Volume 62, Issue 2 Page 523

Stanford Law Review

AN EMPIRICAL ANALYSIS OF SECTION 1983 QUALIFIED IMMUNITY ACTIONS AND IMPLICATIONS OF *PEARSON V. CALLAHAN*

Greg Sobolski & Matt Steinberg

NOTE

AN EMPIRICAL ANALYSIS OF SECTION 1983 QUALIFIED IMMUNITY ACTIONS AND IMPLICATIONS OF *PEARSON V. CALLAHAN*

Greg Sobolski* & Matt Steinberg**

* J.D., 2009, Stanford Law School; B.A., B.S., 2004, Stanford University.

** J.D., 2009, Stanford Law School; B.A., 2003, Stanford University. The authors would like to thank Professor Larry Lessig for his guidance and trenchant discussions, Professor Richard Olshen and Zhou Yu for statistical guidance, Professor Daniel Ho for invaluable feedback, and the editors of the *Stanford Law Review* for their careful revisions.

INDEX OF TABLES AND FIGURES

INTRODUCTION

The Supreme Court's recent decision in *Pearson v. Callahan*[1] marked a turning point in a judicial experiment concerning § 1983[2] constitutional litigation, which began in 2001 with *Saucier v. Katz*.[3] The experiment involved the doctrine of qualified immunity, an immunity from suit extended to state and local government officials (and to federal officials in *Bivens* actions[4]) in § 1983 actions for monetary relief where it would not be "clear to a reasonable officer that his conduct was unlawful in the situation he confronted."[5]

A court deciding a § 1983 action in which the defendant pleads qualified immunity faces two possible questions: (1) whether a constitutional right of the plaintiff was violated; and (2) whether that right was "clearly established" at

1. 129 S. Ct. 808 (2009).
2. 42 U.S.C. § 1983 (2006).
3. 533 U.S. 194 (2001).
4. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971). *Bivens* actions for constitutional violations are equivalent to § 1983 suits, except they are brought against federal officials rather than state or local actors.
5. *Saucier*, 533 U.S. at 202.

the time the conduct occurred. If the court answers the first question "no," the defendant prevails because the plaintiff has failed to successfully allege a constitutional violation. If the court answers the second question "no," the defendant is entitled to qualified immunity, barring the plaintiff's recovery. The question at the heart of the line of cases leading to *Pearson* is whether a court must confront the constitutional question regardless of the outcome of the "clearly established" qualified immunity prong, or whether a court may skip the substantive constitutional issue altogether when the answer to the "clearly established" prong supports granting qualified immunity.

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. While the Supreme Court's jurisprudence has spanned the spectrum from providing no guidance about sequencing, to suggesting it, to requiring it, and after *Pearson*, again to only suggesting it, there have been until recently no empirical studies that examined the relationship between the Supreme Court's position on the qualified immunity sequencing issue and the behavior of lower courts resolving § 1983 claims.

This Note examines a random sample of 741 appellate qualified immunity cases, representing 901 § 1983 claims, drawn from thirty-two years of qualified immunity jurisprudence (1976-2008).[6] Ours is the largest data set constructed on the topic to date.

Part I describes how the scholarship has generally divided the evolution of qualified immunity doctrine into three doctrinal periods. Part I.A considers a first doctrinal period, during which the Supreme Court issued little guidance to lower courts on sequencing. Part I.B describes a second period marked by *Siegert v. Gilley*,[7] which encouraged confrontation of the constitutional question before the "clearly established" question. That approach is typically thought to have lasted until the Court's *Saucier* decision in 2001, detailed in Part I.C, which mandated that the constitutional rights question be answered first. *Saucier*'s requirement represented a high-water mark in the Court's efforts to create a uniform and obligatory procedure for all courts to adjudicate § 1983 actions. But *Saucier* became the target of criticism, sparking a debate ("the sequencing debate") in academia and the judiciary about the virtues of mandatory sequencing. Part I.D then introduces the post-*Pearson* period, heralded by the Court's latest qualified immunity decision.

Part II overviews the key criticisms of the *Saucier* regime, but focuses primarily on an issue of relevance to this Note's empirical findings: how mandatory sequencing affects constitutional articulation—the judicial process

6. *See infra* Part III.A.

7. 500 U.S. 226 (1991).

of confronting and resolving substantive constitutional questions—thus clarifying what sets of facts and conduct represent rights violations. Although the *Saucier* Court insisted that sequencing was central to providing explanations about the "law's elaboration from case to case,"[8] there has been little dispute and, until recently, little empirical research on the relationship between mandatory sequencing and constitutional articulation as it is borne out in the courts.

How lower courts have approached sequencing during three phases of Supreme Court guidance was the subject of only one empirical study prior to 2009.[9] That study, authored by Professor Thomas Healy in 2005, is of limited use for understanding the impact of the evolution of qualified immunity doctrine on the behavior of lower courts because it examined only a small set of appellate decisions issued after the *Saucier* opinion.[10]

Part II.A introduces relevant prior scholarship on empirical dimensions of qualified immunity. Two contemporary quantitative studies of qualified immunity were published in 2009.[11] In one, Paul Hughes sampled appellate dispositions during three discrete time intervals falling within the three doctrinal periods, and documented the expected finding that the shift to mandatory sequencing corresponded to a decrease in the frequency with which appellate courts skipped the substantive constitutional question.[12]

In a subsequent study, Nancy Leong sampled appellate and district court opinions from three discrete time intervals, and concluded that *Saucier* has increased the quantity of constitutional articulation, but at the expense of constraining plaintiffs' constitutional rights.[13] Part II.B locates this Note within the context of these prior studies. After presenting and analyzing original data in Part III, this Note revisits the Leong and Hughes conclusions in Part IV, echoing their findings on the frequency of constitutional articulation in the post-*Saucier* period, but presenting new conclusions as to how that articulation has affected the development of constitutional rights in the appellate courts.

Part III.A describes our methodology, and Part III.B presents our results. Generally, this Note provides evidence that while a mandatory sequencing regime may disadvantage plaintiffs bringing § 1983 actions, it may also have a

8. 533 U.S. at 201.

9. Thomas Healy, *The Rise of Unnecessary Constitutional Rulings*, 83 N.C. L. REV. 847, 930 (2005) (examining qualified immunity actions in two years following *Saucier* as part of a broader point about remedial deterrence and its relationship to qualified immunity).

10. *Id.* at 930, 937 n.431.

11. Paul W. Hughes, *Not a Failed Experiment:* Wilson-Saucier *Sequencing and the Articulation of Constitutional Rights*, 80 U. COLO. L. REV. 401 (2009); Nancy Leong, *The* Saucier *Qualified Immunity Experiment: An Empirical Analysis*, 36 PEPP. L. REV. 667 (2009).

12. Hughes, *supra* note 11, at 404, 418-29.

13. Leong, *supra* note 11, at 670. For a critical discussion, see *infra* Part IV.A.

rights-affirming effect for plaintiffs, thereby benefiting potential future plaintiffs bringing similar § 1983 claims. Our analysis shows that: (1) the imposition of *Saucier*'s mandatory sequencing regime was associated with a decreased frequency of outcomes where the court granted qualified immunity without addressing the substantive constitutional question (Part III.B.1); (2) after *Saucier*, there was an increase in the frequency of outcomes where the court denied a constitutional violation, but that change was not statistically significant (Part III.B.2); (3) after *Saucier*, there was a statistically significant increase in the frequency of outcomes where the court found the plaintiff successfully alleged a constitutional violation (Part III.B.3); but (4) in the pre-*Saucier* period, plaintiffs found by the court to have successfully alleged a constitutional violation were more likely (by 11%) to ultimately recover damages than their counterparts after *Saucier*, also a statistically significant observation (Part III.B.3).

Part IV.A reviews this Note's findings in light of related quantitative work. The discussion assesses—and, based on our data, ultimately rejects—the common view of a three-period framework in which, before *Saucier*, lower courts freely exercised their discretion to determine the sequence of qualified immunity inquiries. *Saucier* was not necessarily a seismic moment at which the mandatory period began among appellate courts. This Note proceeds along the traditional view until Part IV.B, but then presents quantitative and qualitative evidence that appellate courts considered themselves bound to sequence even before the *Saucier* decision. In other terms, *Saucier* is not a clean proxy for the point at which appellate courts suddenly begin perfect compliance with sequencing requirements, and this is important for the empirical study of qualified immunity because it suggests a new timeline along which to study lower court behavior in relation to Supreme Court decisions.

Finally, after discussing some of the Note's limitations in Part IV.C, Part IV.D argues *Pearson* should be cast as the start of a new period in the sequencing debate, rather than as a reversion to the status quo ante *Saucier*. After *Pearson*, lower courts should understand without ambiguity that they have discretion in the handling of the key questions in § 1983 qualified immunity actions. How courts will employ that discretion is not a matter that may be bounded or predicted on the basis of past behavior. The post-*Pearson* period will represent, at last, a period in which courts may unambiguously understand themselves to have discretion in the disposition of § 1983 qualified immunity actions, and therefore will be an ideal period to continue an empirical analysis of how discretionary sequencing influences the articulation and refinement of constitutional rights in the § 1983 context.

I. QUALIFIED IMMUNITY AND THE SEQUENCING DEBATE: A SUMMARY

In a § 1983 action in which the plaintiff seeks damages against

government officials, defendants may plead an affirmative defense of qualified immunity. The Court articulated the doctrine of qualified immunity nearly forty years ago in *Pierson v. Ray*,[14] but the modern roots are in *Harlow v. Fitzgerald*.[15] The doctrine aims to balance two competing interests implicated in § 1983 litigation: (1) "the importance of a damages remedy to protect the rights of citizens";[16] and (2) "'the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority.'"[17]

To ascertain whether a government officer is entitled to the affirmative defense,[18] a court must determine whether the officer's conduct "violate[d] clearly established statutory or constitutional rights of which a reasonable person would have known."[19] Generally, that inquiry raises two further questions: (1) "whether a constitutional right would have been violated on the facts alleged;" and (2) "assuming the violation is established, the question whether the right was clearly established must be considered on a more specific level."[20] For purposes of this Note, the former is termed the "constitutional question," the latter, the "'clearly established' question."

The Supreme Court has struggled with how much discretion to allow lower courts in deciding the order in which to address the constitutional and "clearly established" questions and the related issue of whether both questions must be addressed in every case. We call the Court's deliberation and the corresponding discord in the literature over the preferable strategy the "sequencing debate." Understanding the evolution of qualified immunity and the sequencing debate is critical to the doctrine's empirical study because guidance from the Court acts as a sort of point of intervention in the behavior of lower courts, which presumably adapt their approaches relatively faithfully to comply with Supreme Court precedent. These points of intervention imply temporal referents during which one can study changes in the distribution of lower court outcomes, and subsequently examine whether such changes comport with the conceptual justifications behind a given position on sequencing.

The literature on sequencing has generally divided the Court's approaches

14. 386 U.S. 547, 555-57 (1967).

15. 457 U.S. 800, 807 (1982).

16. *Id.*

17. *Id.* (quoting Butz v. Economou, 438 U.S. 478, 506 (1978)).

18. To invoke qualified immunity, a government official first must establish that she was acting within the scope of her discretionary authority. The burden then shifts to the plaintiff to overcome the defense of qualified immunity. *See* Bates v. Harvey, 518 F.3d 1233, 1242 (11th Cir. 2008).

19. *Harlow*, 457 U.S. at 818. Before *Harlow*, a government official needed to demonstrate a subjective element—the lack of malicious intent—in order to be granted qualified immunity. *See, e.g.*, *Pierson*, 386 U.S. at 557.

