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THE "ORDER-OF-BATTLE" IN CONSTITUTIONAL LITIGATION

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THIS Article examines and defends a procedural rule that figures prominently in constitutional tort litigation,[1] has drawn sharp criticism from the federal judiciary, and seems to have lost the support of at least four sitting Supreme Court Justices. In order to recover damages, plaintiffs must not only prove a constitutional violation but also fend off assertions of official immunity. In ruling on motions to dismiss the complaint and motions for summary judgment, a preliminary question is the sequence in which the two issues should be addressed–a problem the Justices call the "order-of-battle."[2] *Morse v. Frederick*, the "Bong Hits 4 Jesus" case, illustrates the issue.[3] Frederick, a high school student, displayed a banner containing that phrase at an off-campus event and was suspended by Morse, the school's principal, when he refused to take it down.[4] He sued Morse under 42 U.S.C. § 1983, challenging the punishment on free speech grounds. The substantive constitutional issue was whether the First Amendment protected the banner in these circumstances.[5] The immunity issue was whether Morse should escape liability for damages even if the suspension infringed Frederick's First Amendment right, on the ground that the right she violated was not "clearly established" at the time.[6] Chief Justice Roberts' majority opinion reached the merits and found no free speech violation.[7] Justice Breyer would have decided the case differently. The Court "need not and should not decide this difficult First Amendment issue on the merits."[8] Rather, "it should simply hold that qualified immunity bars the student's claim for

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1. These are suits brought against state officers under 42 U.S.C. § 1983 and against federal officers under the principle of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 396–97 (1971). For general overviews of the area, see JOHN C. JEFFRIES, JR. ET AL., CIVIL RIGHTS ACTIONS: ENFORCING THE CONSTITUTION (2d ed. 2007); SHELDON H. NAHMOD ET AL., CONSTITUTIONAL TORTS (2d ed. 2004).

2. Scott v. Harris, 127 S. Ct. 1769, 1774 n.4 (2007); *see also id.* at 1780 (Breyer, J., concurring).

3. 127 S. Ct. 2618, 2638 (2007).

4. *Id.* at 2622.

5. *Id.* at 2624.

6. *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (explaining that officials are immune from liability for damages unless they violate "clearly established" federal law).

7. *Morse*, 127 S. Ct. at 2629.

8. *Id.* at 2638 (Breyer, J., concurring in the judgment in part and dissenting in part).

monetary damages and say no more."[9]

Justice Breyer's quarrel with the *Morse* majority concerns a directive the Court had issued to the lower courts several years ago in *Saucier v. Katz*.[10] There the Ninth Circuit Court of Appeals had put the immunity issue first.[11] The Supreme Court, after many years of counseling lower courts that "the better approach" was to decide the substantive issue before immunity,[12] laid down a rule to that effect.[13] Writing for the Court, Justice Kennedy declared that "the first inquiry must be whether a constitutional right would have been violated on the facts alleged."[14] By beginning with the immunity issue, the Court of Appeals did not merely make an unwise choice. It "was in error."[15]

Criticism of the rule soon emerged. Notably, in *Brosseau v. Haugen*, Justice Breyer, joined by Justices Scalia and Ginsburg, expressed concern that *Saucier* "rigidly requires lower courts unnecessarily to decide difficult constitutional questions when there is available an easier basis for the decision (*e.g.*, qualified immunity)."[16] Echoing these sentiments, lower

9. *Id.*

10. 533 U.S. 194 (2001).

11. *See* Katz v. United States, 194 F.3d 962, 967 (9th Cir. 1999). Besides the two alternatives of (1) resolving the constitutional issue first, and (2) putting the immunity first, a third approach, followed by some pre-*Saucier* courts, was (3) to collapse the two questions into a single inquiry. *See, e.g.*, Gregoire v. Class, 236 F.3d 413, 416–19 (8th Cir. 2000) (upholding the defendant's qualified immunity defense, apparently on the ground that he committed no constitutional violation). This method of addressing the issues has no defenders on the Supreme Court.

12. *See* County of Sacramento v. Lewis, 523 U.S. 833, 841 n.5 (1998). For an earlier and somewhat less direct expression of the Court's preference for putting the constitutional issue first, see *Siegert v. Gilley*, 500 U.S. 226, 232–33 (1991). *Siegert* and *Lewis* are discussed in John M. M. Graebe, *Mirabile Dictum!: The Case for "Unnecessary" Constitutional Rulings in Civil Rights Damages Actions*, 74 NOTRE DAME L. REV. 403, 411–18 (1999) (arguing, pre-*Saucier*, that the aims of constitutional tort would be better served by deciding the constitutional issue first.). *See infra* text accompanying notes 133, 150.

13. *Saucier*, 533 U.S. at 200 (directing that "the first inquiry must be whether a constitutional right would have been violated on the facts alleged"). Earlier, somewhat less definitive, expressions of this directive can be found in *Wilson v. Layne*, 526 U.S. 603, 609 (1999), and *Conn v. Gabbert*, 526 U.S. 286, 290 (1999).

14. *Saucier*, 533 U.S. at 200.

15. *Id.*

16. 543 U.S. 194, 201–02 (2004) (Breyer, J., concurring). Justice Breyer also brought up the burden imposed on the federal courts by the requirement that they resolve the constitutional issue. *See id.* This "scarce judicial resources" argument is an old refrain in constitutional tort law, dating back at least thirty-six years. Justice Black, dissenting from the Court's recognition in the *Bivens* case of an implied cause of action to enforce the Fourth Amendment, complained that allowing victims to sue would strain federal judicial resources. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 427–29 (1971) (Black, J., dissenting). As recently as the final week of the October 2006 Term, the Court resorted to a similar argument in declining to extend *Bivens* to allow a suit seeking damages for retaliating against the plaintiff's exercise of his property rights. *See* Wilkie v. Robbins, 127 S. Ct. 2588, 2604 (2007) (recognizing that the cause of action would generate an "enormous swath of potential litigation"). The best answer to Justices Black, Breyer, and Souter is the one offered by Justice Harlan, concurring in *Bivens*, and echoed by Justice Ginsburg, dissenting in *Wilkie*. Justice Harlan pointed out that such factors of judicial resources "should not be permitted to stand in the way of the recognition of otherwise sound constitutional principles." *Bivens*, 403 U.S. at 411 (Harlan, J., concur-

court judges have questioned the wisdom of *Saucier*,[17] distinguished it,[18] and ignored it.[19] More recently, in *Scott v. Harris*,[20] twenty-eight states joined in an amicus brief (the "States' Brief") calling for overruling *Saucier*.[21] Justice Breyer wrote a concurring opinion in that case, endorsing the States' Brief and declaring that he would leave "lower courts . . . free to decide the two questions in whatever order makes sense in the context of a particular case."[22] A few weeks later, Justices Stevens and Ginsburg said that they, too, would "disavow" *Saucier*.[23] At one time or another, a total of five Justices—one of whom, Chief Justice Rehnquist, is no longer with us—have called for reconsidering the rule.[24] For its part, the *Scott* majority sidestepped the issue, noting the debate over the continuing via-

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ring in the judgment); *see also Wilkie*, 127 S. Ct. at 2613 (Ginsburg, J., joined by Stevens, J., dissenting).

17. *See, e.g.*, Lyons v. City of Xenia, 417 F.3d 565, 580–84 (6th Cir. 2005) (Sutton, J., concurring). Another circuit judge chose a law review article as the vehicle for his criticism. *See* Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1275–81 (2006).

18. *See, e.g.*, Motley v. Parks, 432 F.3d 1072, 1078 n.5 (9th Cir. 2005); Carswell v. Borough of Homestead, 381 F.3d 235, 241 (3rd Cir. 2004); Tremblay v. McClellan, 350 F.3d 195, 199–200 (1st Cir. 2003).

19. *See, e.g.*, Cherrington v. Skeeter, 344 F.3d 631, 640 (6th Cir. 2003); Koch v. Town of Brattleboro, 287 F.3d 162, 166 (2nd Cir. 2002).

20. 127 S. Ct. 1769 (2007).

21. *See* Brief for the States of Illinois et al. as Amici Curiae Supporting Petitioner, Scott v. Harris, 127 S. Ct. 1769 (2007) (No. 05-1631), 2006 WL 3747719 [hereinafter *States' Brief*].

22. *Scott*, 127 S. Ct. at 1780 (Breyer, J., concurring); *see also* Morse v. Frederick, 127 S. Ct. 2618, 2638–41 (2007) (Breyer, J., concurring in the judgment in part and dissenting in part) (reiterating this view). One critic of *Saucier* pushes the constitutional avoidance argument a step further, arguing that *Saucier* violates Article III's prohibition on advisory opinions and that a federal court should never decide the constitutional issue first in a qualified immunity case. *See* Thomas Healy, *The Rise of Unnecessary Constitutional Rulings*, 83 N.C. L. REV. 847, 856–57, 895–921 (2005). No Supreme Court Justice, past or present, seems to share Professor Healy's view. Nor do any of the federal judges who criticize *Saucier*, with the possible exception of Judge Leval. *See* Leval, *supra* note 17, at 1280–81 (recommending only a narrow exception to a general rule of deciding the immunity issue first). John Graebe rebuts the "central premise of the strict necessity position: that legal holdings are properly regarded as encompassing only those legal pronouncements which, when viewed post hoc, are strictly necessary to resolution of the case at hand." Graebe, *supra* note 12, at 420–21.

The threshold problem with Professor Healy's reasoning–and no doubt the reason for his isolation on this issue–is that the advisory opinion doctrine ordinarily functions more as a standard than as a rule. It is, as he recognizes elsewhere in his article, "usually implemented through other justiciability doctrines, such as standing, ripeness, and mootness." Healy, *supra*, at 896. Each of these doctrines incorporates the "advisory opinions" theme into a larger matrix of factors bearing on whether a given litigant or a given dispute should be granted access to federal court. *See infra* note 84. Only a naked request for advice, as in the early episode of the Correspondence of the Justices (1793), *reprinted in* RICHARD FALLON ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 78–79 (5th ed. 2003) would trigger what he calls the "ban on advisory opinions," Healy, *supra*, at 895.

23. Los Angeles County v. Rettele, 127 S. Ct. 1989, 1994 (2007) (per curiam) (Stevens, J., joined by Ginsburg, J., concurring in the judgment). *See also* Wilkie v. Robbins, 127 S. Ct. 2588, 2617 n.10 (2007) (Ginsburg, J., joined by Stevens, J., concurring in part and dissenting in part).

24. *See Scott*, 127 S. Ct. at 1774 n.4 (recounting the Justices' expressions of "doubt . . . regarding the wisdom of *Saucier*'s decision to make the threshold inquiry mandatory").

bility of *Saucier*, but resolving the issue in the case at hand without taking sides.[25] Since the order-of-battle rule has no bearing on primary conduct and induces no reliance on the part of anyone in the way people conduct their affairs, the Court is unlikely to adhere to *Saucier* just for the sake of respecting precedent.[26] Precedents have little weight when they address jurisdictional matters and similar issues unrelated to primary conduct, thereby producing little or no reliance and little or no interest in stability.[27]

Why has an apparently routine policy, bearing on the internal dynamics of adjudication, spawned so much controversy? The answer is that appearances are deceptive. In reality, the order-of-battle rule has significant consequences for the role of the federal courts in adjudicating constitutional cases. Underneath the surface of this seemingly mundane issue simmers a clash between competing constitutional principles. On the one hand, absent the *Saucier* rule, lower courts may routinely incline to dispose of section 1983 cases without reaching the merits, to the detriment of the development of substantive constitutional law.[28] On the other, the argument against *Saucier* relies on the Court's longstanding policy of avoiding unnecessary constitutional decisions.[29] If the defendant wins on the official immunity issue, the argument goes, the plaintiff gets no damages whether or not the defendant committed a constitutional vio-

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25. *See id.* (deciding that the Court "need not address the wisdom of *Saucier* in this case"). The substantive issue in *Scott* was whether a police officer could be held liable for a Fourth Amendment violation when he engaged in a high-speed chase that ended with injury to the person being pursued. *Id.* at 1772. The Court held that "[a] police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death." *Id.* at 1779.

