterparts.

Id. at 1666.

135. *Id.* at 1665. The court added “[n]ot only will such individuals’ performance of any ongoing government responsibilities suffer from the distraction of lawsuits, but such distractions will also often affect any public employees with whom they work by embroiling those employees in litigation.”

Id. at 1666.

136. *Id.* at 1668 (Ginsburg, J., concurring).

137. *Reichle*, 132 S. Ct. 2088.

138. *Id.* at 2091.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

142. *Id.* at 2091-92.

143. *Id.* at 2091.

leave, but Agent Reichle stepped in front of him.¹⁴⁴ When Reichle asked Howards if he touched Vice President Cheney, he said “no.”¹⁴⁵ After confirming that several agents saw the touch—some describing it as a shove¹⁴⁶—Agent Reichle arrested Howards.¹⁴⁷ Howard was transferred to local law enforcement officials who charged him with violating the state law on harassment.¹⁴⁸

Howards sued the agents under 42 U.S.C. § 1983, alleging that he was arrested and searched without probable cause in violation of the Fourth Amendment, and that his arrest was in retaliation for his criticism of the Vice President and thus violated his First Amendment rights.¹⁴⁹ The district court denied summary judgment to the agents who claimed they were entitled to qualified immunity, and on interlocutory appeal, a divided Tenth Circuit panel decided that the agents were entitled to qualified immunity as to the Fourth Amendment claim, but not as to the First Amendment claim.¹⁵⁰

The Supreme Court considered whether the officers were also entitled to qualified immunity as to the First Amendment claim. The Court stated that the right in question was the “right to be free from a retaliatory arrest that is otherwise supported by probable cause.”¹⁵¹ In other words, if the arrest is supported by probable cause, does a retaliatory motive render the arrest unconstitutional? The majority emphasized that the Court has never held that there is a right to be free from a retaliatory arrest when probable cause justifies the arrest.¹⁵² The Court declined to address it in this case,¹⁵³ stating that “[t]his approach comports with our usual reluctance to decide constitutional questions unnecessarily.”¹⁵⁴

Skipping the first prong of the test for qualified immunity,¹⁵⁵

144. *Id.*

145. *Id.*

146. *Id.* at 2091 n.1.

147. *Id.* at 2092.

148. *Id.* (noting that the charge was eventually dismissed).

149. *Id.*

150. *Id.*

151. *Id.* at 2093.

152. *Id.* at 2094.

153. *Id.* at 2093 (stating “[w]e elect to address only the second question”, thus not addressing “whether a First Amendment retaliatory arrest claim may lie despite the presence of probable cause to support the arrest”); *see also id.* at 2093 n.4 (stating that “[w]e need not (and do not) decide here whether *Bivens* extends to First Amendment retaliatory claims.”).

154. *Id.* at 2093.

155. *Id.* at 2094. The Supreme Court in *Pearson* held that courts are permitted to address the two prongs of the *Saucier* test in either order. *Pearson*, 555 U.S. at 236. It appears from the 2012 decisions that the Supreme Court is largely dispensing with the old first prong entirely (whether the conduct violated a constitutional right) and is using a simplified version of

the Supreme Court addressed whether the purported right was “clearly established.”¹⁵⁶ Concluding that the law was far from clear,¹⁵⁷ the Supreme Court held that Agents Reichle and Doyle were entitled to qualified immunity.¹⁵⁸

Concurring, Justice Ginsburg emphasized the importance of deferring to the on-the-scene judgment of officers. She wrote, “[o]fficers assigned to protect public officials must make singularly swift, on the spot, decisions whether the safety of the person they are guarding is in jeopardy . . . [i]f rational, that assessment should not expose them to claims for civil damages.”¹⁵⁹

IV. TROUBLESOME ASPECTS OF THE CURRENT APPROACH

A few aspects of the Supreme Court’s recent qualified immunity decisions are troublesome. These problematic aspects include (1) the failure to clarify important constitutional rights that may be infringed upon, and (2) the grant of qualified immunity in such extreme situations that the distinction between absolute and qualified immunity is almost eliminated for all practical purposes. Moreover, the circularity of qualified immunity reasoning leaves state officials uncertain about their actions and stagnates the development of the law. These concerns are not necessarily new, but this section of the Article takes a look at these issues in light of the four recent Supreme Court opinions.