20. Saucier v. Katz, 533 U.S. 194, 200 (2001).

into three periods,[21] yet this Note will submit that recent Supreme Court activity suggests a new fourth period, dubbed "post-*Pearson*." In Period One, beginning in 1967 with *Pierson* and ending May 23, 1991 with *Siegert v. Gilley*,[22] the Court provided no guidance to lower courts about when or how to sequence qualified immunity actions. In Period Two, beginning after the *Siegert* decision in 1991 and ending June 18, 2001 with the *Saucier* decision, the Court indicated an increasingly strong preference for courts to sequence their qualified immunity inquiries. Both Hughes and Leong designated Period Two as one where sequencing was discretionary,[23] a premise this Note will examine more closely.

As elaborated in Part IV.B, because of the relatively ambiguous language with which the Court's preferences were expressed during Period Two, there was confusion among the lower courts as to whether, or when, sequencing was in fact mandatory. The Court put such confusion to rest in Period Three by mandating sequencing, beginning with *Saucier* in 2001 and ending January 21, 2009 with the *Pearson* decision. Finally, in Period Four, beginning with *Pearson* in 2009, the Court has restored discretion to lower courts on how to approach qualified immunity cases, while still indicating a preference for *Saucier*-style sequencing.

A. *The Pre-*Siegert *Period (Period One): No Guidance from the Court*

Before *Siegert*, the Supreme Court had expressed no opinion about how lower courts should approach sequencing. As Hughes notes, a small handful of courts took *Harlow* as establishing a sequencing requirement,[24] but this was not the predominant view.[25] Courts were free to answer the constitutional and "clearly established" questions in the order they wished. It was not unusual for lower courts to answer the "clearly established" question first, and, when the answer was in the negative, to skip the constitutional question altogether.[26]

The Supreme Court expressed clearer guidance in its 1991 *Siegert*

---

21. *See, e.g.*, Hughes, *supra* note 11, at 407; Leong, *supra* note 11, at 670.

22. 500 U.S. 226 (1991).

23. Hughes, *supra* note 11, at 408-12; Leong, *supra* note 11, at 673-74. For discussion, see *infra* Part IV.A-B.

24. Hughes, *supra* note 11, at 407 n.39 ("In analyzing qualified immunity issues, this circuit normally requires a two step process: (1) '[t]he initial determination is whether the claim itself is viable, whether the actions of the plaintiff are constitutionally protected[ ]' and (2) if so, the next step is an evaluation of whether the 'constitutional right asserted was "clearly established" at the time of [the public official's] conduct so that a reasonable official would have understood that his conduct violated that right.'" (quoting Thompson v. City of Starkville, 901 F.2d 456, 468 n.12 (5th Cir. 1990)) (alteration in original)).

25. *See infra* Part I.B.

26. *See, e.g.*, Molinelli v. Tucker, 901 F.2d 13 (2d Cir. 1990); Williams v. Smith, 781 F.2d 319 (2d Cir. 1986).

decision.[27] *Siegert* involved a claim against a government official for deprivation of a constitutionally-protected liberty interest, and the D.C. Circuit had "assume[d], without deciding" that the plaintiff had asserted a constitutional violation.[28] The circuit court next concluded that the law was not clearly established at the time of the official's conduct.[29] Thus, the plaintiff's claim was dismissed without any ruling on the underlying constitutional question.

On review, the Supreme Court disagreed with the D.C. Circuit's approach, stating 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."[30] The Court concluded that the court of appeals "should not have assumed, without deciding, th[e] preliminary issue" to the "clearly established" question.[31] Largely because of this latter determination by the Court, the literature on sequencing generally regards *Siegert* as initiating Period Two,[32] but this Note offers empirical observations to suggest that *Siegert*'s issuance does not represent a clean point at which lower courts radically changed their sequencing behavior.

B. *The Pre-*Saucier *Period (Period Two): Limited Guidance from the Court; Confusion Among Lower Courts*

The Supreme Court in *Pearson* stated in no uncertain terms that *Saucier* made sequencing a "mandate."[33] A necessary implication is that the Court believed that prior to *Saucier* sequencing was not mandatory. That implication has been uncontroversial; indeed, the pre-*Saucier* period is generally considered a phase when courts were able to exercise discretion in sequencing.[34] For example, Hughes—while using a different end date for the pre-*Saucier* period (the Court's 1999 decision in *Wilson v. Layne*)—states that within the pre-*Saucier* period, sequencing was merely "preferred," and that "confusion persisted in the lower courts as to whether it was mandatory."[35] Similarly, Professor Healy states that "many [courts] continued to skip the underlying constitutional question and proceed straight to the issue of qualified

27. 500 U.S. at 232-33.
28. *Id.* at 232.
29. Siegert v. Gilley, 895 F.2d 797, 803 (D.C. Cir. 1990).
30. 500 U.S. at 232.
31. *Id.*
32. *See, e.g.*, Hughes, *supra* note 11, at 408; Leong, *supra* note 11, at 670.
33. 129 S. Ct. 808, 816 (2009).
34. *See, e.g.*, Hughes, *supra* note 11, at 408-12; Leong, *supra* note 11, at 670.
35. Hughes, *supra* note 11, at 408.

immunity" in the pre-*Saucier* period.[36] As Part IV suggests, however, it is inaccurate to refer to the pre-*Saucier* period as merely a period of lower court discretion. *Siegert*'s admonition that the constitutional question is a "necessary concomitant" to the subsequent "clearly established" inquiry can hardly be equated to a grant of unfettered discretion. Instead, some courts were under the impression that *Siegert* had mandated sequencing.[37]

In *County of Sacramento v. Lewis*,[38] Justice Souter, writing for the Court, stated that a "better approach is to determine the [constitutional] right before determining whether it was previously established with clarity."[39] The holding that sequencing is merely a "better" approach should have necessarily signaled to lower courts that sequencing was not mandatory. But only one year later, in *Conn v. Gabbert*,[40] and then in *Wilson v. Layne*,[41] the Court stated that "[a] court evaluating a claim of qualified immunity 'must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all, and if so, proceed to determine whether that right was clearly established at the time of the alleged violation.'"[42] Hughes concludes that *Wilson v. Layne* marked the beginning of mandatory sequencing.[43] Leong, on the other hand, agreeing with the Supreme Court's take, marks *Saucier* as the point at which sequencing became mandatory.[44]

The precise endpoint of the pre-*Saucier* period is not critical for the purposes of this Note, but the following three points are important: First, during the pre-*Saucier* period, a growing number of courts believed sequencing was mandatory. Second, it is unclear, even in hindsight, when a majority of courts were operating under the impression that sequencing was mandatory. Third, in light of the prior two points, it is not accurate to tag the pre-*Saucier* period as a phase of lower court discretion with respect to sequencing. In sum, significant confusion persisted among the lower courts during the pre-*Saucier*

---

36. Healy, *supra* note 9, at 879. Healy cites *Powers v. CSX Transportation, Inc.*, 105 F. Supp. 2d 1295 (S.D. Ala. 2000), as an example of a case supporting this argument. Healy, *supra* note 9, at 879 n.162 ("'[T]he Court concludes that it is appropriate to . . . address first whether the constitutional and statutory rights asserted by the plaintiff were clearly established . . . .'" (quoting *Powers*, 105 F. Supp. 2d at 1308) (alteration in original)); *see also* Shepherd v. Sanchez, No. 96 Civ. 9012(LAP), 2000 WL 1010829, at *4-*5 (S.D.N.Y. July 21, 2000); Does v. Covington County Sch. Bd. of Educ., 930 F. Supp. 554, 576 (M.D. Ala. 1996); Bapat v. Conn. Dep't of Health Servs., 815 F. Supp. 525, 535 (D. Conn. 1992).

37. *See* Leong, *supra* note 11, at 674 (citing McCall v. Williams, 59 F. Supp. 2d 556 (D.S.C. 1999); Cline v. Binder, 187 F.3d 628 (4th Cir. 1999) (unpublished table decision)); *infra* Part IV.

38. 523 U.S. 833 (1998).

39. *Id.* at 842 n.5.

40. 526 U.S. 286 (1999).

41. 526 U.S. 603 (1999).

42. *Id*. at 609 (quoting *Gabbert*, 526 U.S. at 290).

43. Hughes, *supra* note 11, at 412-13.

44. Leong, *supra* note 11, at 670.

period, an observation made in the literature but insufficiently incorporated into the empirical analysis of mandatory sequencing.

C. *The Post-*Saucier *Period (Period Three): The Court Mandates Sequencing*

Saucier marked the start of the third period of the sequencing debate and at last resolved confusion by explicitly making sequencing mandatory.[45] Writing for the Court, Justice Kennedy outlined the mandatory regime, requiring strict adherence to a two-step qualified immunity inquiry. First, as a "threshold question," a court was to ask, "[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?"[46] The Court stated that "[t]his must be the initial inquiry."[47] Second, "if a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established."[48]

As justification for strict sequencing, the Court wrote that, "[t]he law might be deprived of [an] explanation were a court simply to skip ahead to the question whether the law clearly established that the officer's conduct was unlawful in the circumstances of the case."[49] Thus, *Saucier* sequencing was intended to ensure the "law's elaboration from case to case."[50] Prior to *Saucier*, the Court made clear its belief that, if courts were to routinely avoid the constitutional merits inquiry in favor of the "clearly established" immunity inquiry, "standards of official conduct would tend to remain uncertain, to the detriment both of officials and individuals."[51] Such an approach, the Court surmised, "[would] provide[] no clear standard, constitutional or nonconstitutional,"[52] and thus "the law might be deprived of [an] explanation" as to the existence of a particular constitutional right.[53] That result, in turn, would give municipalities "multiple bites of a constitutionally forbidden fruit."[54] Professor Sam Kamin succinctly articulates the potential circularity:

> [I]f the entitlement to qualified immunity were determined before the merits of the underlying case, difficult issues and close cases would almost never be decided on the merits in damages actions. To say that a case is close is to say that the law is not well established; to say that the

45. Saucier v. Katz, 533 U.S. 194, 200 (2001).
46. *Id.* at 201.
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. County of Sacramento v. Lewis, 523 U.S. 833, 841 n.5 (1998).
52. *Id.*
53. *Saucier*, 533 U.S. at 201.
54. Garcia *ex rel.* Garcia v. Miera, 817 F.2d 650, 656-57 n.8 (10th Cir. 1987).

> law is not well-established is to say that the defendant is entitled to qualified immunity; to say that defendant is entitled to qualified immunity is to say that the Court need not resolve the merits of the close case. This nearly circular analysis could serve to stagnate the substance of constitutional law almost indefinitely.[55]

The danger of rights stagnation is its potential to undermine the fundamental purpose of qualified immunity, which enables courts to advance constitutional law without subjecting the government to the "paralyzing cost of full remediation for past practice."[56] Where courts are faced with the prospect of assessing significant remedial costs against the government for violating rights theretofore unarticulated, they might be deterred from recognizing new constitutional rights.[57] For example, Daryl Levinson points out that "[t]he Court would never have created the right in *Miranda v. Arizona* . . . if the warning requirement had applied retroactively so that every prisoner had to be released from custody on postconviction review."[58] Recognizing this potential Achilles' heel in the development of constitutional rights, the Court concluded that mandatory sequencing was "necessary to set forth principles which will become the basis for a [future] holding that a right is clearly established," thereby subjecting future officials to liability for repeated violations, while limiting the remedial impact of the first violation.[59]

Reaction to mandatory sequencing was mixed. Critics from within both academia and the judiciary pointed out a number of flaws in the bright-line rule.[60] Those criticisms, both jurisprudential (for example, how mandatory sequencing contravenes the doctrine of constitutional avoidance) and practical (for example, how mandatory sequencing affects efficiency in the federal judiciary), did not fall on deaf ears. The Supreme Court soon indicated its own

---

55. Sam Kamin, *Harmless Error and the Rights/Remedies Split*, 88 VA. L. REV. 1, 49 (2002) (footnotes omitted); *see also* John M.M. Greabe, Mirabile Dictum*!: The Case for "Unnecessary" Constitutional Rulings in Civil Rights Damages Actions*, 74 NOTRE DAME L. REV. 403, 410 (1999) ("The requirement that the allegedly violated right be clearly established at the time of the action in question tends, if not to 'freeze' constitutional law, then at least to retard its growth through civil rights damages actions. The corpus of constitutional law grows only when courts address novel constitutional questions, yet a novel claim, by definition, seeks to establish a right that is not already 'clearly established.'" (citation omitted)).