In *Morse v. Frederick*, too, the Court dodged the question of the continuing vitality of *Saucier*. There the plaintiff sought not only damages, but also prospective relief. Hence, the Court explained, the constitutional issue would have to be addressed in any event, as the defendant would enjoy no immunity from prospective relief. Morse v. Frederick, 127 S. Ct. 2618, 2624 n.1 (2007). Justice Breyer took issue with that reasoning. *Compare id. with id.* at 2642–43 (Breyer, J., concurring in the judgment in part and dissenting in part). The dispute between the majority and Justice Breyer on that point need not be resolved here.

26. *See Scott*, 127 S. Ct. at 1781 (Breyer, J., concurring).

27. *See* Michael Wells, *The Unimportance of Precedent in the Law of Federal Courts*, 39 DEPAUL L. REV. 357, 376–83 (1990).

28. *See* Saucier v. Katz, 533 U.S. 194, 201, 207 (2001) (This sequence promotes "the law's elaboration from case to case," and "permits courts in appropriate cases to elaborate the constitutional right with greater . . . specificity"). Underlying the perceived need to develop the law is the general proposition that "constitutional adjudication . . . functions more as a vehicle for the pronouncement of norms than for the resolution of particular disputes." Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1800 (1991). But one can usefully examine the narrow order-of-battle issue without necessarily taking a general stand on the broad question of the extent to which the federal courts ought to devote more of their resources to pronouncing norms rather than resolving disputes, or so it seems to the author.

29. *See, e.g.*, United States v. Resendiz-Ponce, 127 S. Ct. 782, 785 (2007) ("[i]t is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to the decision of the case." (citing Ashwander v. TVA, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring))).

lation. It follows that the case can often be resolved without reaching the constitutional question and with a lesser investment of judicial resources.

This Article examines the constitutional avoidance objection to *Saucier* and finds it wanting. *Saucier*'s critics invoke constitutional avoidance as a kind of mantra that suffices to advance their cause without regard to the context in which the occasion for avoidance arises.[30] But constitutional avoidance is a more complex and nuanced policy than they suppose it to be. The Court has never treated avoidance as an absolute; it is a policy aimed at specific objectives, and these nearly always compete with other goals. The strength of the avoidance argument *vis-a-vis* other policies varies depending on context, and it is especially weak in constitutional tort law. The order-of-battle issue presents the avoidance theme in a distinctive setting, and resolving it requires careful attention to the interaction between constitutional avoidance and constitutional torts. The aims of constitutional tort law include vindicating constitutional rights and deterring constitutional violations. Allowing lower courts discretion to decide on a case-by-case basis whether to apply the avoidance policy—as Justice Breyer proposes—would systematically undermine those goals. This is too high a price to pay for the minimal benefits of avoidance in this context.

Part I of this Article describes the "order-of-battle" problem in constitutional torts and Part II discusses the general policy of constitutional avoidance. Part III makes the case that, on balance, the costs of constitutional avoidance outweigh its benefits in the constitutional tort context.

I. THE "ORDER-OF-BATTLE" PROBLEM AND THE LAW OF CONSTITUTIONAL REMEDIES

Two distinctions will help to situate the order-of-battle issue within the law of constitutional remedies and lay a foundation for the argument that follows. The first is between offensive and defensive remedies. The latter can be illustrated by a criminal defendant accused of distributing obscene material who argues that the items are protected by the First Amendment, or that they were seized by an unreasonable search in violation of the Fourth Amendment. These defendants use the constitution as a

30. Critics of *Saucier* typically appeal to the constitutional avoidance policy without examining its underpinnings or the limits of its reach. *See, e.g.*, *Morse*, 127 S. Ct. at 2640 (Breyer, J., concurring in the judgment in part and dissenting in part) ("we should . . . adhere to a basic constitutional obligation by avoiding unnecessary decision of constitutional questions"); *Scott*, 127 S. Ct. at 1780 (Breyer, J., concurring) (declaring that "frequently the order-of-battle rule violates that older, wiser judicial counsel not to pass on questions of constitutionality unless such adjudication is unavoidable") (internal ellipses and citation omitted); *States' Brief*, *supra* note 21, at *11 ("On its own, this longstanding principle of judicial restraint counsels in favor of permitting courts the flexibility to resolve qualified immunity cases without first reaching the merits of the constitutional question."); Healy, *supra* note 22, at 850 ("For the most part, the Court has adhered to the principle that, whenever possible, the resolution of constitutional questions should be put off for another day."); Leval, *supra* note 17, at 1277 ("It is a long-honored principle that a court should decide a constitutional question only when there is no other basis for resolving the dispute.").

shield. Our concern here is with offensive remedies. Section 1983 and *Bivens* authorize persons with constitutional claims to take the role of plaintiff, deploy the Constitution as a sword, and bring suit against officers or local governments.

The second distinction relates to the relief available in these suits. Offensive litigation of this kind may seek either prospective relief, in the form of an injunction or a declaratory judgment aimed at changing official behavior in the future, or retrospective relief by way of a constitutional tort suit seeking damages for harm done in the past.[31] This Article deals with a problem that comes up in the latter type of litigation, so-called constitutional tort suits, where someone sues a government official solely for damages for a constitutional violation under section 1983 or *Bivens*. Besides establishing a constitutional violation, the plaintiff in such a case faces another hurdle. Officers who violate rights while acting in a judicial, prosecutorial, or legislative function enjoy "absolute" immunity,[32] and simply may not be sued for damages, no matter how egregious their conduct.[33] Other officers are entitled to "qualified" immunity, which protects them "from liability for civil damages insofar as their conduct does not violate clearly established . . . constitutional rights of which a reasonable person would have known."[34] Since a successful invocation of immunity produces victory for the officer, it may be possible to avoid the constitutional issue entirely by addressing the immunity issue first.

No one denies that analytical clarity would generally be served by deciding whether the plaintiff states a violation of a constitutional right before deciding if the right was clearly established at the time. *Saucier*'s harshest critics acknowledge that "it often may be difficult to decide whether a right is clearly established without deciding precisely what the exiting constitutional right happens to be."[35] Justice Breyer does not call for replacing *Saucier* with a rule requiring that the immunity issue be decided first, but prefers a flexible, case-by-case approach.[36] In some cir-

31. Prospective relief has been available at least since *Ex Parte Young*, 209 U.S. 123, 159–60 (1908). *See* FALLON ET AL., *supra* note 22, at 992–95. The modern cases affirming the availability of damages are *Monroe v. Pape*, 365 U.S. 167, 169 (1961) (against state officers, in suits brought under 42 U.S.C. § 1983), and *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 397 (1971) (against federal officers, in a cause of action implied directly from the Constitution). The classic articles on these suits for damages, written in the wake of the key Supreme Court decisions, include Walter E. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532 (1972) and Marshall S. Shapo, *Constitutional Tort*: Monroe v. Pape, *and the Frontiers Beyond*, 60 NW. U. L. REV. 277 (1965).

32. *See, e.g.*, Bogan v. Scott-Harris, 523 U.S. 44, 53 (1998) (legislative immunity); Stump v. Sparkman, 435 U.S. 349, 362 (1978) (judicial immunity); Imbler v. Pachtman, 424 U.S. 409, 422–23 (1976) (prosecutorial immunity).

33. Of course, they have no absolute immunity for other functions. *See, e.g.*, Forrester v. White, 484 U.S. 219, 223–24 (1988) (finding that hiring and firing decisions by a judge are not part of his judicial functions, so they are not protected by absolute judicial immunity).

34. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

35. *States' Brief*, *supra* note 21, at *18 (quoting Lyons v. City of Xenia, 417 F.3d 565, 581 (6th Cir. 2005) (Sutton, J., concurring)).

36. *See supra* note 22 and accompanying text.

cumstances, an orderly and coherent resolution of the case seems to *demand* that the constitutional issue come first. *Saucier* itself is an example. The plaintiff there charged that a police officer had violated his Fourth Amendment right against unreasonable seizure by using excessive force in arresting him when shoving him into the back of a police van. The outcome depended on whether, in the circumstances, the amount of force employed by the officer was reasonable. The immunity issue was whether–given a constitutional violation–the officer had made a reasonable mistake as to the reasonableness of the amount of force he was permitted to use.[37] It seems awkward to try to decide the immunity issue–in other words, whether an officer has made a reasonable mistake as to what was a reasonable amount of force–without first deciding whether the amount of force he used was reasonable.[38]

In other cases, however, there are stronger arguments for deciding the immunity issue first. In particular, on a given set of facts, the immunity issue may be far easier to resolve than the substantive one. These are cases in which the substantive issue is novel or sharply controverted, so that however it comes out the officer will win on immunity. *Brosseau v. Haugen*,[39] like *Saucier*, also concerned the use of excessive force in making an arrest.[40] But there the circumstances made it easier to resolve the immunity issue than the substantive one. In order to make that point, consider the facts giving rise to the litigation. Haugen got into a fight with someone, and Brosseau, a police officer, responded to a call for help.[41] Brosseau also knew that there was a warrant out for Haugen's arrest on drug charges.[42] She and other officers chased Brosseau on foot for over half an hour.[43] Then Haugen managed to get into his Jeep Cherokee, which was parked a few feet from vehicles containing other participants in the fight.[44] Brosseau tried to stop him, breaking the window glass and striking him with her gun.[45] When Haugen nonetheless started the Jeep, Brosseau jumped back and fired one shot, hitting Haugen in the back.[46] Haugen later pleaded guilty to the felony of "eluding," a plea that in effect admitted that he drove the Jeep with wanton or wilful disre-

37. The Ninth Circuit had held that since both the substantive and the immunity issues turned on "reasonableness," the immunity issue collapsed into the substantive issue. Katz v. United States, 194 F.3d 962, 968 (9th Cir. 1999). Under this approach, the officer would be liable once it was determined that he acted unreasonably. *See* Saucier v. Katz, 533 U.S. 194, 199–200 (2001). The Supreme Court rejected that reasoning, holding that the officer would win if either (1) he employed a reasonable amount of force or (2) he made a reasonable mistake as to what would constitute a reasonable amount of force. *See id.* at 206.

38. Nonetheless, the Supreme Court ignored its own directive and did just that. *See id.* at 207–08.

39. 543 U.S. 194 (2004).

40. *Id.* at 194–97.

41. *Id.* at 195.

42. *Id.*

43. *Id.* at 196.