A. Failure to Articulate Constitutional Rights

The current post-*Pearson* period where courts are free to address the two prongs in either order is an excellent time to analyze how often courts choose to avoid the underlying constitutional questions.¹⁶⁰ The prediction is that there will be less

test, taken from *Pearson. Reichle*, 132 S. Ct. at 2093 (stating that “courts may grant qualified immunity on the ground that a purported right was not ‘clearly established’ by prior case law, without resolving the often more difficult question whether the purported right exists at all”).

156. See *id.* at 2094 (referencing *Hartman v. Moore*, 547 U.S. 250 (2006), and the Tenth Circuit opinions in *DeLoach v. Bevers*, 922 F.2d 618 (10th Cir. 1990) and *Poole v. Cnty. of Otero*, 271 F.3d 955 (10th Cir. 2001)).

157. *Id.* at 2095.

158. *Id.* at 2097 (Ginsburg, J., concurring) (stating that “at the time of Howard’s arrest, it was not clearly established that an arrest supported by probable cause could violate the First Amendment”).

159. *Id.*

160. Sobolski & Steinberg, *supra* note 48, at 527. An observation in the Sobolski-Steinberg empirical study has been borne out by recent opinions. They state: “The stakes are high because the difference between mandatory or discretionary sequencing may bear on the frequency with which courts address substantive constitutional rights questions, which in turn impacts the ‘rate’ at which constitutional rights are ‘clearly established’ through precedents.” *Id.* at 525.

articulation and less clarification of constitutional rights during this non-mandatory sequencing period. Anecdotally, that appears to be true.

The 2012 decisions reveal that the Supreme Court is largely dispensing with the old first prong entirely (that is, whether the conduct violated a constitutional right). Although the Supreme Court held in *Pearson* that the prongs could be addressed in either order,¹⁶¹ the reality is that the first prong is not currently being addressed at all in most cases. For example, the Supreme Court in *Messerschmidt* did not reference the traditional two-pronged test, instead focused on the “clearly established” prong of qualified immunity analysis.¹⁶² Similarly, the Supreme Court skipped the threshold question in *Reichle*, which was whether an arrest justified by probable cause may nonetheless violate the First Amendment if the arrest was made in retaliation for political speech.¹⁶³ The Court acknowledged that *certiorari* was granted on two issues, but deliberately avoided the threshold constitutional one, stating, “[w]e elect to address only the second question” (whether the law was clearly established).¹⁶⁴

Again in *Ryburn*, the Supreme Court did not apply the two-pronged test for qualified immunity.¹⁶⁵ Instead of focusing on whether the Huffs asserted a clearly established Fourth Amendment right that was violated, the Court viewed the situation from the vantage point of the police and simply quoted an earlier opinion saying “it would be silly to suggest that the police would commit a tort by entering [a residence] . . . to determine whether violence . . . is about to (or soon will) occur.”¹⁶⁶ The Court analyzed whether it was objectively reasonable for the police to have acted as they did, and the result seemed to be predisposed in their favor.¹⁶⁷ The Court moved swiftly to the determination that the officers deserved the protection of the qualified immunity doctrine.¹⁶⁸

The Court’s current position is consistent with the jurisprudential admonition that if a case can be decided on other than constitutional grounds, the Court should not delve into the constitutional issue.¹⁶⁹ The Supreme Court stated in *Pearson* that “[a]dherence to *Saucier*’s two-step protocol departs from the

161. *Pearson*, 555 U.S. at 236.