56. John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 100 (1999); *see also* Wyatt v. Cole, 504 U.S. 158, 167 (1992) (noting that qualified immunity is meant to strike a balance "between compensating those who have been injured by official conduct and protecting government's ability to perform its traditional functions").

57. For further discussion of this potential "remedial deterrence" phenomenon in § 1983 actions, see Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 889-99 (1999).

58. *Id*.

59. Saucier v. Katz, 533 U.S. 194, 201 (2001) (alteration in original).

60. *See infra* Part III.

unease with mandatory sequencing. In *Brosseau v. Haugen*,[61] the Court did not abide by the *Saucier* rule, but instead addressed the "clearly established" question while "express[ing] no view as to the correctness of the Court of Appeals' decision on the constitutional question itself."[62] The Court justified its departure from *Saucier* sequencing as an "exercise [of] [its] summary reversal procedure . . . to correct a clear misapprehension of the qualified immunity standard."[63] Such an exception to mandatory sequencing was mentioned neither before nor again after *Brosseau*. Despite spending no further time justifying its failure to abide by *Saucier*, the Court did subtly indicate a changing viewpoint on mandatory sequencing: "We have no occasion in this case to reconsider our instruction in *Saucier* . . . ."[64] Similarly, in *Scott v. Harris*,[65] the Court alluded to reservations about mandatory sequencing: "We need not address the wisdom of *Saucier* in this case . . . because the constitutional question with which we are presented is . . . easily decided."[66]

D. *The Post*-Pearson *Period (Period Four): The Court Reverses Course; Sequencing Discretionary but Encouraged*

The Court, itself, brought the mandatory sequencing issue back into the spotlight in 2008. In granting certiorari in *Pearson v. Callahan*, which involved a claim based on unreasonable search and seizure under the Fourth Amendment, the Court instructed the parties, sua sponte, to brief a question that neither had raised: "Whether the Court's decision in *Saucier v. Katz* should be overruled?"[67] In an opinion released in January 2009, Justice Alito, writing for an unanimous Court, held that "the *Saucier* protocol should not be regarded as mandatory in all cases," and that "[t]he judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand."[68] The Court carefully noted that its "decision does not prevent the lower courts from following the *Saucier* procedure," but that "it simply recognizes that those courts should have the discretion to decide whether that procedure is worthwhile in particular cases."[69]

Pearson marked the close of the post-*Saucier* period and the opening of a

61. 543 U.S. 194 (2004).
62. *Id.* at 198.
63. *Id.* at 198 n.3.
64. *Id.*
65. 550 U.S. 372 (2007).
66. *Id.* at 377 n.4.
67. Pearson v. Callahan, 128 S. Ct. 1702, 1702-03 (2008) (mem.) (granting certiorari).
68. Pearson v. Callahan, 129 S. Ct. 808, 818 (2009).
69. *Id.* at 821.

fourth period in qualified immunity jurisprudence. Although it might be argued that this new period is merely a return to the pre-*Saucier* period, when courts were able to exercise discretion on the sequencing question, this Note provides evidence that the post-*Pearson* period more likely represents a distinct and novel phase in sequencing jurisprudence.

II. CRITIQUES OF MANDATORY SEQUENCING AND A POSSIBLE CONTRIBUTION FROM THIS NOTE

The Court's *Pearson* decision was prefaced by growing scrutiny of *Saucier*'s mandatory sequencing regime, both from within the Court and from legal academics. In fact, prior to the Court's decision in *Pearson*, Justices Breyer, Ginsburg, Stevens, Scalia, Kennedy,[70] and former Chief Justice Rehnquist had stated opposition to mandatory sequencing.[71] A number of lower courts had similarly questioned the *Saucier* approach,[72] and, at times, refused to abide.[73] In his concurrence in *Scott v. Harris*, Justice Breyer

70. It should be noted that Justice Kennedy initially resisted sequencing, but then wrote the majority opinion in *Saucier* requiring mandatory sequencing. *Compare* Siegert v. Gilley, 500 U.S. 226, 235 (1991) (Kennedy, J., concurring) ("[I]t seems to reverse the usual ordering of issues to tell the trial and appellate courts that they should resolve the constitutional question first."), *with* Saucier v. Katz, 533 U.S. 194, 201 (2001) ("The law might be deprived of [an] explanation were a court simply to skip ahead to the question whether the law clearly established that the officer's conduct was unlawful in the circumstances of the case.").

71. *See, e.g.*, Morse v. Frederick, 551 U.S. 393, 432 (2007) (Breyer, J., concurring in the judgment in part and dissenting in part) (urging the Court to "end the failed *Saucier* experiment now"); *Scott*, 550 U.S. at 387 (Breyer, J., concurring); Brosseau v. Haugen, 543 U.S. 194, 201-02 (2004) (Breyer, J., concurring joined by Scalia & Ginsburg, JJ.) (arguing for reconsideration of *Saucier*'s "rigid 'order of battle'" because it "requires courts unnecessarily to decide difficult constitutional questions when there is available an easier basis for the decision (*e.g.*, qualified immunity) that will satisfactorily resolve the case before the court"); Bunting v. Mellen, 541 U.S. 1019 (2004) (Stevens, J., respecting denial of certiorari joined by Ginsburg & Breyer, JJ.) (taking issue with the "unwise judge-made rule under which courts must decide whether the plaintiff has alleged a constitutional violation before addressing the question whether the defendant state actor is entitled to qualified immunity"); *id.* at 1025 (Scalia, J., dissenting from denial of certiorari joined by Rehnquist, C.J.) ("We should either make clear that constitutional determinations are *not* insulated from our review . . . or else drop any pretense at requiring the ordering in every case."); *Siegert*, 500 U.S. at 235 (Kennedy, J., concurring in the judgment) ("If it is plain that a plaintiff's required malice allegations are insufficient but there is some doubt as to the constitutional right asserted, it seems to reverse the usual ordering of issues to tell the trial and appellate courts that they should resolve the constitutional question first.").

72. *See, e.g.*, Lyons v. City of Xenia, 417 F.3d 565, 580-84 (6th Cir. 2005) (Sutton, J., concurring).

73. *See, e.g.*, Hatfield-Bermudez v. Aldanondo-Rivera, 496 F.3d 51, 59-60 (1st Cir. 2007); Cherrington v. Skeeter, 344 F.3d 631, 640 (6th Cir. 2003); Koch v. Town of Brattleboro, 287 F.3d 162, 166 (2d Cir. 2002); Pearson v. Ramos, 237 F.3d 881, 884 (7th Cir. 2001); Powers v. CSX Transp., Inc., 105 F. Supp. 2d 1295, 1307-08 (S.D. Ala. 2000).

articulated four reasons why *Saucier*'s mandatory sequencing should be overturned:

> Sometimes (*e.g.*, where a defendant is clearly entitled to qualified immunity) *Saucier's* fixed order-of-battle rule wastes judicial resources in that it may require courts to answer a difficult constitutional question unnecessarily. Sometimes (*e.g.*, where the defendant loses the constitutional question but wins on qualified immunity) that order-of-battle rule may immunize an incorrect constitutional ruling from review. Sometimes . . . the order-of-battle rule will spawn constitutional rulings in areas of law so fact dependent that the result will be confusion rather than clarity. And frequently the order-of-battle rule violates that older, wiser judicial counsel "not to pass on questions of constitutionality . . . unless such adjudication is unavoidable."[74]

In addition to these critiques of mandatory sequencing, the *Pearson* opinion and the briefs filed on behalf of the parties raised two additional critiques: (1) whether mandatory sequencing is, in fact, necessary to accomplish the goal of constitutional articulation;[75] and (2) whether mandatory sequencing of Fourth Amendment claims is appropriate given the conceptually thorny confluence of Fourth Amendment and *Saucier* "reasonableness" inquiries.[76]

These six practical, theoretical, and jurisprudential critiques of mandatory sequencing—creation of bad law,[77] waste of judicial resources,[78]

---

74. *Scott*, 550 U.S. at 387-88 (Breyer, J., concurring) (quoting Spector Motor Serv., Inc. v. McLaughlin, 323 U.S. 101, 105 (1944)) (alteration in original).

75. Pearson v. Callahan, 129 S. Ct. 808, 818-19 (2009).

76. *Id.* at 819. The difficulty arises because Fourth Amendment violations are routinely presented in terms of "unreasonable" searches and seizures. Similarly, in cases involving the Fourth Amendment, the second prong of the *Saucier* qualified immunity inquiry requires a court to determine whether the defendant officer's behavior exhibited "objective legal reasonableness." Harlow v. Fitzgerald, 457 U.S. 800, 819 (1982). In other words, a court must determine whether, in light of the clearly-established law at the time, an objectively reasonable officer could have concluded it was constitutional to engage in the alleged violation. Proponents of mandatory sequencing argue that, in light of the risk that the Fourth Amendment "reasonableness" inquiry and the qualified immunity "objective reasonableness" inquiry might be conflated, it is vital to require that courts make a specific and separate determination on the constitutionality of the officer's behavior. Brief for the United States as Amicus Curiae Supporting Petitioners at 26-27, *Pearson*, 129 S. Ct. 808 (No. 07-751).

77. For a discussion on how mandatory sequencing might result in the creation of "bad" law, see Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1279 (2006) (stating that mandatory sequencing "is a blueprint for the creation of bad constitutional law"). *See also* Morse v. Frederick, 551 U.S. 393, 430-31 (2007) (Breyer, J., concurring in the judgment in part and dissenting in part) (noting that mandatory sequencing could "require [courts] to resolve constitutional issues that are poorly presented"); Horne v. Coughlin, 191 F.3d 244, 247 (2d Cir. 1999) (stating that under a mandatory sequencing regime "[j]udges risk being insufficiently thoughtful and cautious in uttering pronouncements that play no role in their adjudication"); Brief for the State of Illinois et al. as Amici Curiae Supporting Petitioners at 20-21, *Pearson*, 129 S. Ct. 808 (No.

immunization from appellate review,[79] violation of principles of constitutional avoidance,[80] special difficulties of mandatory sequencing in the Fourth Amendment context,[81] and the effect of sequencing on constitutional

07-751) (noting that mandatory sequencing can result in less-than-adequate briefing of issues, and citing a case wherein "the merits of [the constitutional] issue [were] scarcely mentioned in the briefs on appeal, let alone adequately briefed" (quoting African Trade & Info. Ctr., Inc. v. Abromaitis, 294 F.3d 355, 359 (2d Cir. 2002)) (alteration in original)); Leong, *supra* note 11, at 680-81 (noting that the possibility of creating "bad" law "is compounded by the fact that courts often confront the qualified immunity question early in the course of litigation").

78. *See, e.g.*, *Morse*, 551 U.S. at 430 (Breyer, J., concurring in the judgment in part and dissenting in part) (noting that mandatory sequencing can "wast[e] judicial resources"); Brosseau v. Haugen, 543 U.S. 194, 201-02 (2004) (Breyer, J., concurring) ("[W]hen courts' dockets are crowded, a rigid 'order of battle' makes little administrative sense . . . ."); Brief for the United States as Amicus Curiae Supporting Petitioners at 31, *Pearson*, 129 S. Ct. 808 (No. 07-751) ("[An inflexible merits-first sequence] requires the reviewing court to decide the constitutional issue as an initial matter even if resolution of that question is difficult and time-consuming, even if members of an appellate panel are divided about its proper resolution, and even if the court's disposition of the issue turns on idiosyncratic, case-specific factors so that its opinion provides little guidance for future disputes."); Leval, *supra* note 77, at 1279 n.89 ("[Mandatory sequencing] increases the workload of an already overburdened judiciary."). *Contra* Brief of Respondent at 53, *Pearson*, 129 S. Ct. 808 (No. 07-751) (Where sequencing is not mandatory, "district judges may exercise their discretion in a way that does not give the proper weight to [elaborating of constitutional law], by putting their own interest in clearing their dockets as efficiently as possible ahead of the Court's policy of elaborating constitutional norms." (citing Michael L. Wells, *The Order-of-Battle in Constitutional Litigation*, 60 SMU L. REV. 1539, 1566 (2007))).