44. *Id.*

45. *Id.*

46. *Id.* at 196–97.

gard for others' lives.[47]

Haugen then sued Brosseau for excessive force in making the arrest.[48] The closest precedent was *Tennessee v. Garner*,[49] which held that it is unreasonable to "seize an unarmed, non-dangerous suspect by shooting him dead."[50] Though Brosseau did not kill Haugen, federal courts have held that shooting someone is considered deadly force.[51] The substantive issue was whether Brosseau used reasonable force on these facts. The Ninth Circuit devoted eleven pages to this issue and concluded, over a nine-page dissent,[52] that the plaintiff should win at the summary judgment stage, because the facts thus far developed would support a finding that the force was excessive.[53] The majority and the dissent considered such factors as whether Haugen's prior crimes would justify the officer in taking strong measures, whether the evidence necessarily supported the officer's inference that once inside the vehicle he may have been reaching for a weapon, and whether a jury would necessarily be obliged to conclude that Haugen's effort to escape in the vehicle would endanger others.[54] The Ninth Circuit also denied qualified immunity at the summary judgment stage.[55]

Ignoring the rule it set forth for lower courts in *Saucier*, the Supreme Court granted certiorari solely on the qualified immunity issue and reversed.[56] It held that whatever the proper outcome may be on the excessive force issue, the few earlier cases similar to the *Brosseau* fact pattern were at best equivocal, showing "that this area is one in which the result depends very much on the facts of each case."[57] *Brosseau* is a poster-child for overruling *Saucier* in favor of flexibility. The lower federal courts often encounter cases like *Brosseau*, where the facts are complex so that the immunity issue is easier to resolve than the substantive one and comes out in the officer's favor, allowing them to dispose of the case without deciding a difficult constitutional issue.[58] *Brosseau* makes it easy to see why Judge Leval would characterize *Saucier* as a "bizarre practice."[59]

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47. *Id.* at 197.
48. *Id.*
49. 471 U.S. 1 (1985).
50. *Id.* at 11.
51. *See, e.g.*, Rahn v. Hawkins, 464 F.3d 813, 817 (8th Cir. 2006).
52. *See* Haugen v. Brosseau, 339 F.3d 857, 876–85 (9th Cir. 2003) (Gould, J., dissenting).
53. *Id.* at 873.
54. *Compare id.* at 869–73, *with id.* at 877–78 (Gould, J., dissenting).
55. *Id.* at 873.
56. Brosseau v. Haugen, 543 U.S. 194, 198 n.3 (2004).
57. *Id.* at 201.
58. *See, e.g.*, Rosales v. City of Bakersfield, No. CV-F-05-2370ww/LJQ, 2007 WL 1847628 (E.D. Cal. June 27, 2007).
59. Leval, *supra* note 17, at 1280.

II. CONSTITUTIONAL AVOIDANCE

Critics of *Saucier* rely heavily on the policy of constitutional avoidance as the central argument against putting the constitutional issue first. Insofar as one can tell from the way they deploy the avoidance doctrine, they seem to think it is an undifferentiated value across the whole range of constitutional adjudication, for they pay no attention to the distinctive features of the order-of-battle problem.[60] In conceiving of avoidance as monolithic, they are mistaken. Rather, the Supreme Court's decisions show that the strength of the constitutional avoidance policy varies from one situation to another and that its application depends on its costs and benefits in a given context.[61]

A. TWO VERSIONS OF CONSTITUTIONAL AVOIDANCE

Discussions of constitutional avoidance typically begin with Justice Brandeis's classic exposition of the policy in *Ashwander v. Tennessee Valley Authority*.[62] Brandeis identified two broad propositions.[63] First, when a litigant raises a constitutional objection to a statute, "this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."[64] Second, Brandeis observed that the Court "will not pass upon a constitutional question . . . if there is also present some other ground upon which the case may be disposed of."[65] Today this latter proposition is often called the "last resort rule,"[66] a usage this Article will follow. Of the two types of constitutional avoidance, only the last resort rule bears on the order-of-battle. *Saucier*'s crit-

60. *See supra* note 30 and accompanying text.

61. *See* Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. REV. 1003, 1028–35 (1994) (showing that "[t]he Court has used an ad hoc approach in implementing the last resort rule"). For a recent illustration, see *In re Fashina*, 486 F.3d 1300, 1303 (D.C. Cir. 2007). Even Professor Healy, an ardent advocate of constitutional avoidance, acknowledges (as a prelude to criticizing the practice) that unnecessary constitutional decision making is on the rise. *See* Healy, *supra* note 22, at 850, 858–95.

62. 297 U.S. 288, 345–48 (1936) (Brandeis, J., concurring). The Court endorsed Justice Brandeis's account of the avoidance policy in *Rescue Army v. Municipal Court*, 331 U.S. 549, 568–69 (1947), and continues to do so. *See supra* note 29.

63. *Ashwander*, 297 U.S. at 347–48 (Brandeis, J., concurring); *see* FALLON ET AL., *supra* note 22, at 87–88 (distinguishing the "last resort rule" from what the authors call the "avoidance canon").

64. *Ashwander*, 297 U.S. at 348 (Brandeis, J., concurring) (quoting Crowell v. Benson, 285 U.S. 22, 62 (1932)).

65. *Ashwander*, 297 U.S. at 347 (Brandeis, J., concurring).

66. This is the label given by Dean Kloppenberg. *See* Kloppenberg, *supra* note 61, at 1004. Justice Brandeis listed five other avoidance principles. Four of these are closely related to the last resort rule, if not mere corollaries of it. Thus, "[t]he Court will not pass upon the validity of legislation in a friendly, non-adversary proceeding," "will not anticipate a question of constitutional law in advance of the necessity of deciding it," "will not formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied," and "will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation." *Ashwander*, 297 U.S. at 346–47 (Brandeis, J., concurring).

The final principle deals only peripherally with avoidance: The Court will not hear a constitutional challenge to a statute by someone who has "availed himself of its benefits." *Id.* at 348 (Brandeis, J., concurring).

ics maintain that official immunity is just the kind of alternative ground that the last resort rule directs courts to adopt in lieu of a constitutional ruling.[67]

Separating these "avoidance" strands helps to clarify the relation between the avoidance policy and the order-of-battle issue. Much of the contemporary debate on avoidance centers on the "statutory construction" theme. Critics claim that this maxim often entails an equally "aggressive judicial performance" as invalidation.[68] Construing statutes to avoid constitutional problems may entail smuggling constitutional interpretation into the process of construing the statute, thereby shifting formal focus on the analysis, but not truly avoiding the constitutional issue.[69] One critic argues that the practice shows "illusory respect for legislative supremacy," and "does not avoid the unnecessary making of constitutional law."[70] In addition, it "commonly creates a here-and-now conflict between Court and Executive."[71] This critique may land telling blows against the "statutory construction" prong of the avoidance doctrine, but it does not directly threaten the last resort rule. Relying on a non-constitutional ground under the last resort rule effectively avoids the constitutional issue. In opposing its application to the order-of-battle problem, the author does not rely on the objections to the "statutory construction" maxim.[72]

B. THE LAST RESORT RULE

Constitutional avoidance aims to minimize the friction between democratic principles and judicial authority. A premise of our system of government is that conflicts among social goals ordinarily should be resolved by majority rule. At the same time, the legislative and executive branches are not free to do as they please. At least since *Marbury v. Madison*, courts have asserted the power to thwart the will of the majority through judicial review of the acts of elected officials.[73] The power is said to be justified by the need to protect the rights of minorities,[74] the

67. *See supra* note 29.

68. *See, e.g.*, Frederick Schauer, Ashwander *Revisited*, 1995 SUP. CT. REV. 71, 97.

69. *See id.* at 73 ("[T]he increasingly common practice of interpreting statutes so as to avoid constitutional questions involves paying a price for the benefits thought to come from judicial reticence in the exercise of its constitutional authority."); *see also* William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 CORNELL L. REV. 831, 834 (2001) (arguing "that the [avoidance] canon seriously intrudes upon the roles of both Congress and the Executive in the constitutional scheme").

70. Kelley, *supra* note 69, at 860.

71. *Id.* at 867–68.

72. The author does, however, argue that resolving qualified immunity claims often requires attention to substantive constitutional issues. *See infra* Section III.A.1.

73. 137, 5 U.S. (1 Cranch) 137 (1803). General recognition of the power of judicial review may have antedated *Marbury*. *See* Michael J. Klarman, *How Great Were the "Great" Marshall Court Decisions?*, 87 VA. L. REV. 1111, 1113–26 (2001); William Michael Treanor, *Judicial Review Before* Marbury, 58 STAN. L. REV. 455, 457 (2005).

74. For an influential exposition of this rationale for intensive judicial oversight of the other branches, see *United States v. Carolene Products Co.*, 304 U.S. 144, 152–53 n.4 (1938).

constitutional system of checks and balances,[75] and the premise that a written constitution implies limits on legislative and executive authority.[76] Since we value both democratic principles and judicial oversight too much to part with either, the dilemma is a topic of enduring debate.[77] The tension between the two principles—a conflict Alexander Bickel called the "counter-majoritarian difficulty"[78]—has generated a vast body of case law and scholarly commentary on the legitimacy of judicial review, its scope, and the extent to which it actually interferes with democratic decision making.[79]

The problem is not just academic or theoretical. If courts interfere too much with the work of the executive and the legislature, democratic values will suffer. In the 1930s, for example, a narrow conservative majority on the Supreme Court blocked efforts by Congress and the President to battle the Great Depression.[80] This is not the only danger. The majoritarian branches may retaliate by looking for ways to curb judicial authority, as President Roosevelt did after the 1936 election.[81] Faced with the Court's intransigence, he proposed to add several Justices, the

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The leading academic work elaborating on the *Carolene Products* theory of judicial review is JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

75. *See* THE FEDERALIST NO. 78, at 229 (Alexander Hamilton) (Roy P. Fairfield ed., 1961) (advocating that rather than supposing that "the legislative body are themselves the constitutional judges of their own powers, . . . [i]t is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority").

76. *See Marbury*, 5 U.S. (1 Cranch) at 175–76; *see also* KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 16 (15th ed. 2004).

77. *See* SULLIVAN & GUNTHER, *supra* note 76, at 19.

78. ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16 (1982).

79. For a comprehensive treatment, see Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153 (2002) [hereinafter Friedman, *Academic Obsession*], as well as earlier articles in the series. Barry Friedman, *The Counter-majoritarian Problem and the Pathology of Constitutional Scholarship*, 95 NW. U. L. REV. 933 (2001); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Two: Reconstruction's Political Court*, 91 GEO. L.J. 1 (2002); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of* Lochner, 76 N.Y.U. L. REV. 1383 (2001); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Four: Law's Politics*, 148 U. PA. L. REV. 971 (2000). A central theme of Professor Friedman's *oeuvre* is that judicial review is actually not particularly countermajoritarian. *See, e.g.*, Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596, 2599 (2003) ("The animating idea of the Article is that our system is one of popular constitutionalism, in that judicial interpretations of the Constitution reflect popular will over time."). To the extent he is right, the case for avoidance is weaker in *all* contexts, and the case against *Saucier* is correspondingly weaker. For present purposes, however, the author will assume that there is a serious countermajoritarian difficulty in at least some contexts and will argue that the case for avoidance is nonetheless weak in connection with the order-of-battle problem.

80. *See* ROBERT G. MCCLOSKEY & SANFORD LEVINSON, THE AMERICAN SUPREME COURT 108–13 (4th ed. 2004); SULLIVAN & GUNTHER, *supra* note 76, at 134–39.