162. *Messerschmidt*, 132 S. Ct. at 1244.

163. *Reichle*, 132 S. Ct. at 2093.

164. *Id.*

165. *See Ryburn*, 132 S. Ct. at 990 (failing to address both prongs of the qualified immunity test).

166. *Id.* (quoting *Georgia v. Randolph*, 547 U.S. 103, 118 (2006)).

167. *Ryburn*, 132 S. Ct. at 991-92.

168. *Id.*

169. *Pearson*, 555 U.S. at 241 (quoting *Scott*, 550 U.S. at 388 (Breyer, J., concurring)).

general rule of constitutional avoidance.”¹⁷⁰ In 2012, the Court expressly reiterated this view, saying “courts may grant qualified immunity on the ground that a purported right was not ‘clearly established’ by prior case law, *without resolving the often more difficult question whether the purported right exists at all.*”¹⁷¹

The very act of skipping the first step, which is the inquiry into whether someone’s constitutional right was violated in the first place, signals a shift in emphasis away from the focus on individual rights and toward the protection of government officials who violate those rights. This approach focuses on the official’s action rather than the aggrieved person’s rights.

The shift in emphasis is apparent in *Messerschmidt* where the Supreme Court itself implied that the search warrant probably should not have been issued because it was unconstitutionally overbroad, but where the Court constructed scenarios to justify the officers’ reliance on that warrant.¹⁷² This shift in emphasis may indicate which values are paramount in the eyes of the Court. It is not the protection of aggrieved citizens that leads the Court to its current decisions; it is deference to state officials that weighs more heavily.

B. Determining Whether a Right Was “Clearly Established”

The Supreme Court in *Saucier* described the second prong this way: if “the conduct did not violate a clearly established right, or if it was objectively reasonable for the official to believe that his conduct did not violate such a right, then the official is protected by qualified immunity.”¹⁷³ In defining what “clearly established” means, the Court said that the inquiry “must be undertaken in light of the specific context of the case, not as a broad general proposition.”¹⁷⁴

1. Reference to Well-Settled Law

If binding authority sets forth a rule in a factually analogous case, one might argue that the law is clearly established. However, the existence of a rule that may seem clear to a legal scholar does not mean that the “clearly established” prong of the qualified immunity test is met.¹⁷⁵ The legal guidelines must be viewed in

170. *Id.* (quoting *Scott*, 550 U.S. at 388 (Breyer, J., concurring)).

171. *Reichle*, 132 S. Ct. at 2093 (emphasis added).

172. *Messerschmidt*, 132 S. Ct. at 1246-47.

173. *Saucier*, 533 U.S. at 205.

174. *Id.* at 201.

175. *See Reichle*, 132 S. Ct. at 2093 (stating that “[t]o be clearly established, a right must be sufficiently clear ‘that every reasonable official would [have understood] that what he is doing violates that right [and] . . . ‘existing precedent must have placed the statutory or constitutional question beyond debate”).

the context of the actual situation faced by the state official at the time. Mere reference to well-settled case law is not sufficient to show that a right is clearly established.¹⁷⁶ Nonetheless, case law is critically important in the analysis; it simply is not dispositive. “It is sometimes difficult for an officer to determine how the relevant legal doctrine . . . will apply to the factual situation the officer confronts.”¹⁷⁷ “The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.”¹⁷⁸ In other words, “[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.”¹⁷⁹

Even if the state official is mistaken, he or she is still “entitled to the immunity defense” so long as “the officer’s mistake as to what the law requires is reasonable.”¹⁸⁰ The correct inquiry is “what the officer reasonably understood his powers and responsibilities to be, when he acted, under clearly established standards.”¹⁸¹

In 2001, Justice Ginsburg noted in her *Saucier* concurrence:

As aptly observed by the Second Circuit, ‘even learned and experienced jurists have had difficulty in defining the rules that govern a determination of probable cause As he tries to find his way in this thicket, the police officer must not be held to act at his peril.’¹⁸²

She added, “[l]aw in the area [of probable cause] is constantly evolving and, correspondingly, variously interpreted.”¹⁸³ Thus, reference to case law—without a specific factual context—is insufficient to resolve whether a right was clearly established at the time of the official’s actions.