79. *See, e.g.*, *Morse*, 551 U.S. at 431 (Breyer, J., concurring in the judgment in part and dissenting in part) (noting that sequencing could "immunize an incorrect constitutional holding from further review"); Bunting v. Mellen, 541 U.S. 1019, 1023 (2004) (Scalia, J., dissenting) ("[Mandatory sequencing] should not apply where a favorable judgment on qualified-immunity grounds would deprive a party of an opportunity to appeal the unfavorable (and often more significant) constitutional determination."); Lyons v. City of Xenia, 417 F.3d 565, 582 (6th Cir. 2005) (Sutton, J., concurring) ("By multiplying constitutional holdings that are not subject to review in the normal course, a rigid application of the two-step inquiry may do as much to unsettle the law as to settle it."); *Horne,* 191 F.3d at 247 ("If those government actors defer to the courts' declarations and modify their procedures accordingly, new constitutional rights will have effectively been established by the dicta of [the] lower court without the defendants having the right to appellate review.").

80. For a discussion of whether, when a plaintiff loses on the second prong of the *Saucier* inquiry, a finding that a constitutional right has been violated constitutes dictum or a holding of the court, compare Greabe, *supra* note 55, at 408, with Melissa Armstrong, Note, *Rule Pragmatism: Theory and Application to Qualified Immunity Analysis*, 38 COLUM. J.L. & SOC. PROBS. 107, 123-28 (2004). *See also Bunting*, 541 U.S. at 1023-24 (2004) (Scalia, J., dissenting) ("[C]onstitutional determination is *not* mere dictum in the ordinary sense, since the whole reason we require it to be set forth (despite the availability of qualified immunity) is to clarify the law and thus make unavailable repeated claims of qualified immunity in future cases.").

81. *See, e.g.*, Greabe, *supra* note 55, at 418-24 (arguing that mandatory sequencing does not often impinge upon separation of powers principles embodied in avoidance

articulation—have been well-summarized in the literature. Thus, this Note will not retread that territory in full, but will instead discuss the one critique relevant to this Note's empirical findings: the relationship between mandatory sequencing and articulation of constitutional rights.

A. *Prior Empirical Studies on Mandatory Sequencing*

As discussed above, the *Saucier* rationale rested squarely on the notion that mandatory sequencing would ensure the "law's elaboration from case to case . . . ."[82] Nevertheless, few advocates or critics of sequencing have taken issue with the underlying assumption that mandatory sequencing indeed results in increased constitutional articulation. In fact, while much of the discussion on *Saucier* sequencing has been premised on this assumption, only recently has any empirical work been done to test its veracity.[83] When those studies emerged in 2009, parties on both sides of the debate took notice.

In one study, Paul Hughes sampled published appellate dispositions during three isolated years (1988, 1995 and 2005) falling within the three doctrinal periods, and found that the shift to mandatory sequencing corresponded to a decrease in the frequency with which appellate courts skipped the substantive constitutional question.[84] In short, lower courts had indeed abided by the Supreme Court's *Saucier* instructions. The Hughes study, a manuscript of which was made available in 2008, was cited in the *Pearson* Respondent's Brief[85] as well as in various amicus briefs submitted in that litigation, and used as evidence that the mandatory sequencing regime had successfully resulted in greater constitutional articulation.[86]

In another study published in 2009, Nancy Leong echoed Hughes' observations by sampling appellate and district court opinions from three time periods (two years prior to *Siegert,* two years prior to *Saucier*, and 2006-2007). She went on to test how this increased constitutional articulation actually

---

doctrine); Seth F. Kreimer, *Exploring the Dark Matter of Judicial Review: A Constitutional Census of the 1990s*, 5 WM. & MARY BILL RTS. J. 427, 459, 466, 506-07 (1997) (pointing out that in relatively few qualified immunity actions are courts asked to rule on the validity of acts of Congress or high ranking executive officials).

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

83. Prior to recent empirical work on this matter, some scholars had done rough calculations of courts' behaviors under *Siegert*'s optional sequencing regime. *See* Greabe, *supra* note 55, at 419 n.35 (finding that courts skipped the constitutional question in fifty-one of seventy-nine representative qualified immunity cases decided around 1997 in which the defendant won on the immunity issue).

84. Hughes, *supra* note 11, at 418, 424.

85. Brief of Respondent, *supra* note 78 at 51, 54.

86. *See, e.g.*, Brief for the National Campaign to Restore Civil Rights as Amicus Curiae Supporting Respondent at 24-26, *Pearson*, 129 S. Ct. 808 (No. 07-751); Brief of National Police Accountability Project and Ass'n of American Justice as Amici Curaie Supporting Respondent at 17, *Pearson*, 129 S. Ct. 808 (No. 07-751).

affects the underlying substantive constitutional rights being articulated. Leong concluded that although "[c]ourts now avoid fewer constitutional questions, and as a result, generate more constitutional law," the new law that is being created "uniformly denies the existence of plaintiffs' constitutional rights."[87] In contrast, this Note presents new evidence demonstrating that mandatory sequencing has in fact resulted in a proliferation of rights-affirming holdings (holdings that, irrespective of the outcome of that particular litigation, recognize the existence of a constitutional right and consequently at least indirectly affirm the rights of future plaintiffs to bring similar claims). We revisit these findings in light of Leong and Hughes in the subsequent discussion.

B. *This Note's Contribution to the Mandatory Sequencing Debate*

While the empirical work on the frequency of articulation is a helpful point of departure for further analysis, the more illuminating questions involve the actual content of that articulation. This Note explores how the move towards mandatory constitutional articulation has affected the judicial outcome at the appellate level for the constitutional rights at issue in a random sample of § 1983 litigation. Specifically, this Note addresses whether mandatory sequencing has resulted in a greater proliferation of pro-defendant or pro-plaintiff constitutional holdings. Our findings—that mandatory sequencing has in fact resulted in a statistically significant increase in pro-plaintiff constitutional rights—provide new perspective on how the mandatory sequencing regime has impacted substantive rights.

This study also reveals two empirical gaps in the sequencing debate. First, while the conceptual discussion about the theoretical and practical merits of sequencing implies an empirical dimension, there has been no serious quantitative work to reconcile assumptions built into conceptual models with empirical realities of sequencing outcomes until very recently. For example, assertions about the impact of mandatory sequencing on the quality of sequencing beg reference to data on whether post-*Saucier* constitutional articulations are in fact inferior in quality as compared to the pre-*Saucier* cases. But there is no such study, confining the discourse to the conceptual level, without complementary empirical support. Second, the field's working framework is that sequencing doctrine has developed relatively neatly over three periods—pre-*Siegert*, pre-*Saucier*, and post-*Saucier*—and that appellate courts' behavior conforms to these doctrinal shifts. But the data herein suggest that using the Supreme Court's doctrine as a proxy for shifts in appellate court behavior is not commensurate with the empirical reality, and this finding may help future studies more accurately perform empirical work on sequencing

87. Leong, *supra* note 11, at 692-93.

doctrine.

III. RESULTS

A. *Methodology*

To generate the full set of reported and published federal appellate decisions regarding § 1983 actions involving qualified immunity, we performed a query for "qualified immunity" in Westlaw's "all federal appellate courts" database.[88] The search generated 6472 results. From this set, we selected a random sample of 750 cases using a random number generator set to return integers from "1" to "6472" to minimize selection bias.[89] The primary coder read and coded each opinion, and a second reader read the first one hundred cases. Where applicable, coding conflicts were discussed and resolved, although disagreement occurred in fewer than ten percent of cases.

Because some cases present multiple claims, the 750 opinions yielded 910 distinct dispositions. Some cases contained multiple claims about *separate* constitutional questions. Such cases were coded as containing distinct claims. But when a case presented *identical* claims against multiple defendants, it was coded as a single claim, unless the disposition was different among the defendants. For example, a case was coded as one claim if five identical Fourth Amendment complaints were alleged against multiple police officers and the court treated the claims identically, but as two claims if the court found liability with respect to only some of the officers.

Among the 910 claims, nine yielded results that appeared logically impossible (perhaps the result of coding errors or errant judicial decisions), and after confirmation by a second reader, these cases were excluded from the final sample. Ultimately, this Note presents an analysis of 741 appellate cases, representing 901 constitutional claims.

After reading a case, the primary reader recorded identifying information, including case name, citation, circuit, authoring judge, and year. Next, using eighteen categories of constitutional questions that arise in § 1983 litigation,[90]

88. The search string was: "qualified /2 immunity % ci(slip no not unpub! unreport! table)." The search was performed on December 15, 2008. While selecting cases from the Westlaw database and further selecting only published and reported opinions may introduce some inherent bias in the sample, *see, e.g.*, Leong, *supra* note 11, at 685 n.88, 701-02 (performing logistic regressions to conclude that observed effects in that study were not attributable to Westlaw's publication bias), this Note deliberately includes only published opinions because unpublished opinions are not precedential and thus do not contribute to the "clear establishment" of constitutional rights. *See* Hughes, *supra* note 11, at 419 & n.112.

89. *See* Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 108-12 (2002) (explaining methodological advantage of using random sample in large-*n* studies to minimize selection bias).

90. *See* Paul W. Hughes, Not a Failed Experiment: *Wilson-Saucier* Sequencing and the

the constitutional issue presented was recorded. Each case was also assigned a doctrinal period: the "pre-*Siegert*" period occurred before the May 23, 1991 *Siegert v. Gilley* decision; the "pre-*Saucier*" period lasted from May 24, 1991 to June 18, 2001, when *Saucier v. Katz* was decided; and the "post-*Saucier*" period lasted from June 19, 2001 to December 15, 2008, when sampling for this study occurred.

The primary coder recorded what the appellate court's disposition was and described the path by which the court reached its decision. The code book provides the details of qualitative coding.[91] The qualitative outcomes that form the basis of this study describe the five possible outcomes at which a court may arrive in a § 1983 qualified immunity action. These outcomes are described below and are depicted in Figure 1.

Outcome 1: No constitutional violation alleged ("Rights-Restricting Constitutional Holding"). The court confronts the substantive constitutional issue and determines that the plaintiff has not successfully alleged a constitutional violation. The court therefore makes no determination regarding the qualified immunity defense.[92] Outcome 1 favors the defendant and has a rights-restrictive effect for future plaintiffs bringing similar constitutional claims.

Outcome 2: Constitutional violation alleged, qualified immunity denied ("Rights-Affirming Denial of Qualified Immunity"). The court confronts the substantive constitutional issue and determines that the plaintiff has successfully alleged a constitutional violation. The court next decides the qualified immunity defense and finds the law was clearly established at the time of the conduct.[93] This outcome favors the present plaintiff in the litigation and has a net rights-expanding effect on future plaintiffs bringing similar claims. In the time before *Saucier*, a court could first decide that the law was clearly established at the time of the conduct—resulting in a denial of qualified immunity—and subsequently determine that a constitutional violation was

---

Articulation of Constitutional Rights app. D (Aug. 4, 2008) (unpublished appendix, on file with author).

91. *See infra* Appendix A.