81. An earlier episode concerned the post-Civil War Congress's fear that the Supreme Court might overturn its Reconstruction legislation. Congress simply deprived the Court of jurisdiction to hear a worrisome case, and the Court submitted to its authority. *See Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 513 (1869). These events are discussed at length in William W. Van Alstyne, *A Critical Guide to* Ex Parte McCardle, 15 ARIZ. L. REV. 229 (1973).

so-called "Court-packing" scheme.[82] The matter never came to a head, as Justice Owen Roberts began to change his vote in key cases.[83] Both before and after that episode, legislators unhappy with federal court decisions have proposed legislation to strip the Supreme Court or lower federal courts of jurisdiction over various categories of cases.[84] Were these efforts to succeed, the result would be fewer of the benefits sought by way of judicial review. As no modern Justice has suggested either rethinking *Marbury* or trying to run roughshod over the other branches, the dilemma remains a source of concern today.

One way to partially escape the dilemma of judicial review is to minimize the number of occasions on which one encounters it, and this is where the avoidance policy enters the picture.[85] The last resort rule is a simple and easily understood tool. Given the value and the potential pitfalls of judicial review, it is hardly surprising that the Court would prefer to sidestep constitutional questions when it can do so at little or not cost. It stands to reason that fewer occasions of judicial intervention will produce fewer instances of judicial nullification of legislative and executive decisions. Fewer nullifications in turn will produce less friction between the branches. In this way, constitutional avoidance diminishes the worry that judicial activism may disrupt the balance between majority rule and constitutional norms. Throughout most of the 1980s, for example, the Court avoided a definitive ruling on the power of Congress to abrogate state sovereign immunity, by demanding a "clear statement" of Congress's intent to do so and relying on the absence of one.[86]

The practice of constitutional avoidance has a long pedigree. From the beginning, the Court refused to issue advisory opinions[87] and to hand down rulings that would not bind the executive.[88] Early in the 19th century, Chief Justice John Marshall counseled avoidance of unnecessary constitutional decisions.[89] In his synthesis of the constitutional avoidance doctrine, Justice Brandeis gave two examples of the application of the last

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82. *See* MCCLOSKEY & LEVINSON, *supra* note 80, at 117–18; SULLIVAN & GUNTHER, *supra* note 76, at 139–41, 506.

83. *See* MCCLOSKEY & LEVINSON, *supra* note 80, at 117.

84. *See* FALLON ET AL., *supra* note 22, at 321–22. *See also* James E. Pfander, *Federal Supremacy, State Court Inferiority, and the Constitutionality of Jurisdiction-Stripping Legislation*, 101 NW. U. L. REV. 191, 192–93 (2007) (discussing more recent proposals).

85. *See* Kelley, *supra* note 69, at 836 ("Given the dramatic character of judicial review, the Court has from the beginning taken care to minimize the frequency of that confrontation—that is, the number of occasions on which it undertakes even to decide a constitutional question.").

86. Green v. Mansour, 474 U.S. 64, 68 (1985).

87. *See* Correspondence of the Justices (1793), *reprinted in* FALLON ET AL., *supra* note 22, at 78–79.

88. Hayburn's Case, 2 U.S. (2 Dall.) 408, 410 (1792). *See* FALLON ET AL., *supra* note 22, at 96–105 (discussing the problem of executive and legislative revision of judicial decisions).

89. *See Ex Parte* Randolph, 20 F. Cas. 242, 254 (C.C.D. Va. 1833) (No. 11,558). *See also* Kloppenberg, *supra* note 61, at 1004; Schauer, *supra* note 68, at 73, 73 n.9.

resort rule.[90] One is the "alternative ground" fact pattern, in which someone challenges state action on a non-constitutional ground as well as a constitutional one.[91] If his non-constitutional claim is sound, he wins no matter how the constitutional issue is resolved.[92] The second example concerns Supreme Court review of a state judgment resting on both state and federal substantive grounds, such as where someone challenges the legality of a police search as a violation of both state law and the Fourth Amendment and wins on both theories in the state court.[93] No matter how the federal ground is resolved, the state court's ruling on state law is adequate to support the judgment and decision on the federal ground is unnecessary.[94] Besides Justice Brandeis's examples, constitutional avoidance also provides some of the underpinning of the law of justiciability and standing. Standing is denied to a federal court litigant who lacks a "distinct and palpable" injury that is caused by the action he challenges or would not be remedied by the relief he requests, for there is no compelling need for judicial intervention in such a case.[95] Similarly, persons who raise objections before they suffer harm may be turned away from federal court for lack of ripeness,[96] and those who persist in seeking to litigate disputes that are no longer alive find their cases dismissed for mootness.[97] While other factors besides the avoidance policy also help to shape these doctrines,[98] in many cases, a primary rationale for dismissal is that an

90. Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *See, e.g.*, Allen v. Wright, 468 U.S. 737, 751–52 (1984) (explaining that these and other standing questions "must be answered by reference to the Art. III notion that federal courts may exercise power only in the last resort, and as a necessity") (citation omitted).

96. *See, e.g.*, Nat'l Park Hospitality Ass'n v. Dep't of the Interior, 538 U.S. 803, 807–08 (2003).

97. *See, e.g.*, DeFunis v. Odegaard, 416 U.S. 312, 316 (1974).

98. For example, whether a case will be dismissed for mootness may depend on the reasons why the defendant has ceased the offending conduct. *See, e.g.*, City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 289 & n.11 (1982). It may also depend on whether the case is "capable of repetition, yet evading review." Roe v. Wade, 410 U.S. 113, 124–25 (1973). Ripeness can turn on whether more facts need to be developed in order to resolve the issues presented. *See, e.g.*, *Nat'l Park Hospitality Ass'n*, 538 U.S. at 808, 812. Standing can be present or absent depending on whether the offending action is taken by Congress or the Executive. *Compare* Hein v. Freedom from Religion Found., Inc., 127 S. Ct. 2553, 2555–68 (2007), *and* Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 489–90 (1982) (rejecting taxpayer standing to challenge *executive* branch transfer of funds on Establishment Clause grounds), *with* Flast v. Cohen, 392 U.S. 83, 105–06 (1968) (recognizing taxpayer standing to challenge *Congressional* expenditure on Establishment Clause grounds). On the Constitutional provision relied upon by the plaintiff, *compare Flast*, 392 U.S. at 105–06, *with* DaimlerChrysler Corp. v. Cuno, 126 S. Ct. 1854, 1865–68 (2006) (rejecting taxpayer standing to challenge state expenditure on Commerce Clause grounds). For another set of factors bearing on justiciability, see Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—And Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 635–36 (2006) (arguing that "concerns about remedies exert a nearly ubiquitous, often unrecognized, and little understood influence in the shaping and application of justiciability doctrines").

unnecessary constitutional decision ought to be avoided.[99]

Despite the benefits of constitutional avoidance, it is best characterized as a flexible norm, not an absolute requirement.[100] The objection to unbending adherence to the last resort rule is that the benefits come at a price and the price will sometimes be too high. To see why, imagine an (admittedly unrealistic) regime in which the Court took the extreme view favoring avoidance in *all* cases. Unbridled avoidance would effectively abandon judicial review altogether and deny all relief to litigants with constitutional claims. No one proposes that. In its strongest form, the policy is that courts should avoid *unnecessary* constitutional decisions. The adequate state ground doctrine cited by Justice Brandeis identifies situations in which nothing the Supreme Court may do with the federal issue would modify the outcome.[101] The "alternate ground" principle applies where the result would be the same whether the federal court decides the federal issue or not.[102]

But determining what is "unnecessary" requires the exercise of judgment and the drawing of lines. Even in situations where a ruling on the constitutional issue is arguably unnecessary, constitutional avoidance produces costs as well as benefits, and the characterization of judicial intervention as "unnecessary" may depend on *how much* good will be accomplished by ruling on the matter rather than *whether* anything of value will be gained. When the Supreme Court declines to review a state court holding on a constitutional issue because of an adequate state ground, it foregoes the opportunity to correct an error of federal law, to clear up confusion about the content of federal law, and to resolve conflicts among lower courts.[103] Sometimes these considerations are strong enough to justify departures from the avoidance policy. In *Michigan v. Long*,[104] for example, the Court faced the problem of how to deal with ambiguous state court opinions. The ambiguity issue concerns state court

99. *See* Healy, *supra* note 22, at 896–98 (discussing the influence of the avoidance policy in standing, ripeness, and mootness decisions).

100. *See* Rescue Army v. Mun. Ct., 331 U.S. 549, 574 (1947) ("[T]he policy's applicability can be determined only by an exercise of judgment relative to the particular presentation, though relative also to the policy generally and to the degree in which the specific factors rendering it applicable are exemplified in the particular case."). Some of the post-*Rescue Army* cases illustrating the flexible application of the "last resort rule" are discussed in Kloppenberg, *supra* note 61, at 1027–36.

It seems fair to call "last resort" a rule, even though its application is spotty. There are degrees of "ruleness." *See* FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 113–18, 196 (1991) (noting that rules may have exceptions and nonetheless remain rules). So long as avoidance is a policy with significant weight across a range of cases one can usefully speak of last resort as a rule, despite the many exceptions to it. In any event, whether it ought to be called a rule or a policy is irrelevant to this Article.

101. Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 347 (1936) (Bandies, J., concurring) (citing Berea Coll. v. Kentucky, 211 U.S. 45, 51 (1908)).

102. *Id.*; *Berea Coll.*, 211 U.S. at 51.

103. *See* Richard A. Matasar & Gregory S. Bruch, *Procedural Common Law, Federal Jurisdictional Policy, and the Abandonment of the Adequate and Independent State Grounds Doctrine*, 86 COLUM. L. REV. 1291, 1384–89 (1986).

104. 463 U.S. 1032 (1983).

judgments supported by opinions that do not clearly indicate whether they are based on state or federal grounds.[105] In some earlier cases, the Court, out of fidelity to the avoidance policy, had presumed that such judgments were based on state grounds, thereby avoiding the constitutional issues they presented.[106] *Long* abandoned that approach, as well as other ways of dealing with ambiguous state opinions,[107] in favor of the opposite presumption, that is, that the state court judgment rests on federal grounds unless it contains a "plain statement" to the contrary.[108] The older approach gave too little credit to the "important need for uniformity in federal law."[109]

Similar flexibility applies in the "alternate grounds" cases. When a federal court ignores the constitutional issue in favor of an alternate ground, it leaves the content of federal law less certain and gives up the opportunity to accord federal law the force it deserves in regulating official conduct. In *Zobrest v. Catalina Foothills School District*, the constitutional issue was whether the Establishment Clause of the First Amendment forbids a local government from providing a sign language interpreter for a deaf student at a religious school.[110] Though statutory grounds were available and were argued to the Supreme Court,[111] a 5-4 majority insisted on reaching the constitutional issue.[112] Chief Justice Rehnquist explained that "only First Amendment questions were pressed on the Court of Appeals," so that "the prudential rule of avoiding constitutional questions has no application."[113] This reasoning may not be wholly persuasive, for the point of avoidance is to serve the Court's institutional need to minimize friction, and that need has nothing to do with the litigation history of the case. Nonetheless, there were good pragmatic reasons for declining to apply the avoidance policy in *Zobrest*. The case provided the Court with an opportunity "to clarify a highly contentious issue of

105. *Id.* at 1037–44.

106. *See, e.g.*, Lynch v. New York, 293 U.S. 52, 54–55 (1934).

107. The other methods adopted in earlier cases were (1) sending the case back to the state court for clarification and (2) independent inquiry by the Supreme Court into the ultimate grounds for the ruling. *See Long*, 463 U.S. at 1038–39.

108. *Id.* at 1040–41.