176. *Saucier*, 533 U.S. at 201-02.

177. *Id.* at 205.

178. *Id.* at 202. The court stated, however, that if various courts have agreed that certain conduct is a constitutional violation under facts not distinguishable in a fair way from the facts presented in the case at hand, the officer would not be entitled to qualified immunity based simply on the argument that courts had not agreed on one verbal formulation of the controlling standard.

Id. at 202-03.

179. *Id.* at 202 (citing *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

180. *Id.* at 205.

181. *Id.* at 208; *see also Reichle*, 132 S. Ct. at 2093 (reversing the Court of Appeals grant of qualified immunity).

182. *Saucier*, 533 U.S. at 214-15 (Ginsburg, J., concurring).

183. *Id.* at 214 (Ginsburg, J., concurring).

2. *Were the Officer's Actions Objectively Reasonable?*

The second aspect of “clearly established” focuses on whether the state official’s actions were objectively reasonable.¹⁸⁴ Where reasonable officials could differ, even if they are mistaken, it cannot be said that the legal right was “clearly established.”¹⁸⁵ The test is objective.

Prior to 1982,¹⁸⁶ the shield of qualified immunity from suit was only available to those government officials who acted in good faith.¹⁸⁷ The “good faith” requirement was purged from the test for qualified immunity roughly thirty years ago¹⁸⁸ when the Supreme Court announced that an objective test, rather than a subjective standard, would be used in determining whether officials in a given situation were entitled to qualified immunity.¹⁸⁹ The test changed significantly from a subjective inquiry into the mindset of the government official to the current objective test, that is, whether the official’s actions were objectively reasonable.¹⁹⁰ In *Harlow*, the Supreme Court abandoned the good faith requirement.¹⁹¹

Since *Harlow*, the objective test has become more and more

184. *Pearson*, 555 U.S. at 231.

185. *See id.* at 231 (stating that “[t]he protection of qualified immunity applies regardless of whether the government official’s error is ‘a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact’”).

186. *Harlow*, 457 U.S. at 816.

187. *Butz v. Economou*, 438 U.S. 478, 484 (1978) (stating “officials of the Executive Branch exercising discretionary functions did not need the protection of an absolute immunity from suit, but only a qualified immunity based on *good faith* and reasonable grounds”) (emphasis added); *Imbler v. Pachtman*, 424 U.S. 409, 434 (1976) (stating that officials who fall within the protection of the qualified immunity doctrine “may be held liable for unconstitutional conduct absent ‘*good faith*’”) (emphasis added).

188. *Harlow*, 457 U.S. at 818.

189. *Id.*

190. *Id.* As the Second Circuit stated in *Doninger*, in a decision that the Supreme Court let stand, it is irrelevant whether the school official’s actions toward the student were “improperly motivated” because the qualified immunity test is objective, not subjective, and the mindset of the individual officer is irrelevant *unless “intent is an element” of the claim or defense*. *Doninger v. Niehoff*, 642 F.3d 334, 349 (2d Cir. 2011), *cert. denied*, 132 S. Ct. 449 (2011) (emphasis added).

191. *Harlow*, 457 U.S. at 816-17; *see also* Comment, *Harlow v. Fitzgerald: The Lower Courts Implement the New Standard for Qualified Immunity Under Section 1983*, 132 U. PA. L. REV. 901, 904 (1984) (stating that “*Harlow* . . . [held] that the good faith of an official seeking qualified immunity was to be measured against an ‘objective’ standard”). Although the concurring opinion adopted by Brennan, Marshall, and Blackmun in *Harlow* stated that “[t]his standard would not allow the official who *actually knows* that he was violating the law to escape liability for his actions, even if he could not ‘reasonably have been expected’ to know what he actually did know,” the majority attempted to eliminate or minimize the inquiry into the mindset of the actor. *Harlow*, 457 U.S. at 816-17; Comment, *supra*, at 929 n.151.