92. *See, e.g.*, Shero v. City of Grove, 510 F.3d 1196, 1204 (10th Cir. 2007) (holding that city's and city employees' actions in rejecting plaintiff's requests for council packets, limiting his speaking time at a city council meeting, and filing a declaratory judgment suit against him did not violate his First Amendment rights); Butler v. Rio Rancho Pub. Sch. Bd. of Educ., 341 F.3d 1197, 1201 (10th Cir. 2003) (holding that no substantive due process violation had been alleged where school suspended student for possession of a weapon).

93. *See, e.g.*, Williams v. Greifinger, 97 F.3d 699, 706-08 (2d Cir. 1996) (holding that prison policy of denying exercise to inmates had long been found to violate the Eighth Amendment, and that it was objectively unreasonable for defendant to believe he was not violating a clearly established right); Scott v. Glumac, 3 F.3d 163, 167 (7th Cir. 1993) (holding that seizure of defendant's automobile was a violation of his Fourth Amendment rights and that a reasonable officer could not have believed there was probable cause to seize the car).

successfully alleged. That path yields a conceptually identical outcome and was also labeled as a rights-affirming denial of qualified immunity.

Outcome 3: Constitutional violation alleged; qualified immunity granted ("Rights-Affirming Grant of Qualified Immunity"). The court confronts the substantive constitutional issue and determines that the plaintiff has successfully alleged a constitutional violation. The court next reaches the qualified immunity defense and finds the law was not clearly established at the time of conduct.[94] While this outcome favors the present defendant in the litigation, it has a rights-affirming effect for potential future plaintiffs pleading similar constitutional claims.

Outcome 4: Constitutional violation not alleged; qualified immunity granted in the alternative ("Rights-Restricting Constitutional Holding, Grant of Qualified Immunity in the Alternative"). The court confronts the substantive constitutional issue and determines that the plaintiff has not successfully alleged a constitutional violation. Nevertheless, the court next reaches the qualified immunity defense and determines, in the alternative, that the law was not clearly established at the time of the conduct.[95] This outcome thus favors the defendant in the present litigation and has a rights-restricting effect on both present and potential future plaintiffs.

Outcome 5: Qualified immunity granted; constitutional question not reached ("Rights-Neutral Grant of Qualified Immunity"). The court decides that the law regarding the conduct alleged was not clearly established at the time of the conduct, and makes no further holding regarding the substantive constitutional issue.[96] A rights-neutral grant of qualified immunity thus favors the defendant in the litigation. While this outcome should theoretically not have remained possible after the Supreme Court mandated sequencing in

94. *See, e.g.*, Bilida v. McCleod, 211 F.3d 166, 174-75 (1st Cir. 2000) (holding that defendant officers had violated plaintiff's Fourth Amendment rights, but were protected by qualified immunity based on a lack of prior precedent on the matter and their reasonable common belief that their superior had secured a warrant); Clue v. Johnson, 179 F.3d 57, 61-62 (2d Cir. 1999) (holding that defendant's behavior violated the First Amendment rights of union members, but defendant was entitled to qualified immunity because no court had recognized such rights as of the date of the violation).

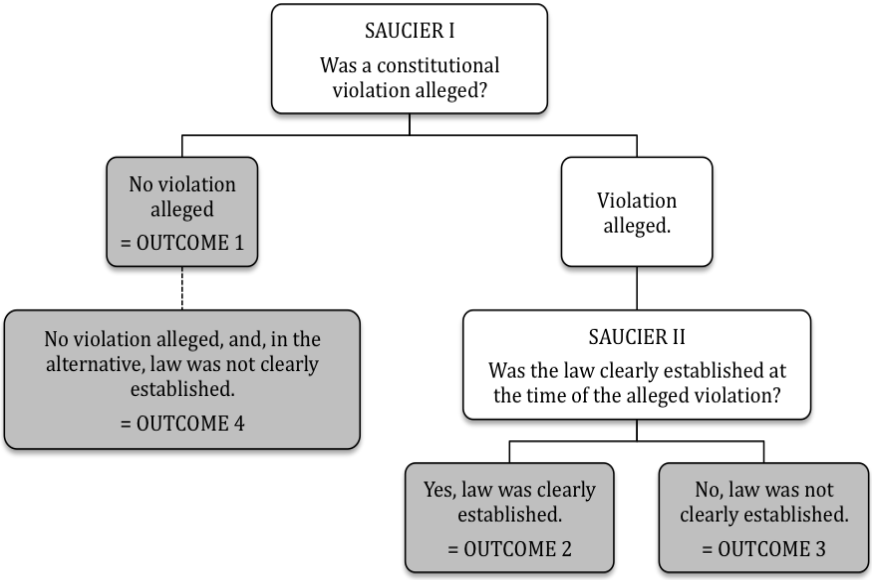
95. *See, e.g.*, Maggio v. Sipple, 211 F.3d 1346, 1354 (11th Cir. 2000) (holding that plaintiff had failed to allege a First Amendment retaliation claim, and could not show, in the alternative, that a reasonable person in the defendants' position would have been on notice that her actions violated clearly-established law); Saylor v. Bd. of Educ., 118 F.3d 507, 513, 515 (6th Cir. 1997) (holding that plaintiff had failed to allege a violation of his substantive due process rights in a corporal punishment claim, and, in the alternative, that the rights in question were not clearly established).

96. *See, e.g.*, Martin v. Snyder, 329 F.3d 919, 921-22 (7th Cir. 2003) (holding that prison official did not violate any clearly established rights under the Fourteenth Amendment by delaying a prisoner's right to marry); Molinelli v. Tucker, 901 F.2d 13, 16-17 (2d Cir. 1990) (holding that the constitutional status of urine testing for public employees under the Fourth Amendment was not clearly established at the time plaintiff's urine was tested, and thus defendants were protected by the qualified immunity defense).

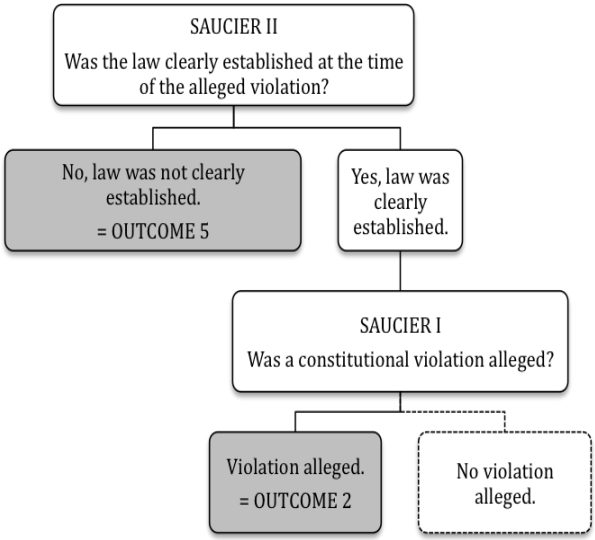
Saucier, the data below reveal the persistence of a small number of post-*Saucier* appellate decisions reaching this outcome anyway.

Figure 1. Five Possible Outcomes in § 1983 Qualified Immunity Actions

Panel A: Where the Court Confronts Constitutional Question First



Panel B: Where the Court Confronts "Clearly Established" Qualified Immunity Question First



Note: In panel A, the dashed line represents an outcome that is redundant because the "clearly established" question is unnecessary given the court's substantive determination that no violation was alleged, but that nevertheless appeared in the sample. In panel B, the dashed line represents an outcome that is theoretically possible but was not observed in any of the cases sampled for this study.

B. *Results and Analysis*

1. *Description of sample trends*

This study describes outcomes from 901 § 1983 claims before the federal appellate courts between 1976 and 2008 in which a qualified immunity defense was raised. Of 901 distinct claims, 6.8% are from the First Circuit, 7.2% from the Second, 4.2% from the Third, 4.7% from the Fourth, 9.9% from the Fifth, 11.1 % from the Sixth, 10.3% from the Seventh, 15.6% from the Eighth, 12.1% from the Ninth, 8.2% from the Tenth, 9.3% from the Eleventh, and 0.6% from the District of Columbia. Further, 18.4% of the sample is drawn from the pre-*Siegert* period (*Siegert* was decided May 23, 1991), 44.2% from the pre-*Saucier* period (from May 24, 1991 until June 18, 2001), and 37.4% from the post-*Saucier* period (from June 19, 2001 until the day of sampling, December 15, 2008).

Table 1 shows the distribution of the five outcome types across the three doctrinal periods. Predictably, the judicial move towards mandatory sequencing was associated with a drop in frequency of rights-neutral grants of qualified immunity (outcome 5), from 38% of all cases pre-*Siegert*, to 28.1% of all pre-*Saucier* cases, to only 5.9% of all cases post-*Saucier*. Given that the frequency of rights-neutral grants of qualified immunity (outcome 5) decreased progressively across periods, which outcomes increased in frequency in the post-*Saucier* compared to pre-*Saucier* period? One would predict an increase across periods in the frequency of outcomes from which a court confronts the substantive constitutional question (outcomes 1, 3, and 4). Indeed, Table 1 shows that the frequency of rights-expanding denials of qualified immunity (outcome 2) was roughly the same across periods; the frequency of rights-expanding grants of qualified immunity (outcome 3) increased slightly across periods, from 3.6% to 5.5% to 13.9%;[97] and the combined frequency of outcomes 1 and 4[98] increased, from 26.5% pre-*Siegert* to 37.7% pre-*Saucier* to 43.9% post-*Saucier*.

97. This data is summarized *infra* in Table 1. This Note does not focus on the pre-*Siegert* data because that period represents a time when lower courts had no formal guidance from the Supreme Court on sequencing. Therefore, although we consider all data, including pre-*Siegert*, in Table 1 for the sake of thoroughness, the comparisons that are meaningful for exploring the effects of discretionary versus mandatory sequencing involve only pre- and post-*Saucier* data, as summarized in Tables 2 and 3.

98. Throughout this Note, we combine outcomes 1 and 4 because for both an appellate court first confronts the substantive constitutional question and subsequently holds that the plaintiff did not allege a constitutional violation. The pronouncement of outcome 4, that the law was not clearly established at the time of conduct, is merely in the alternative. Note, however, that Table 1 indicates that the frequency of outcome 4 was nearly the same across periods.

Table 1. Distribution of Appellate Outcomes from Study Sample Across Three Doctrinal Periods

		Outcomes					
		Outcome 1: Rights-Restricting Constitutional Holding	Outcome 2: Rights-Affirming Denial of Q.I.	Outcome 3: Rights-Affirming Grant of Q.I.	Outcome 4: Rights-Restricting Holding, Grant of Q.I. in Alternative	Outcome 5: Rights-Neutral Grant of Q.I.	Total
Pre-*Siegert* (5/91)	No. of claims	32	53	6	12	63	166
	% within period	19.3%	31.9%	3.6%	7.2%	38.0%	100.0%
Pre-*Saucier* (5/91 to 6/01)	No. of claims	117	114	22	33	112	398
	% within period	29.4%	28.6%	5.5%	8.3%	28.1%	100.0%
Post-*Saucier* (6/01 to 12/08)	No. of claims	119	123	47	28	20*	337
	% within period	35.3%	36.5%	13.9%	8.3%	5.9%	100.0%
Total	No. of claims	268	289	75	73	195	901
	% of total	29.7%	32.2%	8.3%	8.1%	21.6%	100.0%

* The continued appearance of these outcomes even after the Court's *Saucier* pronouncement is intriguing. Unfortunately, our data do not shed light on why lower courts would ignore the *Saucier* regime; there are no discernable similarities among these claims (for example circuit, judge, or type of constitutional question).