109. *Id.* at 1040. For another example of the Court's willingness to give other factors priority over adherence to a strong avoidance policy, see *U.S. Parole Commission v. Geraghty*, 445 U.S. 388 (1980). There the plaintiff, a federal prisoner, attempted to bring a class action to challenge regulations affecting the availability of parole. *Id.* at 390. The district court denied his request to frame the suit as a class action, and he was released from prison under the guidelines he had challenged. *Id.* at 393–94. Even though he no longer had a live dispute on the merits, the Court rejected mootness, reasoning that the issue of class certification remained alive. *Id.* at 397–401. The pragmatic explanation for the outcome is that other prisoners still may have an ongoing dispute with the government, the plaintiff's lawyer was still interested in the litigation, and a class may ultimately be certified. *Id.* at 402–04. All the same, under a strict reading of the "avoidance" policy, the Court would surely have reached the opposite result. *See* FALLON ET AL., *supra* note 22, at 215–16.

110. 509 U.S. 1, 3 (1993).

111. *See* Kloppenberg, *supra* note 61, at 1006–08.

112. *Zobrest*, 509 U.S. at 7–8.

113. *Id.*

public importance and no invalidation of legislative or executive action [was] required."[114]

III. THE ORDER-OF-BATTLE PROBLEM: COSTS AND BENEFITS OF CONSTITUTIONAL AVOIDANCE

The lesson taught by cases like *Long* and *Zobrest* is that the decision whether to apply the last resort rule depends on an assessment of the costs and benefits of avoidance in a given situation. It is, of course, impossible to assign a numerical value to those pluses and minuses, and equally impossible to show that the calculation must come out one way rather than the other as a matter of logic. All the same, one may better understand the stakes and evaluate the strength of the case for avoidance by situating the order-of-battle problem within the whole range of cases where the last resort rule may be applied. This Part of the Article argues that, by comparison with other areas where avoidance may be justified, the benefits are low in the order-of-battle context and the costs are high.

A. Low Benefits

1. Qualified Immunity and the Merits.

One reason why the benefits are low in the order-of-battle context is that applying qualified immunity law requires some attention to the substantive constitutional standard. Immunity does not depend on the officer's subjective good faith, but on whether he violated "clearly established . . . constitutional rights of which a reasonable person would have known."[115] In resolving the immunity issue, the court must concentrate on the substantive law at the time of the challenged action.[116] Under *Saucier*, the immunity issue is resolved only after the court has concluded that the plaintiff's allegations state a constitutional violation today.[117] In this way, the *Saucier* order-of-battle separates the substantive issue from the immunity issue and thereby promotes analytical clarity. Absent *Saucier*, a court that undertakes to resolve the immunity issue first may have difficulty distinguishing between the two. In *Seigert v. Gilley*, the Supreme Court pushed this argument a step further, suggesting

114. Kloppenberg, *supra* note 61, at 1065. *Pullman* abstention—in which federal courts defer consideration of constitutional issues while the parties obtain from the state court a decision on a possibly dispositive state law issue—is also justified, in part, by the avoidance policy. *See* R.R. Comm'n v. Pullman Co., 312 U.S. 496, 498 (1941). But the Court also recognizes that the cost of abstention may be too great to justify the benefits, such as when the delay in getting a definitive reading of state law will be too great. *See, e.g.*, Baggett v. Bullitt, 377 U.S. 360, 378 (1964) (deciding that the vagueness of state law would require multiple state court rulings to clear up). Professor Kloppenberg goes further and "rejects efficiency and fear of friction as legitimate grounds for applying *Pullman* abstention." Kloppenberg, *supra* note 61, at 1056–57.

115. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

116. Brosseau v. Haugen, 543 U.S. 194, 198 (2004) ("If the law at that time did not clearly establish that the officer's conduct would violate the Constitution, the officer should not be subject to liability or, indeed, even the burdens of litigation.").

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

that the substantive issue and the immunity issue are inevitably connected: "A necessary concomitant to the determination of whether the constitutional right asserted by the 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."[118]

Judge Leval disputes this reasoning, arguing to the contrary that "[i]t is often immediately apparent that the claimed right was not clearly established at the time of the defendant's conduct, while it may be very difficult to determine whether the claimed right should be found to exist."[119] Judge Leval seems to have the better of this argument. Consider the Supreme Court's disposition of *Saucier* and *Brosseau*. In both cases, the Court managed to address the immunity issue without resolving the substantive one.[120] If the Court's reasoning in *Seigert* overstates the substance-immunity link, it may nonetheless accurately reflect the practical realities of most constitutional adjudication. In a qualified immunity case, a court must not only examine the law as it existed at the time of the challenged act, but also decide what inferences a reasonable officer ought to draw from it.[121] Inevitably, the opinion will contain analysis and judgments about the state of the law, its evolution, and its internal logic. Given that ordinary statutes of limitations apply to constitutional tort cases,[122] the time in question will not be very far in the past. In the course of this analysis it will often be possible to remain agnostic as to the present law. It seems likely, however, that courts will often draw conclusions about the current constitutional landscape and will in one way or another make their views known.[123]

But suppose the author of the opinion takes care to distinguish between qualified immunity and the merits, such that he successfully keeps the two issues separate and the ruling on immunity gives no clue as to the current state of the law. Even so, putting the immunity issue first will often have little or no impact on avoidance. Adjudication of a constitu-

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

119. Leval, *supra* note 17, at 1278 n.86.

120. *See Brosseau*, 543 U.S. at 198; *Saucier*, 533 U.S. at 197.

121. *See* Hope v. Pelzer, 536 U.S. 730, 739–41 (2002) (explaining that officers must have "fair warning"). *See also* Amanda K. Eaton, Note, *Optical Illusions: The Hazy Contours of Clearly Established Law and the Effects of* Hope v. Pelzer *on the Qualified Immunity Doctrine*, 38 GA. L. REV. 661, 690 (2004) (suggesting that *Hope* implies that "decisions arising out of entirely distinct factual scenarios can provide clearly established law if the premise or general reasoning is relevant to the case in question"). For an illustration of this theme, see *Craighead v. Lee*, 399 F.3d 954, 962 (8th Cir. 2005) ("[T]he issue [under *Hope*] is not whether prior cases present facts substantially similar to the present case but whether prior cases would have put a reasonable officer on notice that the use of deadly force in these circumstances would violate [the suspect's] right not to be seized by the use of excessive force.").

122. *See* Wilson v. Garcia, 471 U.S. 261, 266–67 (1985).

123. Judge Sutton, an influential foe of *Saucier*, acknowledges this relationship. *See* Lyons v. City of Xenia, 417 F.3d 565, 581 (6th Cir. 2005) (Sutton, J., concurring) ("The constitutional and non-constitutional questions in a qualified immunity case overlap, and it often may be difficult to decide whether a right is clearly established without deciding precisely what the existing constitutional right happens to be."). *See also* Wilkinson v. Russell, 182 F.3d 89, 112 (2d Cir. 1999) (Calabresi, J., concurring).

tional tort case presenting both substantive and immunity issues must follow one of three paths: (1) The plaintiff has alleged the violation of a clearly established constitutional right, in which case the constitutional issue will not be avoided no matter what the sequence; (2) The plaintiff fails to show a prima facie violation of a constitutional right, so there is no friction with the majoritarian branches no matter what the sequence (in fact, democratic decision making may be *better* served if the constitutional issue is decided at the outset rather than avoided by way of the "last resort rule," as the ruling on the merits would dispel concerns about the scope of legislative and executive power);[124] (3) the plaintiff's allegations state a violation of a constitutional right, but the right was not clearly established at the time of the act.

The third path is the only one in which there will be more or less judicial-majoritarian friction, depending on whether the constitutional issue or the immunity issue is decided first. Under *Saucier*, the court will rule on the constitutional issue, contrary to the avoidance policy. Under the "last resort rule," the court will decide the immunity issue first. In the course of the opinion it may or may not provide guidance on the substantive issue for future reference. To the extent it does indicate that the plaintiff's right was in fact violated, even in dicta, it will not have fully avoided the constitutional issue. Only when it examines the substantive law with sufficient care to show that the right was not clearly established–but not so comprehensively as to indicate the current state of the law–will it have successfully implemented the avoidance policy.[125]

2. *The Type of Litigation in Which Order-of-Battle Problems Arise*

Some section 1983 suits give rise to an order-of-battle issue, but many do not, and the ones that do tend to be cases in which the benefits of avoidance are low. Constitutional litigation can be divided into two broad categories. One consists of suits in which the sole defendant is an official and the sole relief sought is recovery of damages. This is the type of case in which the order-of-battle is key, because the outcome may turn on the immunity issue. The other category includes lawsuits seeking relief against an ongoing, threatened, or systemic practice, such as the operation of a school system, a jail, or some other public agency. This second category includes suits brought against state officials to challenge statutes and ongoing administrative practices,[126] as well as litigation against mu-

124. *See* Graebe, *supra* note 12, at 427 (arguing that by resolving cases on immunity grounds courts may "needlessly dissuade lawsuit-wary government actors from engaging in conduct that is legal"); *see also id.* at 428–29.

125. The foregoing rationale for rejecting constitutional avoidance applies only to *qualified* immunity. Although the link between the qualified immunity inquiry and the merits may weaken the avoidance policy, there is no such link between *absolute* immunity and the merits. Since absolute immunity depends on the officer's function, its availability can be determined without considering the merits. *See supra* notes 32–33 and accompanying text. Other arguments for keeping *Saucier* apply to both absolute and qualified immunity.

126. State governments are immune from suit on account of the constitutional principle of sovereign immunity. Will v. Mich. Dep't of State Police, 491 U.S. 58, 66 (1989). Con-

nicipal governments, who may be held liable for activities the Supreme Court calls their "official policies" and "customs."[127] "Customs" are widespread practices of which high officials know or should know,[128] and "official policies" include rules of general applicability promulgated by municipal lawmakers,[129] inadequate municipal training programs that produce constitutional violations,[130] as well as the decisions of a municipality's final policymakers.[131] When the defendant is a municipal government, the order-of-battle problem does not arise because these governments have no immunity.[132] Even if an official is also named as a defendant, it may be necessary to address the constitutional issue in order to adjudicate the case against the municipality. Nor is sequencing a consideration when the plaintiff seeks prospective relief, for qualified immunity shields the officer only from liability for damages.[133]

Because of the distinctive features of the type of litigation that presents the order-of-battle issue, the benefits of avoidance are significantly lower than they are in other types of constitutional litigation. Constitutional avoidance aims at minimizing friction between the judicial branch and the majoritarian ones. But there are *degrees* of friction between judicial authority and democratic rule, and judicial review produces more of it in some cases than others.[134] The tension is comparatively high when judges nullify the acts of politically accountable bodies and officers, such as state legislatures, municipal governing bodies, and elected executive officials. The danger of friction is also especially acute when courts interfere with the core projects pursued by elected officials, which typically consist of broad policies of general application. Now consider the class of constitu-

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gress may abrogate that immunity in certain circumstances, but the Supreme Court has held that section 1983 does not do so. *Id.* at 65–66. Accordingly, states may not be sued at all under section 1983, either in federal or state court. *Id.* at 66; *see also* Quern v. Jordan, 440 U.S. 332, 339–40 (1979). Nonetheless, challenges to state action seeking prospective relief can be maintained against their officers under the principle established in *Ex Parte Young*, 209 U.S. 123, 159-60 (1908). *See* FALLON ET AL., *supra* note 22, at 994–97.