“objective,” now covering not only those state officials whose actions were “reasonable,” but those whose actions were not “entirely unreasonable.”¹⁹² For example, the Court stated in *Messerschmidt* that “it would not have been ‘entirely unreasonable’ for an officer to believe that the facts set out in the affidavit established a fair probability that such evidence would aid the prosecution of Bowen for the criminal acts at issue.”¹⁹³ Further, the majority wrote that “it would not have been ‘entirely unreasonable’ for an officer to believe . . . that there was probable cause.”¹⁹⁴ The wording itself shows a tendency to view the state officials’ conduct leniently, shifting the measuring point from what is “reasonable” to what is “not entirely unreasonable.”¹⁹⁵

Currently, the objective government official merely has to act in a way that is not “entirely unreasonable.”¹⁹⁶ He or she must simply avoid blatantly and incontrovertibly violating the law. The Supreme Court appears willing to speculate as to possible acceptable, i.e., reasonable, scenarios so as to justify the actions of a police officer, as was pointed out by the dissent in *Messerschmidt*.¹⁹⁷ The Court has interpreted the “all but the plainly incompetent” rule very broadly and generously, e.g., in *Messerschmidt* where the police officers should have known from experience that the search warrant was overbroad even though it was issued by a neutral magistrate.¹⁹⁸ The Ninth Circuit denied qualified immunity to the police officers, saying that a reasonable police officer would have known the warrant was invalid.¹⁹⁹ The Supreme Court, as stated, granted them qualified immunity on the rationale that even if they were mistaken, their mistake was reasonable.²⁰⁰ The majority emphasized that the search warrant “was not so obviously lacking in probable cause that the officers can be considered ‘plainly incompetent’ for concluding otherwise.”²⁰¹ The majority’s characterization of the *Messerschmidt* facts seems speculative, even in the eyes of some members of the Court.²⁰² The Court’s opinion is, however, an

192. *Messerschmidt*, 132 S. Ct. at 1249.

193. *Id.*

194. *Id.* at 1239 (emphasis added).

195. *Id.* at 1249.

196. *Id.*

197. *Id.* at 1254 (Sotomayor, J., dissenting) (stating that “the Court reaches this result only by way of an unprecedented, *post hoc* reconstruction of the crime that wholly ignores the police’s own conclusions, as well as the undisputed facts presented to the District Court”).

198. *Id.* at 1260 (Sotomayor, J., dissenting).

199. *Millender*, 620 F.3d at 1035.

200. *Messerschmidt*, 132 S. Ct. at 1250-51.

201. *Id.* at 1250.

202. See *supra* text accompanying notes 118-126. Slightly less forcefully, Justice Kagan, concurring in part and dissenting in part, described the majority’s analysis as an “inadequate justification.” *Messerschmidt*, 132 S. Ct.

informative peek into the current mindset of the majority regarding qualified immunity.

Qualified immunity does not shield “the plainly incompetent,” nor does qualified immunity protect “those who knowingly violate the law.”²⁰³ In actuality, this second aspect gets little attention in current qualified immunity analysis. Since the 1982 shift to the objective test, inquiries into whether an officer acted in good faith or out of malice are not fully explored.²⁰⁴ In *Harlow*, the Court stated that “[w]here an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate.”²⁰⁵ Nonetheless, the dangling phrase “or those who knowingly violate the law” seems to linger like a vestige of the past. Like the human appendix, this once vital aspect of the qualified immunity test no longer provides a useful function.