2. *Testing for statistical significance of the observed increase in the frequency of rights-restricting outcomes from pre- to post-*Saucier

Table 2 shows an increase in the frequency of rights-restricting outcomes in which a court determines the plaintiff failed to successfully allege a constitutional violation (outcomes 1 and 4) from the pre- to post-*Saucier* periods. One possible account of the observation is that as Supreme Court decisions increasingly required lower courts to confront sometimes difficult constitutional questions, courts complied, but at the cost of constraining the constitutional rights of individual plaintiffs. In other terms, while Table 2 shows that appellate court compliance with *Saucier* manifested itself through

an increased frequency of cases yielding constitutional rulings because lower courts confronted the substantive constitutional question, that compliance may have been matched by an increased proportion of constitutional holdings that were rights-restricting vis-à-vis plaintiffs (outcomes 1 and 4).[99]

Table 2. Distribution of Rights-Restricting Versus Rights-Affirming or Rights-Neutral Outcomes in pre- and post-*Saucier* Periods

		Rights-Affirming or Rights-Neutral Outcomes (outcomes 2, 3, and 5)	Rights-Restricting Holdings (outcomes 1 and 4)
Pre-*Saucier*	No. of claims	248	150
	% within period	62.3%	37.7%
Post-*Saucier*	No. of claims	190	147
	% within period	56.4%	43.6%

Note: Details on application of statistical tests to the data appear in Appendix B.1-2.

Analysis of our data, however, reveals that while there is an apparent increase in frequency in rights-restricting holdings (outcomes 1 and 4) from the pre- to post-*Saucier* period, it is not statistically significant. Statistical significance was assessed using two tests: Pearson's chi-square test[100] and Student's *t*-test (further details about and results of the statistical analyses appear in Appendix B.1-2).

Pearson's chi-square test assesses whether the frequencies of paired observations of two variables are independent. The chi-square statistic in turn yields a *p*-value, which describes the likelihood of observing the particular result by chance if the variables are independent. By convention, statistical significance exists for values of p less than 0.05—that is, there is a less than five percent chance that the observed results would occur if the null hypothesis (in the case of the chi-square test, that the outcome distributions for the study sample are independent of each other) were true.

Applied to the data in Table 2, the chi-square test asks whether we can reject the possibility that right-restricting holdings were equally likely pre-*Saucier* and post-*Saucier*, and the differences are purely based on random variation, given samples from each doctrinal periods of the particular size. The results of the chi-squared test do not permit rejection of the null hypothesis (chi-squared = 2.937, $p > 0.05$). That result means that we cannot reject the hypothesis that the increase in rights-restricting holdings from 37.7% during

99. Leong posits this conclusion. Leong, *supra* note 11, at 692-93.

100. There is no relationship between the name of the test and *Pearson v. Callahan*, 129 S. Ct. 808 (2009).

the pre-*Saucier* period to 43.6% during the post-*Saucier* period is a random artifact.

We also used Student's *t*-test, which determines whether the means of two normally distributed populations with equal variances are equal.[101] The test produces a value of the *t*-statistic for the given data, which corresponds to a *p*-value that indicates the likelihood of obtaining the observed result assuming that the null hypothesis (in the case of a *t*-test, that the means are equal) is true.

Applied to Table 2 data, the *t*-test asks whether the difference between the 398 (37.7% of total) rights-restricting outcomes (outcomes 1 and 4) pre-*Saucier* and the 337 (43.6% of total) rights-restricting outcomes post-*Saucier* is statistically significant. In other words, it asks whether the change from 37.7% to 43.6% would be expected to occur randomly in at least 5% of random samples of this size even if the means of the pre- and post-*Saucier* populations were equal. The results of Student's *t*-test indicates a lack of statistical significance ($t = 1.6337$, $p > 0.05$, 733 degrees of freedom (d.f.)).[102] Combined with the chi-square result, there is thus no statistical basis on which to reject the null hypothesis that the observed differences in frequencies of outcomes 1 and 4 in Table 2 are statistically significant.

So far, statistical analysis of the data suggests that while the transition from pre- to post-*Saucier* corresponds to an observable increase in frequency of rights-restricting holdings in which a court holds the plaintiff has not successfully alleged a constitutional violation, such changes are not statistically significant. An important statistical caveat is that the absence of statistical significance does not necessarily imply that there is in reality no true increase in the frequency of rights-restricting appellate holdings in the post-*Saucier* period. In more formal terms, failure to reject a null hypothesis does not imply acceptance of it. But the present data, which represent to our knowledge the largest random sample of appellate § 1983 qualified immunity decisions to date, provide no evidence for a statistically significant increase in the frequency of rights-restricting holdings from pre- to post-*Saucier*. That conclusion raises a subsequent question: is there a meaningful change in frequency of rights-*affirming* holdings after *Saucier*?

3. *Testing for statistical significance of the change in frequency of rights-affirming outcomes from pre- to post-*Saucier

The data thus far yield two noteworthy observations. First, as Table 1 (outcome 5, fifth column) shows, the shift from pre- to post-*Saucier*, which

101. *See* ROBERT V. HOGG, JOSEPH W. MCKEAN & ALLEN T. CRAIG, INTRODUCTION TO MATHEMATICAL STATISTICS 182-84 (6th ed. 2005) (explaining Student's *t*-test).

102. For a more detailed elaboration of Student's *t*-test applied to data from this study, see *infra* Appendix.

represents a doctrinal shift towards mandatory confrontation of the substantive constitutional issue, was accompanied by a decrease of 22.2% in the frequency of rights-neutral grants of qualified immunity. That decrease means that there were more constitutional holdings—both rights-restricting and affirming—in the post-*Saucier* period than during the pre-*Saucier* period. Second, the previous section showed that while there was an increased frequency in rights-denying constitutional holdings (outcomes 1 and 4) post-*Saucier* as compared to pre-*Saucier*, that increase does not appear to be statistically significant. Given these observations, we might expect that a greater proportion of rights-affirming holdings (outcomes 2 and 3) should then account for the increased overall frequency of constitutional holdings after *Saucier*.

Indeed, Table 3 shows that the frequency of rights-affirming outcomes jumped from 34.2% of all pre-*Saucier* dispositions to 50.4% of all post-*Saucier* dispositions. Using the same tests of significance as in Part III.B.2 confirms that this change in frequency was statistically significant (chi-squared = 19.189, $p < 0.05$; $t = 4.5152$, $p < 0.05$, 733 d.f.).

Table 3. Distribution of Rights-Affirming Versus Rights- Denying or Rights-Neutral Outcomes in pre- and post-*Saucier* Periods

		Rights-Restricting or Rights-Neutral Outcomes (outcomes 1, 4, and 5)	Rights-Affirming Outcomes (outcomes 2 and 3)
Pre-*Saucier*	No. of claims	262	136
	% within Period	65.8%	34.2%
Post-*Saucier*	No. of claims	167	170
	% within Period	49.6%	50.4%

Note: Details on application of statistical tests to the data appear in Appendix B.1-2.

The statistically significant increase in the frequency of rights-affirming outcomes associated with the doctrinal shift to mandatory sequencing is noteworthy. Part III.B.2 concluded that whatever observable increase in frequency of rights-restricting holdings there may be post-*Saucier*, absence of statistical significance limits confidence that the effect is a true one. In other words, there is insufficient evidence to conclude with statistical assurance that the shift to *Saucier*'s mandatory sequencing regime was associated with a reaction among lower courts towards more holdings restricting plaintiffs' constitutional rights. By contrast, Part III.B.3 provides significant statistical evidence that *Saucier*'s imposition of mandatory sequencing was associated with an increased frequency with which appellate courts affirm plaintiffs' constitutional rights from the time between *Siegert* and *Saucier*.

4. *Distinguishing present and potential future plaintiffs*

The crucial limits of the scope of rights-affirming outcomes deserve consideration because they contextualize what our statistical findings may or may not suggest about the behavior of appellate courts. We have called "rights-affirming" one set of outcomes in which the court holds the plaintiff has successfully pleaded a constitutional violation about which the law was clearly established at the time of conduct (outcome 2) and another set of outcomes in which the court makes the same substantive holding, but subsequently determines the law was not clearly established (outcome 3). To fully appreciate the impact of such outcomes, one must distinguish between two sorts of plaintiffs.

With respect to the parties in the litigation before the court, the former outcome favors the plaintiff, and the latter favors the defendant, whom the court finds is entitled to qualified immunity. An important distinction, however, is that in the latter outcome (outcome 3), the court affirms the constitutional right of the plaintiff in the litigation (though simultaneously denying her relief) by holding that the plaintiff has successfully alleged a constitutional violation. However, the court also affirms the constitutional right of *potential subsequent* plaintiffs, whose possible similar or identical *future* claims should, at least within a circuit, better withstand the qualified immunity defense because there will now be intra-circuit precedent that a given set of facts corresponds to a constitutional violation, helping to "clearly establish" the law. In the former outcome (outcome 2), by contrast, the present plaintiff enjoys not only a favorable constitutional ruling but also the opportunity to recover damages. The possibility of a rights-affirming holding in which the present plaintiff is nevertheless not entitled to recovery is one of the debated aspects of the qualified immunity defense.[103]

In light of the distinctions between favoring present or potential future plaintiffs, it is constructive to parse with more granularity the rights-affirming outcomes presented in Table 3. Pre-*Saucier*, 83% (114 of 136) of rights-affirming holdings were followed by denials of qualified immunity (outcome 2), and 17% (22 of 136) were followed by grants of qualified immunity for the defendant (outcome 3). Post-*Saucier*, 72% (123 of 170) of rights-affirming holdings were attached to denials of qualified immunity, and 28% (47 of 170) to grants of qualified immunity. Those proportions may reveal a nuanced observation about how appellate courts responded to *Saucier*'s imposition of a mandatory sequencing regime.

Specifically, aggregating rights-affirming outcomes (outcomes 2 and 3 combined) shows that appellate courts found a constitutional violation was properly alleged in 16.2% more cases after *Saucier* than before it (Table 3).

103. *See, e.g.*, Jeffries, *supra* note 56, at 87-88.

But that increase in overall rights affirmation seems to have occurred at some expense to *present* plaintiffs bringing suit. As shown in Table 3, before *Saucier*, 83% of appellate outcomes permitted recovery for the present plaintiff. After *Saucier*, that number decreased to 72%. Put another way, before *Saucier*, plaintiffs who successfully pleaded a constitutional violation were denied recovery 17% of the time because the defendants were entitled to qualified immunity, compared to 28% of the time after *Saucier*. Applying Student's *t*-test to these proportions shows that the difference between them is statistically significant ($t = 2.5130$, $p < 0.05$, d.f. = 304).

This statistically significant difference in proportions suggests that while present and potential future plaintiffs, as a single group, may have benefited from the *Saucier* mandatory sequencing regime, the individuals actually bringing § 1983 actions in which courts found constitutional violations recovered more frequently pre-*Saucier*. The story now becomes nuanced: while the overall frequency of rights-affirming outcomes *decreased* post-*Saucier* compared to pre-*Saucier*, the proportion of those outcomes in which the present plaintiff was not entitled to recovery despite judicial finding of a constitutional violation *increased* post-*Saucier*. Those results suggest (but do not prove) that *Saucier* may have contributed to a tendency among appellate courts to affirm constitutional rights more frequently, but at the cost of denying the *present* plaintiff the ability to recover money damages more frequently.

This Note is the first to document distinct and opposite trends between overall rights-affirming outcomes and rights-affirming outcomes that allow or deny plaintiffs' recovery. But it is important to qualify the magnitude of the effect. Specifically, the difference is 11%, and, both pre- and post-*Saucier*, plaintiffs whom the courts found to have successfully alleged a constitutional violation were able to recover damages considerably more than half of the time (83% pre-*Saucier* versus 72% post-*Saucier*). Nevertheless, the possibility that such a trend would continue to increase is a possibility that deserves further attention as new qualified immunity rulings issue after *Pearson*.

IV. DISCUSSION

A. *Reconciling Emerging Studies in a Nascent Field*

While our finding that there was an observable decrease in frequency of rights-neutral grants of qualified immunity (outcome 5) in Part III.B.1 is in harmony with the contemporary studies by Paul Hughes and Nancy Leong, this Note otherwise presents novel and different findings about the behavior of appellate courts in qualified immunity actions.