127. *See* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690–91, 708 (1978).

128. *Compare* Baron v. Suffolk County Sheriff's Dep't, 402 F.3d 225, 238 (1st Cir. 2005) (finding a custom of retaliating against police officers who broke the internal "code of silence" about misconduct by other officers), *with* Patterson v. County of Oneida, 375 F.3d 206, 227 (2d Cir. 2004) ("[W]e cannot see in the record admissible evidence from which a rational factfinder could find that racial harassment of Black corrections officers . . . was so widespread as to permit an inference that the Department had a policy or custom of such harassment."). Just what state of mind is required of high officials remains an open issue, but one that is irrelevant to the argument of this Article.

129. *See Monell*, 436 U.S. at 661, 694–95.

130. *See* City of Canton v. Harris, 489 U.S. 378, 387 (1989). *See also* Bd. of County Comm'rs v. Brown, 520 U.S. 397, 404–05 (1997) (explaining that ill-considered hiring decisions, if sufficiently egregious, may trigger municipal liability).

131. *See* Pembaur v. City of Cincinnati, 475 U.S. 469, 480–81 (1986); Granda v. City of St. Louis, 472 F.3d 565, 569 (8th Cir. 2007); Webb v. Sloan, 330 F.3d 1158, 1164 (9th Cir. 2003).

132. Owen v. City of Independence, 445 U.S. 622, 650 (1980).

133. *See* Sup. Ct. v. Consumers Union of U.S., Inc., 446 U.S. 719, 736 (1980).

134. *See* Friedman, *Academic Obsession*, *supra* note 79, at 165–66 (explaining that "most of the scholarship in which the countermajoritarian difficulty appears rests on an overly simplified and largely inaccurate understanding of American democracy").

tional tort cases in which the order-of-battle matters. This class consists almost entirely of litigation against street-level bureaucrats, such as "police, prison guards, and prosecutors whose accountability hardly equates with a popular mandate."[135] Accordingly, section 1983 cases seeking damages from officials will typically be located at the "less friction" end of the spectrum. In these cases there is comparatively less tension between judicial review and democracy.[136]

The point of distinguishing between the two categories of constitutional litigation should be evident: Order-of-battle problems come up in suits seeking damages for the acts of individual, low-level officers, and not in litigation challenging the decisions of high officials or seeking systemic relief. This distinction dovetails with the one between situations where friction is low and those in which it is high. For the most part, the very presence of an order-of-battle issue is a good indication that the case is one in which the counter-majoritarian difficulty is comparatively weak and the benefits of avoidance will be correspondingly small. At the same time, the costs of avoidance are especially high in the constitutional tort context.

B. High Costs

1. *Applying the "Last Resort Rule" Would Thwart the Aims of Constitutional Tort*

Constitutional avoidance is a general policy that cuts across all fields of constitutional adjudication. Ordinarily the impact of the "last resort rule" will be ad hoc and haphazard, foreclosing a ruling on this or that constitutional point because of an adequate state ground, availability of an alternative non-constitutional rationale, lack of justiciability, or lack of standing. If it is applied to the order-of-battle problem, however, its impact on constitutional tort law will likely be far more systematic. As the Court recognized in *Saucier*, fidelity to the "last resort rule" can easily stunt the growth of substantive constitutional tort law.[137] Failure to articulate the existence of the right in case # 1 will provide no guidance to

135. Seth F. Kreimer, *Exploring the Dark Matter of Judicial Review: A Constitutional Census of the 1990s*, 5 Wm. & Mary Bill Rts. J. 427, 507 (1997) .

136. For an extended treatment of the point made in this paragraph, see Kreimer, *supra* note 135, at 505–07. Kreimer's reasoning also rebuts the application to constitutional tort of other versions of the general theme of constitutional avoidance. *See id.* at 506–07. For example, Professor Cass Sunstein has argued that the Court ought to rule narrowly when doing so can promote what he calls "democratic deliberation" about important issues of social policy. Cass R. Sunstein, One Case At a Time: Judicial Minimalism on the Supreme Court 3–4 (1999). Whatever the merit of Sunstein's thesis, it seems inapposite to constitutional torts. These cases, where no "official policy" or "custom" is at stake, and no prospective relief is requested, rarely require courts to make judgments on matters that reflect the outcome of democratic decision making on social goals and the means for achieving them.

137. *See* Saucier v. Katz, 533 U.S. 194, 201 (2001) (explaining that the order-of-battle rule ensures "the process for the law's elaboration from case to case, and it is one reason for our insisting upon turning to the existence or nonexistence of a constitutional right as the first inquiry").

officers and leave the law uncertain when case # 2 comes up, and so on. To the extent the law does not become more concrete over time, immunity will continue to be available. To the extent cases continue to be resolved by finding immunity, the law will continue to remain less rather than more concrete. Consider the First Amendment issue raised in *Morse v. Frederick*. As Justice Breyer pointed out in his separate opinion, lower courts faced with the task of determining the free speech rights of public school students have been all over the lot.[138] One Supreme Court precedent directs them to focus on whether the speech is unduly disruptive of the learning environment.[139] Another seems to broaden the authority of school administrators in at least some contexts,[140] and a third sets up an entirely different framework for speech that can be attributed to the school itself.[141] Justice Breyer may well be right that the law bearing on the "Bong Hits 4 Jesus" banner was not clearly established, so that the principal who disciplined Frederick would escape liability for damages no matter how the "difficult"[142] substantive issue is resolved.[143] But disposing of the case on immunity grounds does nothing to clarify the law for other students and administrators going forward.

What is more, the costs of uncertainty will not be spread evenly across plaintiffs and defendants alike, but will systematically disfavor the constitutional claimant. Recall that the friction-reducing benefits of avoidance are realized only in the case where the plaintiff actually has a good constitutional case, the right is not clearly established, and, in the course of finding immunity, the court avoids clarifying the substantive constitutional law.[144] Notice that this is also the type of case in which the costs of avoidance are especially high. Part of the cost is that leaving the state of the law in flux permits defendants to escape liability for damages for con-

138. Morse v. Frederick, 127 S. Ct. 2618, 2641 (2007) (Breyer, J., concurring in the judgment in part and dissenting in part). *See also* Samuel P. Jordan, Comment, *Viewpoint Restrictions and School-Sponsored Student Speech: Avenues for Heightened Protection*, 70 U. CHI. L. REV. 1555, 1557 (2003) ("In attempting to strike . . . a balance regarding limitations on viewpoint expression . . . lower courts have reached inconsistent results, disagreeing on which doctrines to apply and how to interpret Supreme Court precedent."); Alexander G. Tuneski, Note, *Online, Not On Grounds: Protecting Student Internet Speech*, 89 VA. L. REV. 139, 149 (2003) ("Faced with a void of guidance from the high court, lower courts have adopted two contrasting approaches to the treatment of student speech taking place off-campus.").

139. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969) (determining that student speech may not be suppressed unless officials reasonably conclude that it will "materially and substantially disrupt the work and discipline of the school").

140. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986) (finding that school authorities did not violate the student's first amendment rights when they disciplined him for "offensively lewd and indecent speech" at a school assembly). *See also Morse*, 127 S. Ct. at 2626–27 (pointing out that "[t]he mode of analysis employed in *Fraser* is not entirely clear" and going on to describe *Fraser* as having "established that the mode of analysis set forth in *Tinker* is not absolute").

141. Hazlewood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988).

142. *Morse*, 127 S. Ct. at 2638 (Breyer, J., concurring in the judgment in part and dissenting in part).

143. Nor did the *Morse* majority improve matters much with its narrow rule permitting administrators to discipline students who "celebrat[e]" the use of illicit drugs. *Id.* at 2625.

144. *See supra* text accompanying notes 124–25.

stitutional violations for an indefinite period of time, to the detriment of persons who have suffered constitutional injuries and cannot recover for them. Besides the harm to victims, leaving constitutional tort issues undecided impedes the public interest in building a coherent and effective body of constitutional tort law.

The cost of avoidance is concentrated in another way as well. It weighs most heavily on certain kinds of litigants and certain kinds of constitutional claims. Here the starting point is the discussion in Part III.A.2 regarding the types of constitutional litigation that generate order-of-battle problems.[145] Since there is no order-of-battle problem in suits for prospective relief and suits against local governments, the costs of overturning *Saucier* fall entirely on plaintiffs whose only remedy is damages against an official. Complaints about the conduct of particular officers toward this particular plaintiff rarely produce a successful suit against a local government.[146] Nor do such suits ordinarily support a request for prospective relief, simply because it is hard to show a likelihood of recurrence of the wrongdoing, and such a showing is crucial.[147] Many constitutional cases involving excessive force[148] or illegal seizures by the police[149] fit this model, as do suits brought by public employees charging that

145. *See supra* text accompanying notes 126–36.

146. A local government could be held liable only if the conduct is sufficiently widespread to meet the test for a "custom," or if the plaintiff can show that it resulted from inadequate training, hiring, or supervision, or if a higher-up final policymaker has ratified the decision and the unconstitutional reason for it. Under each of these theories the plaintiff faces a high hurdle, in that the government cannot be held liable on a respondeat superior theory. For inadequate training, supervision, and hiring suits, liability may be imposed on the local government only by showing that the officials in charge manifested "deliberate indifference" to the plaintiff's constitutional rights. *See* Bd. of County Comm'rs v. Brown, 520 U.S. 397, 412–15 (1997); City of Canton v. Harris, 489 U.S. 378, 388–92 (1989). Though the Supreme Court has not yet told us how much knowledge is necessary for the other two categories, it seems likely that "deliberate indifference" will prevail in those contexts as well.

For illustrations of the difficulties plaintiffs have in trying to sue local governments on this theory, see *Szabla v. City of Brooklyn Park*, 486 F.3d 385, 390 (8th Cir. 2007) ("[O]nly where a municipality's failure to adopt adequate safeguards was the product of deliberate indifference to the constitutional rights of its inhabitants will the municipality be liable for an unconstitutional policy under § 1983."). *See also* Skop v. City of Atlanta, 485 F.3d 1130, 1145 (11th Cir. 2007) (finding no municipal liability in a false arrest case because "[t]he City of Atlanta undeniably trains its officers not to arrest unless there is probable cause to support the arrest."); Blankenhorn v. City of Orange, 485 F.3d 463, 484–85 (9th Cir. 2007) (explaining that, in an excessive force case, "evidence of the failure to train a single officer is insufficient to establish a municipality's deliberate policy").

147. *See* City of Los Angeles v. Lyons, 461 U.S. 95, 107 & n.8 (1983). Recent illustrations of this theme include *Wilson v. Morgan*, 477 F.3d 326, 342–43 (6th Cir. 2007) and *Shain v. Ellison*, 356 F.3d 211, 214–16 (2nd Cir. 2004). For an illustration of the type of case in which a request for prospective relief may succeed, see *Kolender v. Lawson*, 461 U.S. 352, 354, 355 n.3 (1983) (deciding that because plaintiff had been arrested for vagrancy fifteen times, he was therefore entitled to seek an injunction against enforcement of the ordinance against him in the future.).

148. *See, e.g.*, Scott v. Harris, 127 S. Ct. 1769, 1774, 1776 (2007); Graham v. Connor, 490 U.S. 386, 388 (1989).