The elimination of the good faith element made the qualified immunity doctrine more similar than ever before to absolute immunity. There may be a blurring of the line between absolute immunity and qualified immunity. Given the Court’s current position that the certainty of being shielded by the qualified immunity doctrine is of paramount importance, the grant of qualified immunity is so likely that it is almost tantamount to absolute immunity. With regard to absolute immunity, the Supreme Court stated in 1976 that that it is “in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.”²⁰⁶ While the Supreme Court made that statement almost forty years ago with regard to absolute immunity, it appears that its reasoning reflects the 2012 view as to qualified immunity.

In short, the objective standard, as applied, has shifted from what is “reasonable” to what is “not unreasonable” to what is “not entirely unreasonable.” It appears that all but the plainly incompetent are shielded from personal liability, and there is generous leeway for mistakes before an officer would be deemed incompetent. The Court will withhold the shield of qualified immunity only if the actions of the officers were so extreme that no competent officer could possibly have done such a thing. This shift is particularly evident in the 2012 decisions.

at 1252 (Kagan, J., concurring in part and dissenting in part).

203. *Messerschmidt*, 132 S. Ct. at 1244-45.

204. *See supra* text accompanying note 190 (providing an example of a court’s refusal in 2011 to inquire as to an official’s motive or malice).

205. *Harlow*, 457 U.S. at 819.

206. *Imbler v. Pachtman*, 424 U.S. 409, 428 (1976) (referring to absolute, not qualified, immunity).

3. *Circular Reasoning: Unresolved Legal Questions Remain Unclear*

The avoidance of the constitutional question in qualified immunity cases leaves an allegedly unclear area of law entirely unsettled, and the state officials remain uncertain whether their actions will violate someone else's constitutional rights. If they are uncertain, and the law is unclear, then these officials will continue to be protected by qualified immunity. The resulting circularity is one of the most striking problems that surfaces in recent Supreme Court opinions on qualified immunity.

In *Reichle*, for example, the underlying constitutional question was whether an arrest in retaliation for the exercise of First Amendment rights is unlawful when the arrest is justified by probable cause.²⁰⁷ The Supreme Court announced that it “has never recognized” such a right,²⁰⁸ but did not decide whether the right exists. Instead, the Supreme Court disagreed with the Court of Appeals's application of precedent such as *DeLoach*,²⁰⁹ which involved both a retaliatory arrest and a retaliatory prosecution.²¹⁰ The Court also addressed whether its own decision in *Hartman*²¹¹ that “a plaintiff cannot state a claim of retaliatory prosecution in violation of the First Amendment if the charges were supported by probable cause”²¹² had been correctly interpreted by some courts to pertain also to retaliatory arrests.²¹³ Saying “we do not suggest that *Hartman*'s rule in fact extends to arrests,”²¹⁴ the Supreme Court declined to state definitively whether the rule does or does not apply. Instead, the Court simply opined that “when Howards was arrested it was not clearly established that an arrest supported by probable cause could give rise to a First Amendment violation.”²¹⁵ Because of the lack of a holding on the underlying constitutional issue, the answer remains unclear, and the next police officer in a similar situation will not have guidance as to whether a retaliatory arrest that is supported by probable cause will violate the offender's First Amendment rights. Since the law is not clearly established, the officer who potentially violates someone's rights will be shielded from suit by the doctrine of qualified immunity.

Not only is circular reasoning illustrated in *Reichle*, it can also be seen in other cases in which the Supreme Court denied

207. *Reichle*, 132 S. Ct. at 2094.

208. *Id.* at 2093.

209. *DeLoach*, 922 F.2d 618.

210. *Id.* at 620.

211. *Hartman*, 547 U.S. 250.

212. *Reichle*, 132 S. Ct. at 2094.

213. *Id.*

214. *Id.* at 2096.