Leong's study concluded that mandatory "[s]equencing leads to the

articulation of more constitutional law, but not the expansion of constitutional rights."[104] Leong's conclusion stems from her observation that the frequency of constitutional holdings against plaintiffs—by district and appellate courts—increased during the time periods she sampled (two years prior to *Siegert*, two years prior to *Saucier*, and 2006-2007).[105] As Table 4 summarizes, Leong found rights-restricting outcomes (outcomes 1 and 4) comprised 34% of the total in her sample of one hundred appellate cases from the two years before *Siegert*, 52.1% from the two years before *Saucier*, and 61.9% from the calendar years 2006 and 2007.[106] Hughes, by contrast, found numbers more similar to ours: 20.72% in 1988, 45.7% in 1995, and 42.17% in 2005.[107] There is thus sizeable difference in the magnitude of the observations about rights-restricting outcomes that this study and the Hughes study found when compared to the Leong study—and the difference in magnitude leads Leong to state, unlike us, that the new constitutional law articulated as a result of *Saucier* "uniformly denies the existence of plaintiffs' constitutional rights."[108]

A possible explanation for the discrepancy is that the Leong study compares its post-*Saucier* data against its pre-*Siegert* data,[109] while this Note compared only the pre- and post-*Saucier* periods. Attempting to gauge the effect of *Saucier* by reference to a pre-*Siegert* baseline is potentially problematic because pre-*Siegert* describes a doctrinal period during which lower courts were offered *no* guidance from the Supreme Court on sequencing. In other terms, pre-*Siegert*, lower courts may well have been using discretion, but there was no formal decision from the Supreme Court stating that discretion was the appropriate approach to qualified immunity actions. In the pre-*Saucier* period, however, the issuance of *Siegert* helped to clarify the options of lower courts in the qualified immunity inquiry.

While we cannot conclusively determine whether comparing post-*Saucier* observations against pre-*Siegert* observations has a quantitatively confounding effect, the possibility motivates a more detailed inspection of the evolution of appellate outcomes on a year-by-year (rather than aggregated period-by-period) basis, which our study allows because sampling occurred over a continuous time period, rather than isolated years. Part IV.B examines the data year by year.

---

104. Leong, *supra* note 11, at 670.

105. *See id.* at 692-93 ("[Appellate and district c]ourts [after *Saucier*] avoid fewer constitutional questions, and as a result, generate more constitutional law. But the new constitutional law—law that would not have been made before *Siegert* and *Saucier*—uniformly denies the existence of plaintiffs' constitutional rights.").

106. *See infra* Table 4.

107. *See id.*

108. Leong, *supra* note 11, at 693.

109. For example, Leong writes "the percentage of claims where the court found no constitutional right existed increased dramatically, from 46.2% pre-*Siegert* to 84.9% in 2006-2007." *Id.* at 690.

Table 4. Comparative Results from Sobolski-Steinberg, Leong, and Hughes Studies

		Sobolski-Steinberg	Leong	Hughes	Healy
Rights-Restricting Outcomes (outcomes 1 and 4)	Pre-*Siegert**	19.3 + 7.2 = 26.5%	22.9 + 11.1 = 34.0%	20.72%	No data.
	Pre-*Saucier**	29.4 + 8.3 = 37.7%	47.9 + 4.9 = 52.8%	45.70%	No data.
	Post-*Saucier**	35.3 + 8.3 = 43.6%	58.7 + 3.2 = 61.9%	42.17%	76%
Rights-Affirming Denials of Qualified Immunity (outcome 2)	Pre-*Siegert*	31.9%	25%	42.34%	No data.
	Pre-*Saucier*	28.6%	20.1%	25.83%	No data.
	Post-*Saucier*	36.5%	26.5%	46.39%	55%
Rights-Affirming Grants of Qualified Immunity (outcome 3)	Pre-*Siegert*	3.6%	4.2%	2.7%	No data.
	Pre-*Saucier*	5.5%	1.4%	2.65%	No data.
	Post-*Saucier*	13.9%	6.5%	10.24%	17%
Rights-Neutral Grants of Qualified Immunity (outcome 5)	Pre-*Siegert*	38.0%	35.4%	34.23%	No data.
	Pre-*Saucier*	28.1%	22.2%	25.83%	No data.
	Post-*Saucier*	5.9%	4.5%	1.20%	7%

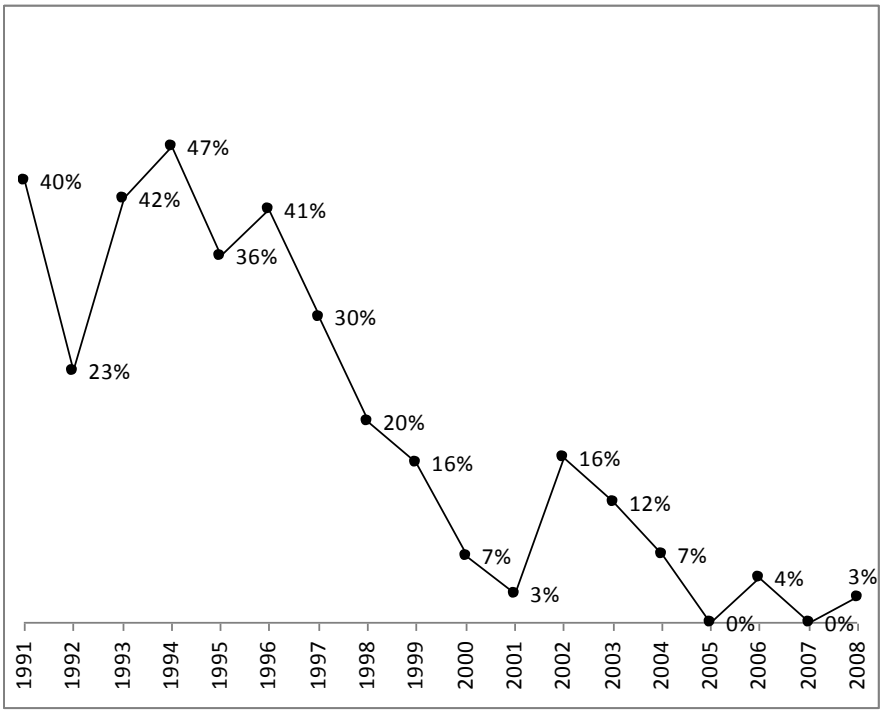
Note: Data are from Leong, *supra* note 11, at 692 and accompanying text; Hughes, *supra* note 11, at 423; Healy, *supra* note 9, at 937-47.

* Leong, Hughes, and Healy sampled data from discrete times within what this Note calls the pre-*Siegert*, pre-*Saucier*, and post-*Saucier* periods. Leong sampled data from: (1) two years before *Siegert*; (2) two years before *Saucier*; and, (3) 2006-2007. Hughes sampled data from: (1) 1988; (2) 1995; and, (3) 2005. Healy sampled data from 2002-2003.

B. *Rethinking the Role of* Saucier *as the Proxy for the Start of Mandatory Sequencing*

The discussion about different observations between this Note and Nancy Leong's study in Part IV.A ultimately concerns the quality of *Saucier* as a clean marker of discretionary versus mandatory sequencing. In fact, our data reveal that before *Saucier*, certain appellate courts were shedding the practice of using the "clearly established" qualified immunity determination to avoid

Figure 2. Percentage of Outcomes That Were Rights-Neutral Grants of Qualified Immunity from *Siegert* to December 2008



Note: Percentages are outcomes that skipped the constitutional question by issuing rights-neutral grants of qualified immunity (outcome 5) as a fraction of the total number of outcomes in each year. Total number of cases in each year is: 1991: 16; 1992: 32; 1993: 38; 1994: 34; 1995: 44; 1996: 39; 1997: 43; 1998: 50; 1999: 38; 2000: 46; 2001: 36; 2002: 43; 2003: 59; 2004: 45; 2005: 38; 2006: 45; 2007: 49; 2008: 40.

the substantive constitutional inquiry.

Figure 2 graphs the frequency of rights-neutral grants of qualified immunity (outcome 5) during every year from *Siegert* to 2008. Figure 2 suggests that some appellate courts performed *Saucier*-style sequencing before the *Saucier* decision. For example, already by 1997, there was a visible downward trend in the frequency of rights-neutral grants of qualified immunity, and in the three years preceding *Saucier*, the frequencies of such outcomes were comparable to the years after it.

The (mis)understanding of appellate courts is comprehensible in light of the linguistic ambiguity in the Supreme Court's pre-*Saucier* opinions relating to qualified immunity. While *Saucier* unambiguously held that that sequencing must occur in a fixed order,[110] some decisions before *Saucier* could reasonably

110. Saucier v. Katz, 533 U.S. 194, 201 (2001); *see also* Pearson v. Callahan, 129 S.

have been read to require sequencing of the constitutional issue ahead of the "clearly established" prong. For example, as discussed in Part I, *Siegert* held 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."[111] Regardless of how *Siegert*'s holding should be interpreted retrospectively, appellate courts evidently sometimes interpreted it as an obligation to sequence.

Indeed, as early as 1992 one finds among nearly all the federal circuits evidence of a belief that sequencing must occur in qualified immunity cases. For example, in *White v. Taylor*,[112] the Fifth Circuit stated "[w]e have interpreted *Siegert* to require that we examine whether the plaintiff has stated a claim for a constitutional violation before reaching the issue of qualified immunity."[113] Similarly, in the case of *Watterson v. Page*,[114] the First Circuit stated that "before even reaching qualified immunity, a court of appeals *must* ascertain whether the appellants have asserted a violation of a constitutional right at all."[115] Similar statements of the allegedly binding nature of *Siegert* can be found in almost every other circuit during the pre-*Saucier* period (no such language was found within the Second or Fourth Circuits).[116]

Ct. 808, 815-16 (2009) (noting that *Saucier* mandated sequencing).

111. Siegert v. Gilley, 500 U.S. 226, 232 (1991).

112. 959 F.2d 539 (5th Cir. 1992).

113. *Id.* at 545 n.4.

114. 987 F.2d 1 (1st Cir. 1993).

115. *Id.* at 7 (emphasis added).

116. *See, e.g.*, Eversole v. Steele, 59 F.3d 710, 717 (7th Cir. 1995) ("When a defendant raises the defense of qualified immunity, this court engages in a two-part, objective inquiry: the court must determine (1) whether the plaintiff has asserted a violation of a federal constitutional right, and (2) whether the constitutional standards implicated were clearly established at the time in question."); Wooten v. Campbell, 49 F.3d 696, 699 (11th Cir. 1995) ("Accordingly, we must first undertake an examination of Wooten's complaint to determine if she possesses a right subject to a constitutional violation."); Martinez v. Mafchir, 35 F.3d 1486, 1490 (10th Cir. 1994) ("To reach the question of whether a defendant official is entitled to qualified immunity, a court must first ascertain whether the plaintiff has sufficiently asserted the violation of a constitutional right at all."); Ricker v. Leapley, 25 F.3d 1406, 1409 (8th Cir. 1994) ("To determine whether [defendants] violated a clearly established right, we must first determine 'whether [plaintiff] has asserted a violation of a constitutional right at all.'" (quoting *Siegert*, 500 U.S. at 232)); Centanni v. Eight Unknown Officers, 15 F.3d 587, 589 (6th Cir. 1994) ("The threshold issue is whether a constitutional right has been violated."); Acierno v. Mitchell, 6 F.3d 970, 977 n.18 (3d Cir. 1993) ("Before determining whether [defendant] is entitled to qualified immunity, we must determine whether plaintiff has sufficiently alleged a constitutional violation."); Navarro v. Barthel, 952 F.2d 331, 333 (9th Cir. 1991) ("Under the Supreme Court's recent decision in *Siegert v. Gilley* . . . we must first determine whether [plaintiffs] have 'asserted a violation of a constitutional right at all'" (citation omitted) (quoting *Siegert*, 500 U.S. at 232)); Hunter v. District of Columbia, 943 F.2d 69, 76 (D.C. Cir. 1991) (concluding that *Siegert* "mandat[ed]" a two-part qualified immunity analysis under which the court must determine

A significant implication of year-by-year observations from our sample for the empirical study of qualified immunity is that a sampling strategy that picks isolated years—such as those of Hughes or Leong—may not capture behavior of lower courts representatively. To that extent, this study's sampling strategy (a random sample across a continuous set of years) may yield methodological advantages.