149. *See, e.g.*, Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 396 (1971); Monroe v. Pape, 365 U.S. 167, 187 (1961).

higher-ups retaliated against them for protected speech,[150] suits by persons claiming that some government benefit is "property" of which they cannot be deprived without due process,[151] and "class of one" equal protection claims, in which plaintiffs claim that they were singled out for unfavorable treatment.[152] The cost of avoidance rests heavily on these plaintiffs and these constitutional claims.[153]

There is, in short, a significant category of substantive constitutional issues that courts will rarely face unless they put aside the last resort rule in order-of-battle cases.[154] Leaving these issues undecided may well be entirely acceptable to the twenty-eight state attorneys general who joined an amicus brief in *Scott v. Harris*[155] favoring reconsideration of the *Saucier* sequencing rule, for the paramount litigating interest of the defendant in a constitutional tort case is to escape liability. But it thoroughly undermines the aims of constitutional tort law. Suits seeking damages for constitutional violations help to vindicate constitutional rights, compensate people for the harm they suffer from constitutional wrongs, and de-

150. *See* Michael L. Wells, *Section 1983, the First Amendment, and Public Employee Speech: Shaping the Right to Fit the Remedy (and Vice Versa)*, 35 GA. L. REV. 939, 983–86 (2001). Many First Amendment "retaliation" suits concern challenges to a particular decision made by a particular low-level officer, not a systematic practice or the act of a final policy maker. *See id.* at 982 & n.258. In theory, prospective relief is an option in many of these public employee speech cases, as successful plaintiffs could ask for injunctions requiring their former employers to rehire them, but this is often not a viable remedy in practice simply because the plaintiff has moved on in life and does not want to return to an unhappy workplace. *Id.* at 986.

151. *See, e.g.*, Bolton v. City of Dallas, 472 F.3d 261, 266 (5th Cir. 2006); Kirkland v. St. Vrain Valley Sch. Dist. No. RE-1J, 464 F.3d 1182, 1189 (10th Cir. 2006); Harris v. Hays, 452 F.3d 714, 719 (8th Cir. 2006); Women's Med. Prof'l Corp. v. Baird, 438 F.3d 595, 616 (6th Cir. 2006); Wojcik v. City of Romulus, 257 F.3d 600, 609 (6th Cir. 2001).

152. The leading case is *Village of Willowbrook v. Olech*, 528 U.S. 562, 564–65 (2000). *See also* Tapalian v. Tusino, 377 F.3d 1, 7 (1st Cir. 2004).

153. Judge Leval and the States' Brief assert that the cost of overruling *Saucier* is low, because local government suits, prospective relief suits, and suppression hearings will suffice for the development of substantive constitutional law. *See States' Brief, supra* note 21, at *11; Leval, *supra* note 17, at 1280–81. It is true that there will be substantial overlap between the range of Fourth Amendment search and seizure issues litigated in suppression hearings and those that litigants raise in section 1983 suits, but that is a narrow range of cases. Reliance on local government and prospective relief suits as means to address the full array of constitutional issues is misplaced because of the differences between the types of issues typically asserted in those cases and the issues that come up in constitutional tort suits involving excessive force, retaliatory dismissal, government-benefits-as-property, "class of one" equal protection, and other claims that typically challenge the decisions of isolated officials.

154. The States' Brief draws an analogy between section 1983 and habeas corpus, in which federal courts are presumptively barred from adjudicating claims based on "new law." *See States' Brief, supra* note 21, at *11. *See also* Whorton v. Bockting, 127 S. Ct. 1173, 1180–81 (2007); Carey v. Musiadin, 127 S. Ct. 649, 653 (2006); FALLON ET AL., *supra* note 22, at 1325 (discussing the "new law" theme in habeas corpus and qualified immunity doctrine). Since limits on habeas have not "inhibited the development of constitutional law," the States' Brief reasons, there is no reason to fear that repudiating *Saucier* would do so either. *States' Brief, supra* note 21, at *20. But the analogy is not apt, as criminal procedure issues that are excluded from habeas are litigated routinely in criminal trials and on direct review. Unlike section 1983 damage suits against officers, there is no distinctive class of cases in which another forum is rarely available.

155. Scott v. Harris, 127 S. Ct. 1769, 1780 (2007).

ter constitutional violations.[156] At the same time, a countervailing concern is that liability will unfairly burden officers who thought they were acting properly and deter them from taking steps that may expose them to liability.[157] The Court's solution to this conflict is not to sacrifice the plaintiff's interest for the sake of providing maximum protection to officials. It has sought instead to achieve a "balance" between the considerations on either side.[158] For most officers, the risk of overdeterrence justifies "qualified" immunity, available only so long as they do not violate clearly established law. As the Court explained in *Harlow v. Fitzgerald*, more comprehensive immunity would interfere too much with the deterrent and vindication goals served by constitutional torts.[159]

Application of the "last resort rule," by effectively insulating some official conduct from constitutional oversight, frustrates this effort to accommodate competing values. Putting the immunity issue first has the effect of systematically restricting the opportunities for developing substantive constitutional law on topics that typically arise in suits for damages. However strong the theoretical merits of the friction-reducing rationale for the last resort rule, the real-world result will be that the defendant's litigation interest triumphs. As courts articulate fewer and fewer substantive constitutional rules, officers' immunity from damages will inevitably prevail over the public interest in deterring constitutional violations as well as the plaintiff's interest in vindicating his rights, contrary to the balance struck by the Court in *Harlow*.

Harlow rests on the premise that immunity for executive acts should be *qualified* rather than absolute.[160] That premise, in turn, reflects a judgment that uncertainty about the content of constitutional law is indeed a problem, and that the short to intermediate term solution to the problem is to shield officers by means of qualified immunity. Immunity is a tool for coping with the uncertainty problem, not a good in itself. The vindication and deterrent aims of constitutional tort law can only be met over the long term by minimizing the role of immunity in constitutional tort cases. This goal can only be achieved if courts constantly "elaborate the constitutional right with greater degrees of specificity"[161] so that there

156. *See, e.g.*, Felder v. Casey, 487 U.S. 131, 139–42 (1988); Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982); City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 267–68 (1981); Owen v. City of Independence, 445 U.S. 622, 650–54 (1980); Carey v. Piphus, 435 U.S. 247, 253–57 (1978). An attempt to synthesize these cases and others into a general account of the aims of constitutional tort liability may be found in Michael Wells, *Constitutional Remedies, Section 1983 and the Common Law*, 68 MISS. L.J. 157, 190–92 (1998).

157. *Harlow*, 457 U.S. at 814.

158. *Id.* at 807 ("[R]ecognition of a qualified immunity defense for high executives reflect[s] an attempt to balance competing values."). *See also id.* at 814.

159. *See id.* at 807–09, 813–14. The Court explained that "an action for damages may offer the only realistic avenue for vindication of constitutional guarantees. It is this recognition that has required the denial of absolute immunity to most public officers." *Id.* at 814 (citations omitted). For a scholarly defense of the Court's "fault-based" regime, see John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 68–81 (1998).

160. *Harlow*, 457 U.S. at 814.

161. Saucier v. Katz, 533 U.S. 194, 207 (2001).

will be fewer and fewer occasions for invocation of immunity.[162] There may well be topics on which the Court should make less constitutional law rather than more, because the issues are politically sensitive or because broad judicial intervention would interfere too much with democratic decision making.[163] But in the constitutional tort field we should maximize the occasions for elaborating the content of constitutional law rather than looking for ways to minimize them.

The point here is *not* that obliging courts to decide more rather than fewer constitutional issues will result in a proliferation of newly-minted constitutional rights. On the contrary, the contemporary federal judiciary often finds against the claimed constitutional right rather than for it.[164] Partisans of seeing to it that state officers are made accountable for their violations may prefer a regime in which rights remain undefined over one in which courts rule against the plaintiff's substantive argument on the merits.[165]

In the author's view, this view is short-sighted. For one thing, if it is true that the current crop of federal judges are not especially sympathetic to expansive interpretations of the Bill of Rights, it is also true that the political composition of the federal judiciary changes over time.[166] The partisan of expansive readings of constitutional rights, who prefers the avoidance doctrine today may find himself in an embarrassing position when a new President names a raft of new judges. A more prudent course is to base the order-of-battle doctrine on factors that go beyond present political circumstances and stick to the rule as the criteria for selecting judges change over time. Otherwise the choice is vulnerable to the charge that it is solely a matter of politics.

Second, the current federal judiciary has not shown itself to be especially hostile to the garden-variety constitutional claims that comprise most section 1983 litigation. The twenty-eight state attorneys general who joined the amicus brief in *Scott* seeking to have *Saucier* overturned probably reckoned that their litigating interests were better served by a regime in which courts addressed fewer rather than more constitutional

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162. *See* Graebe, *supra* note 12, at 429–30 (showing that "the merits bypass allows for the possibility that government actors can repeatedly engage in unconstitutional conduct *previously challenged in court* without ever being subject to liability for their actions") (emphasis added).

163. *See supra* note 136 (discussing Professor Sunstein's thesis).

164. *See* Healy, *supra* note 22, at 930 (reporting that, in circuit court cases decided in the two years after *Saucier*, "of ninety-two asserted rights that were not clearly established, the courts held that seventy were not protected by the Constitution at all").

165. For an argument along these lines, *see* Healy, *supra* note 22, at 928–35.

166. *See* SHELDON GOLDMAN, PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN 4 , 7–9, 17–20, 30–38, 163–73, 296–307 (1997). Jefferson Powell underlines the importance of this avenue for constitutional change, arguing that "our history legitimates efforts to persuade the courts to change their views on constitutional matters . . . by appointing, as opportunity arises, judges likely to take a different position." H. JEFFERSON POWELL, A COMMUNITY BUILT ON WORDS: THE CONSTITUTION IN HISTORY AND POLITICS 208 (2002).

issues.[167] Showing that most rulings on the constitutional merits go against the plaintiff may indicate only that their lawyers advance ambitious theories of recovery, knowing that most of them will fail. A subtle virtue of the official immunity doctrine is that it permits courts to recognize novel constitutional theories without imposing undue costs on the officers found to have crossed a newly-identified constitutional line. In this way, "the right-remedy gap in constitutional torts facilitates constitutional change by reducing the costs of innovation."[168] These benefits can only be obtained if the constitutional issue is decided before immunity, as *Saucier* requires.[169]

Even when a court rules against a constitutional claim, its reasoning may lay the foundation for other, differently framed constitutional arguments. For example, *DeShaney v. Winnebago County Department of Social Services* rejected a broad affirmative duty on the part of government officers toward vulnerable children with whom they have contact.[170] In doing so, the Court distinguished other situations where a duty may be found, giving credence to theories of recovery that barely existed before that case and that have at least sometimes proved successful in its aftermath.[171] The *DeShaney* court rejected the plaintiff's argument that the county violated the due process rights of a small child by leaving him in his father's care despite indications that the father abused the boy:

> While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them. That the State once took temporary custody of Joshua does not alter the analysis, for when it returned him to his father's custody, it placed him in no worse position than that in which he would have been had it not acted at all.[172]

This explanation for rejecting the plaintiff's theory of recovery provided the grounds on which lawyers and lower courts could construct more solid constitutional arguments that "state-created danger" can generate a constitutional violation if the state does bear sufficient responsibility for producing the danger, knows enough about it, and can do something to diminish it but fails to act.[173] In *Breen v. Texas A&M University*, for example, the complaint alleged that officials had authorized

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167. *See State's Brief*, *supra* note 21.

168. John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 90 (1999).

169. *See* Saucier v. Katz, 533 U.S. 194, 200 (2001).

170. DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 201 (1989); *see also* Thomas A. Eaton & Michael Wells, *Governmental Inaction as a Constitutional Tort:* DeShaney *and Its Aftermath*, 66 WASH. L. REV. 107, 111–15 (1991).

171. For some illustrations, see SHELDON NAHMOD ET AL., CONSTITUTIONAL TORTS 211–24 (2d ed. 2004).

172. *DeShaney*, 489 U.S. at 201.

173. *See, e.g.*, Breen v. Tex. A&M Univ., 485 F.3d 325, 333 (5th Cir. 2007); Ye v. United States, 484 F.3d 634, 637–41 (3d Cir. 2007). *See also* Eaton & Wells, *supra* note 170, at 149–58 (discussing various "state-created danger" fact patterns).

students to build a dangerous bonfire on the campus, the bonfire collapsed, and a dozen students were killed.[174] The 5th Circuit ruled that these facts would make out a constitutional violation under the state-created danger theory.[175] Had the affirmative duty issue remained undefined, the guidance needed to develop this theory of recovery would not have existed.

2. *Flexibility Costs More Than It Is Worth*

To be fair, opponents of *Saucier* do not necessarily want to stunt the growth of substantive constitutional law. In particular, Justice Breyer does not advocate replacing *Saucier*'s rule with a general rule of constitutional avoidance on the order-of-battle issue.[176] He favors allowing lower courts discretion to decide on a case-by-case basis whether to adjudicate the substantive issue first.[177] Three factors support the case for flexibility: (1) There may well be a hard constitutional issue and, not coincidentally, an easy immunity issue on account of the difficulty of the constitutional issue; (2) If the circumstances are such that the substantive outcome matters more to the plaintiff than actually winning damages, the plaintiff may not appeal a case in which he succeeds on the substantive issue but loses on immunity, and there will be no way to correct an error on the substantive point;[178] (3) If the circumstances are such that the defendant has a strong case on immunity, he may focus his efforts on that issue, such that the substantive issue is poorly presented to the court for lack of effective advocacy.[179]

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174. *Breen*, 485 F.3d at 331.

175. *Id.* at 337–38 (concluding that "plaintiffs successfully alleged facts showing the violation of constitutional rights under the state-created danger theory"). The court went on to rule that the officials were nonetheless entitled to immunity from liability for damages, because "the state-created danger theory was not clearly established law in the Fifth Circuit" at the time of the incident. *Id.* at 340.

176. Scott v. Harns, 127 S. Ct. 1769, 1780 (2007) (Breyer, J., concurring). Neither do Justices Stevens and Ginsburg. *See* Wilkie v. Robbins, 127 S. Ct. 2588, 2617 n.10 (2007) (Ginsburg, J., joined by Stevens, J., concurring in part and dissenting in part).

177. *Scott*, 127 S. Ct. at 1780 (Breyer, J., concurring); *see supra* text accompanying note 22. Pre-*Saucier*, some lower courts engaged in such careful sifting of the circumstances of particular cases. *See, e.g.*, Tellier v. Fields, 230 F.3d 502, 510–11 (2nd Cir. 2000). Judge Leval adds that under a flexible approach, the court may, if the circumstances call for it, comment in a tentative or preliminary way on the substantive issue, making the issue easier to resolve the next time around. Leval, *supra* note 17, at 1281 ("If the conduct is egregious, or has already escaped review and is probably unconstitutional, the court would warn of the probable unconstitutionality—without taking a definitive position."). It seems that Judge Leval wants to have his cake and eat it, too: If comments about the substantive issue turn out to have weight in later cases, the court has not avoided the constitutional issue at all.

178. *See, e.g.*, Brosseau v. Haugen, 543 U.S. 194, 202 (2004) (Breyer, J., concurring); Bunting v. Mellen, 541 U.S. 1019, 1019–21 (2004) (statement of Stevens, J., respecting the denial of certiorari); *States' Brief*, *supra* note 21, at *8; Leval, *supra* note 17, at 1279.

179. *See, e.g.*, *States' Brief*, *supra* note 21, at *9; Leval, *supra* note 17, at 1277–78.

a. Hard Constitutional Issues Coupled with Easy Immunity Issues

Both *Morse v. Frederick* and *Brosseau v. Haugen* may fall into this category. In such cases, much time and effort could have been saved by simply ruling on immunity to start with. Each case would come out the same as if the court had addressed the constitutional issue first, and the value of minimizing the counter-majoritarian difficulty would have been served as well. However attractive flexibility may seem in the abstract, in the real world it also carries a cost. The main aim of *Saucier* is to encourage the elaboration of constitutional law. Abandoning *Saucier* may effectively sacrifice the elaboration goal. The danger is that district judges may exercise their discretion in a way that does not give the proper weight to that aim, by putting their own interest in clearing their dockets as efficiently as possible ahead of the Court's policy of elaborating constitutional norms.[180] Both the pre-*Saucier* reluctance of some lower court judges to put the substantive issue first[181] and the hostility some lower court judges have shown toward *Saucier*[182] indicate that the temptation is real. We are accustomed to the notion that delay in resolving constitutional questions is tolerable, and perhaps even desirable.[183] Some hard constitutional questions can safely be put off, perhaps indefinitely, because no one incurs a sufficiently distinct and palpable injury due to the purported violation.[184] But here again, constitutional tort is a distinctive field. These plaintiffs claim that they have already suffered an injury and almost always believe they can prove substantial damages. In order to vindicate their rights, deter violations, and provide guidance to officers going forward, the hard constitutional issues need to be decided sooner rather than later.

Perhaps Justice Breyer's premise is that, as a practical matter, a given issue may not need resolution unless it comes up repeatedly.[185] In that event, a lower court following the flexible approach would eventually choose to reach the substantive issue rather than dismiss on qualified im-

180. *See* Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 539–42 (1988) (arguing that "what most arguments for ruleness share is a focus on disabling certain classes of decisionmakers from making certain kinds of decisions").

181. *See* Graebe, *supra* note 12, at 410 & n.35 (providing authority for the assertion that "the cases are legion where courts, in their decision-making discretion, have bypassed pleaded constitutional claims of first impression by assuming arguendo that the claims are viable and then dismissing them on qualified immunity grounds").

182. *See supra* text accompanying notes 17–19.

183. *See* Alexander M. Bickel, *The Supreme Court 1960 Term Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 41–42 (1961) (arguing that there would be fewer occasions for sharp disagreement among the Justices "if certain techniques of the mediating middle way were more imaginatively utilized"). Bickel went on to discuss a number of doctrines, including standing, ripeness, and the political question doctrine, for dodging especially thorny constitutional questions. *Id.* at 42–47.

184. *See* United States v. Richardson, 418 U.S. 166, 179 (1974) (rejecting the notion that standing should be granted to this plaintiff because otherwise no one will have a sufficient injury for standing).

185. *See* Leval, *supra* note 17, at 1280–81 ("At the very least, this risky, unreliable declaration of constitutional rights in dictum should be reserved for the class of cases where a pattern of repetition, escaping review, is likely.").

munity grounds. But any given district judge and any given Circuit Court panel will encounter constitutional tort cases episodically and in a haphazard way. As a result, they may have difficulty discerning patterns. Given these realities of adjudication, it is hard to be confident that lower courts will be able to identify recurring problems and address them with alacrity. Faced with an easy path and a hard one, human beings tend to take the easy one, and judges are, after all, human. At the very least, *Saucier* should have the status of a strong presumption that may be overcome only in exceptional circumstances. Otherwise, the real-world result may be closer to a rule of "immunity first," thereby thwarting the aims of constitutional tort law.

b. No Appellate Review of the Substantive Holding

In order to evaluate the insulation-from-review argument, it is useful to distinguish circuit court review of district court rulings from Supreme Court review of circuit court rulings. With regard to the first appellate stage, it does not make much difference what the district court decided on the substantive issue, as a district court ruling has no precedential effect and will not count for much, if it counts at all, in determining what is "clearly established law" going forward.[186] As for insulation from Supreme Court review, Justice Scalia has proposed that the "general rule [denying review to the winner below] 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."[187] Justice Scalia's reasoning in support of this view shows sensitivity to the aims of constitutional tort and the appropriate balance between those aims and official immunity.[188] He explains that the "constitutional determination is *not* mere dictum in the ordinary sense, since the whole reason we require it to be set forth . . . is to clarify the law and thus make unavailable repeated claims of qualified immunity in future cases."[189]

c. Lack of Effective Advocacy on the Substantive Issue

The concern that litigants may not pay sufficient attention to the substantive issue should not be ignored, yet it may underestimate the degree of uncertainty that envelops most litigation. Plaintiffs and their attorneys will rarely devote resources to bringing suits that are certain to fail. Defendants will rarely be so confident of success on the immunity issue that they can simply ignore the substantive one. It is noteworthy that none of the Supreme Court Justices who disapprove of *Saucier* have given much

186. While the circuits are divided as to whether district court rulings count at all in determining the content of clearly established law, none of them give them much weight in any event. *See* Doe v. Delie, 257 F.3d 309, 321 & n.10 (3d Cir. 2001).

187. Bunting v. Mellen, 541 U.S. 1019, 1023 (2004) (Scalia, J., dissenting from denial of certiorari).

188. *See supra* Part III.B.1.

189. *Bunting*, 541 U.S. at 1023–24 (Scalia, J., dissenting from denial of certiori).

weight to the risk that litigants will pull their punches, though that danger is prominently featured in the States' Brief.[190] In any event, the issue is not whether this concern deserves to be taken into account. It is whether the minus of potentially weak advocacy in some cases should overcome the affirmative case for the *Saucier* order-of-battle. If these cases are "relatively rare,"[191] the balance may tip in favor of strict adherence to *Saucier*, or at least to a strong presumption that it be followed absent compelling reasons to doubt the quality of the advocacy. By contrast, Justice Breyer and other foes of *Saucier* seek to replace it with a regime of broad discretion on the part of district judges to do as they please on a case by case basis.

IV. CONCLUSION

Saucier's order-of-battle rule—requiring courts to resolve the substantive constitutional issue before the immunity question—may seem to be highly vulnerable to objections based on constitutional avoidance, as it flatly rejects the avoidance norm in favor of more rather than fewer rulings on constitutional issues. This Article's aim has been to examine and reject the constitutional avoidance attack on *Saucier*. In brief, the strength of the avoidance policy depends on an assessment of its costs and benefits in a given context. In the constitutional tort context, the benefits are slight, because the court must reach some tentative conclusions about the substantive law in resolving the immunity issue and because these cases concern oversight of street-level officials rather than nullification of statutes and broad policies. The costs are high, because deciding immunity issues first stunts the growth of substantive law to the detriment of the vindication and deterrent goals of constitutional tort law.

What is ultimately at stake in the order-of-battle controversy is whether the body of constitutional law giving rise to suits for damages will be a larger and more concrete or a smaller and more imprecise body of law. No doubt some types of constitutional questions are best left unresolved as long as possible—especially those touching on fundamental allocations of power between the executive, legislative, and judicial branches, or between the states and the national government. Constitutional tort law is of a different order. It concerns judicial oversight of the daily work of police officers, prison guards, school teachers and principals, zoning officials, and others who deal with the public on a daily basis. It is better that the law bearing on their conduct be as fully developed as possible, both for the sake of giving them the guidance they need and in order that victims of their misconduct will have access to an effective damages remedy.

190. *See States' Brief*, *supra* note 21.
191. As suggested in Graebe, *supra* note 12, at 435.

Essays


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