215. *Id.* at 2097.

certiorari in the October 2011 Term, for example, in lawsuits over whether public schools' regulation of students' internet speech violates the students' first amendment rights.²¹⁶ If a school principal punishes a student for an off-campus Facebook posting that targets another student, the law is unsettled as to whether the landmark school speech test from *Tinker*²¹⁷ applies. It is not clearly established whether the student has a protected First Amendment right that will be violated if the principal takes disciplinary action. If the Supreme Court does not clarify the boundaries of a school's authority to regulate internet speech, then that area of law will remain as murky and confusing as it currently is.²¹⁸ As long as it remains unresolved as to whether *Tinker* applies to such speech, then the second aspect (whether the constitutional right was clearly established at the time) will be answered in the negative. When the right is not clearly established, the school official is entitled to qualified immunity from suit. Thus, the next time a similar situation arises, the school official will still be unsure of the legal parameters.

The impact of allowing courts to skip over the threshold question of whether a constitutional right exists at all has yet to be fully determined, but if the October 2011 Term's decisions are any hint, there will be fewer opinions delving into the underlying rights and more decisions finding that the law was not clearly defined. In other words, that circularity will continue: more courts will avoid clarifying the law and will in turn grant qualified immunity to officials whose actions were taken when the law was unclear.

V. CONCLUSION

As Chief Justice Roberts stated, the Supreme Court's position is that state officials should be able to rely on the shield of qualified immunity.²¹⁹ Certainty—the certainty of being immune from liability—is important to those who do the work of the government. Underlying the Supreme Court's most recent decisions is a ringing affirmation of the value of public service and the important nature of government work. The Court's focus is on the importance of the governmental system, the vital role of state officials in maintaining order and promoting the public welfare,

216. *Kowalski v. Berkeley Cnty. Schs.*, 132 S. Ct. 1095 (2012) (mem.), *denying cert. to* 652 F.3d 565 (4th Cir. 2011); *Blue Mtn. Sch. Dist. v. J.S. ex rel. Snyder*, 132 S. Ct. 1097 (2012) (mem.), *denying cert. to* 650 F.3d 915 (3d Cir. 2011) (consolidated pursuant to Supreme Court Rule 12.4 with *Hermitage Sch. Dist. v. Layshock*); *Doninger*, 132 S. Ct. 499 (mem.), *denying cert. to* 642 F.3d 334 (2d Cir. 2011).

217. *Tinker*, 393 U.S. 503.

218. *See, e.g., Doninger*, 642 F.3d 334; *Kowalski*, 652 F.3d 565.

219. *Filarsky*, 132 S. Ct. at 1666.

the immunity doctrine's longstanding historical roots,²²⁰ and the deference and respect due to those who perform government functions.²²¹

For those who are concerned about individual rights, these times are tough. Thirty years ago, the Supreme Court stated that "the resolution of immunity questions inherently requires a balance between the evils inevitable in any available alternative . . . [and] an action for damages may offer the only realistic avenue for vindication of constitutional guarantees."²²² That avenue has narrowed. The direction the Supreme Court is now taking is clear, and it favors those who do the work of the government, not the average citizen.

That said, it is appropriate to shield government workers from individual liability if they perform their jobs reasonably and competently. The risk, however, is that the test is applied so broadly that it may also protect those state officials who unreasonably and incompetently violate the individual rights of a citizen.

Perhaps there will be a return to *Saucier*-style sequencing in the next decade, in keeping with the period shifts of the past forty years of qualified immunity decision-making. Until that time, the current approach is likely to result in legal stagnation as to complex and unsettled constitutional questions. It is also likely that qualified immunity will be granted to government workers in a substantial majority of the cases brought by aggrieved persons. The decisions have drifted away from the protection of victims that the Supreme Court spoke of in *Harlow*: "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."²²³

For state officials, the Supreme Court's emphasis on "certainty" is a wonderful benefit, but for citizens whose rights are abridged by the government, the prospect of recovering money damages from the officials is very slim.

220. *Id.* at 1664.

221. *Id.* at 1666.

222. *Harlow*, 457 U.S. at 813-14.

223. *Id.* at 819 (Brennan, J., concurring).