C. *Limits of the Present Study*

Finally, it is important to include what this Note does not necessarily suggest. While the increase in rights-restricting holdings (outcomes 1 and 4) from pre- to post-*Saucier* was found not to be statistically significant, this does not necessarily rule out the possibility that appellate courts considered responding to the shift to mandatory sequencing by drawing on rights-restrictive holdings at the substantive constitutional level. For example, assuming that § 1983 plaintiffs' attorneys, as a whole, were able to select for appeal those cases that tended to present strong evidence of constitutional violations, then the empirical profile of appellate decisions after *Saucier* would likely resemble what is shown in this study because appellate courts would generally not be presented with cases by which to use the rights restriction lever. It would be illuminating for subsequent research to perform deeper qualitative coding of appellate opinions to explore this possibility. In addition, we studied only appellate decisions and it would be interesting to test whether similar trends existed among district courts.

This Note presents evidence that whatever the disposition or willingness of appellate courts to use legal levers to constrain plaintiffs' constitutional rights may have been as mandatory sequencing emerged, the revealed behavior of appellate courts does not indicate a meaningful increase in rights-restrictive judicial conduct. This study did not, however, perform regression analyses that would be necessary to attribute the effects observed to a particular intervention or moment in time (such as a particular Supreme Court decision). Such modeling would surely be complicated but would nevertheless be an intriguing follow up to sharpen the present findings.

D. *Implications for the Significance of* Pearson v. Callahan

In light of the present findings, *Pearson v. Callahan* is not properly conceived of as a return to a pre-*Saucier* scenario in which lower courts understood themselves to have discretion in how to handle § 1983 qualified immunity actions. While *Saucier* may correctly identify the Supreme Court's

---

whether the complaint alleges both that the plaintiff has been deprived of a constitutional right that exists under current law and that the right in question was "clearly established").

doctrinal shift, this Note finds that it is a misleading indicator of when appellate courts began to shift their judicial behavior from discretionary to mandatory sequencing. Indeed, years before *Saucier*, certain appellate courts expressed through their decisions the belief that sequencing was already mandatory—a belief confirmed empirically in this study.

Pearson is an important decision for the empirical study of qualified immunity because it signals unambiguously that lower courts may apply their discretion in resolving qualified immunity actions. The post-*Pearson* era that will now unfold is thus an opportunity to observe and analyze the discretionary behavior of lower courts and its impact on the development of constitutional rights. This Note has presented evidence to reorient the field's empirical discussion of qualified immunity, providing a more specific and accurate framework through which to structure doctrinal and quantitative studies.

CONCLUSION

Using a random sampling strategy over a continuous time period, this Note has presented evidence from appellate courts that: (1) *Saucier*'s mandatory sequencing regime made courts less likely to avoid addressing the constitutional issue; (2) there was no statistically significant increase in the frequency of rights-restricting outcomes after *Saucier*; (3) there was a statistically significant increased frequency in rights-affirming outcomes after *Saucier*; but (4) plaintiffs found by the court to have successfully alleged a constitutional violation in the pre-*Saucier* period were eleven percent more likely to ultimately recover damages than their counterparts post-*Saucier*—also a statistically significant observation. We also presented evidence that the traditional view of the *Saucier* decision as the proxy for the shift among lower courts to mandatory sequencing may not correspond to the empirical reality of how appellate courts behaved before *Saucier*. In *Pearson v. Callahan*, however, the Supreme Court has unambiguously indicated that lower courts are to use discretion whether to sequence qualified immunity cases. Therefore, the post-*Pearson* period will be an ideal time to expand the empirical study of qualified immunity and gauge more precisely the impact of discretionary sequencing on articulation and refinement of constitutional rights through § 1983 litigation.

APPENDIX

A. *Code Book*

The following is a list of all variables used in this study that require additional explanation:

Code 1: What was the constitutional question?[117]

Explanation: all substantive constitutional issues were categorized into one of fourteen categories, described below.

Code	Constitutional Right Asserted	Description
1	First Amendment	Free/compelled speech, retaliation
2	First Amendment	Patronage dismissal claims
3	First Amendment	Free Exercise/Establishment Clause
4	Fourth Amendment	Unlawful search, seizure, or arrest
5	Fourth Amendment	Excessive force
6	Eighth Amendment	Conditions of confinement
7	Fourteenth Amendment	Due process—Property interest, takings, regulatory takings, unconstitutional zonings
8	Fourteenth Amendment	Due process—Liberty interest
9	Fourteenth Amendment	Due process—Government inflicting injuries/torts
10	Fourteenth Amendment	Due process—Non-prison institutionalized persons, medical care/deliberate indifference
11	Fourteenth Amendment	Due process—Unlawful investigation, improper pre-trial detention/investigation, malicious prosecution
12	Fourteenth Amendment	Due process—Miscellaneous claimed rights, including state-created danger, deliberate indifference, failure to protect
13	Fourteenth Amendment	Due process—Name-clearing hearing, government employment, procedural due process
14	Fourteenth Amendment	Due process—Inmate rights, inmate disciplinary proceedings
15	Fourteenth	Due process—Custodial/familial relationships

117. These codes and descriptions were taken directly from Hughes, *supra* note 90, at app. D.

	Amendment	
16	Fourteenth Amendment	Due process—Privacy
17	Fourteenth Amendment	Due process—Access to courts
18	Fourteenth Amendment	Equal protection

Code 2: Did court resolve the constitutional question?

Explanation: This code reflects whether the court resolved the question of whether a constitutional violation had been alleged. As noted by others who have conducted similar inquiries,[118] the question of whether a court has resolved the constitutional question or has merely addressed whether the right is "clearly established" can be difficult. Especially in Fourth Amendment cases, it can be unclear whether a court is resolving the substantive issue of whether a search is "reasonable" or whether the court is addressing whether the right was "clearly established." In such cases, this data set errs towards concluding that the court was addressing the substantive constitutional question.

0	No. Court did not resolve the constitutional question.
1	Yes. Court resolved the constitutional question.

Code 3: If yes to Code 2, was a constitutional violation alleged?

Explanation: This code reflects whether or not the court concluded, after identifying the constitutional right in question, whether the facts as alleged constitute a violation of that right.

0	No. No constitutional violation alleged.
1	Yes. Constitutional violation alleged.

Code 4: Did court proceed to the "clearly established" question?

Explanation: This code reflects whether the court addressed the question of whether a right was "clearly established" at the time of the violation.

0	No. Defendant is entitled to qualified immunity.
1	Yes. Proceed to Code 5.

118. *Id.*

Code 5: If yes to Code 4, was defendant entitled to qualified immunity because the right was not clearly established (or, in the Fourth Amendment context, defendant's behavior was not clearly unreasonable)?

Explanation: Where a court does, in fact, engage in a *Saucier* II (see Figure 2, Panel B) inquiry, this code reflects whether the court concluded that the right was "clearly established" at the time of the violation.

0	No. Defendant was not entitled to qualified immunity because the right was clearly established.
1	Yes. Defendant was entitled to qualified immunity because the right was not clearly established.

Code 6: Claim dismissed on qualified immunity grounds without any constitutional holding?

Explanation: This code reflects the court's holding on the constitutional claim and the grounds on which it was dismissed.

0	No. Court does not find defendant is entitled to qualified immunity.
1	Yes. Court finds defendant is entitled to qualified immunity.

Code 7: Case dismissed because plaintiff had no constitutional basis to the claim?

Explanation: This code reflects the court's holding on the claim and the grounds on which the claim was dismissed.

0	No. Court does not find plaintiff has failed to allege a constitutional violation.
1	Yes. Court finds plaintiff has failed to allege a constitutional violation.

Code 8: Case dismissed because plaintiff had no constitutional basis to the claim, but, in the alternative, defendant was entitled to qualified immunity?

Explanation: This code reflects the court's holding on the claim and the grounds on which the claim was dismissed.

0	No. Court finds plaintiff has alleged a constitutional violation.
1	Yes. Court finds plaintiff has not alleged a constitutional violation, but nevertheless still makes a technically unnecessary ruling about qualified immunity.

Code 9: Claim survives qualified immunity inquiry and proceeds against defendant?

Explanation: This code reflects those cases in which the court allows the claim to proceed against the defendant.

0	No. Court finds defendants is entitled to qualified immunity.
1	Yes. Court finds defendants are not entitled to qualified immunity and that plaintiff's case may proceed.

Code 10: Outcome

Explanation: These codes represent a summary of Codes 2-9, reflecting the ultimate content and outcome of the court's qualified immunity inquiry.

1	No constitutional violation alleged.
2	Constitutional violation alleged and law was clearly established at the time of the violation
3	Constitutional violation alleged but law was not clearly established at the time of the violation.
4	No constitutional violation alleged and law was clearly established at the time of the violation
5	Law was not clearly established at the time of the violation. No constitutional holding

Constitutive Components of Code 10: Outcome

Constitutive Codes									Outcome Code
Code 2	Code 3	Code 4	Code 5	Code 6	Code 7	Code 8	Code 9	=	Code 10
1	0	0	0	0	1	0	0	=	Outcome 1
1	1	1	0	0	0	0	1	=	Outcome 2
1	1	1	1	0	0	0	0	=	Outcome 3
1	0	1	1	0	1	1	0	=	Outcome 4
0	0	1	1	1	0	0	0	=	Outcome 5

B. *Statistical Analysis*

1. *Pearson's Chi-squared*

The basis for Pearson's chi-squared test of independence is computation of the chi-square test statistic, whose formula is:

$$\mathrm{X}^2 = \sum_{i=1}^{n} \frac{(O_i - E_i)^2}{E_i}$$

where X^2 is the test-statistic, O_i is the observed frequency within a given cell in the 2x2 contingency table, E_i is the expected frequency within a given cell given the null hypothesis, and n is the number of outcomes possible for each event type. The test was performed using SPSS 17.0 software.

2. *Student's* t-*test*

For two samples of unequal size, Student's *t*-test is appropriate when the samples have equal variances.[119] The tables below summarize the data and the outputs from Stata 10.0 software, which we used to perform statistical analysis.

Application to Table 2

	Number of Observations	Mean	95% Confidence Interval	Standard Deviation
Pre-*Saucier* (outcomes 1 and 4)	398	0.377	(0.329, 0.425)	0.485
Post-*Saucier* (outcomes 1 and 4)	337	0.436	(0.383, 0.489)	0.497

119. The term "population" does not refer to the randomly selected sample, but instead to the full population—here, the full number of federal appellate § 1983 qualified immunity decisions decided during Periods two and three.

Application to Table 3—Outcomes 2 and 3 Combined

	Number of Observations	Mean	95% Confidence Interval	Standard Deviation
Pre-*Saucier* (outcomes 2 and 3)	398	0.342	(0.295, 0.389)	0.475
Post-*Saucier* (outcomes 2 and 3)	337	0.504	(0.451, 0.558)	0.501

Application to Table 3 –Outcomes 2 and 3 Disaggregated

	Number of Observations	Mean	95% Confidence Interval	Standard Deviation
Pre-*Saucier* (outcome 2 / outcomes 2 and 3)	136	0.838	(0.776, 0.901)	0.37
Post-*Saucier* (outcome 2 / outcomes 2 and 3)	170	0.718	(0.649, 0.786)	0.451